BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that I have filed the following **COMPLAINANTS' PUBLIC RESPONSE TO MIDWEST GENERATION, LLC'S APPEAL OF THE HEARING OFFICER'S RULING DENYING ITS OBJECTION TO JONATHAN SHEFFTZ'S OPINIONS** in the above-captioned case today, copies of which are hereby served upon you.

.

Faith E. Bugel

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ARDC No: 6255685

Dated: August 21, 2023

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

COMPLAINANTS' PUBLIC RESPONSE TO MIDWEST GENERATION, LLC'S APPEAL OF THE HEARING OFFICER'S RULING DENYING ITS OBJECTION TO JONATHAN SHEFFTZ'S OPINIONS

Complainants Sierra Club, Environmental Law & Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment ("Complainants") hereby respond to Midwest Generation, LLC's ("MWG") July 26, 2023 Appeal of the Hearing Officer's Ruling Denying its Objection to Jonathan Shefftz's Opinions ("MWG Appeal" or "Appeal"). For the fourth time, presenting essentially duplicative arguments to those it has made now either in writing or at hearing on three prior occasions, MWG is seeking an extreme recourse: complete elimination of Mr. Shefftz's opinions on how best to calculate the economic benefit that has accrued to MWG from its noncompliance with Illinois law. MWG Appeal at 8. MWG's Appeal raises essentially the same arguments on which it has now lost thrice, including once previously before the Board: when it first asked the Hearing Officer to grant its Motion in Limine to Exclude Jonathan Shefftz Opinions ("MWG MIL"); when it asked the Board to overturn the Hearing Officer's

determination in its Appeal of the Hearing Officer's Ruling Denying the MWG MIL ("MWG MIL Appeal"); and when, in the course of the hearing that was held in this proceeding on May 15-19 and June 12-15, 2023 ("2023 Hearing"), it objected to inclusion of Mr. Shefftz's expert opinion into the record. May 16, 2023 Hr'g Tr. at 122:14-123:9; May 16, 2023 Conf. Hr'g Tr. at 88:22-89:4; May 17, 2023 Conf. Hr'g Tr. at 45:4-46:7.[1]

Unfortunately for MWG, nothing has changed since it first sought this extreme remedy. Thus, MWG's Appeal should be denied for the same reason the Board upheld the Hearing Officer's first decision to deny the MWG MIL. As the Hearing Officer explained that decision the first time around:

> Experts oftentimes rely on assumptions to formulate their opinions but that does not require the Board to be bound by the opinions of the expert. Timber Creek Homes, Inc. v. Village of Round Lake Park, Round Lake Village Board and Groot Industries, Inc. PCB 14-99 slip at 18, (Aug. 21, 2014). Experts relying on counsel's assumptions or hypotheticals within the realm of direct or circumstantial evidence for their opinion is proper if based on direct or circumstantial evidence. The Board may exercise its own technical expertise in reviewing the assumptions when determining a proper remedy.

July 13, 2022 Hr'g Officer Order at 9. That Order was based on a review of facts and assumptions underlying Mr. Shefftz's opinion that were already clear in advance of the 2023 Hearing, and which were fully confirmed at the 2023 Hearing. And when the Board upheld the Hearing Officer's decision, it noted further that any prejudice was limited by the fact that Respondent would have the opportunity to cross examine Mr. Shefftz regarding the basis for his testimony. Dec. 15, 2022 Order of Bd. at 16-17. MWG was given that opportunity at the 2023 Hearing and did, in fact, cross examine Mr. Shefftz regarding the basis for his testimony.

[1] In support of this response, Complainants incorporate by reference and attach their written responses to the MWG MIL and MWG MIL Appeal

As Complainants have previously explained, the Board should affirm its previous ruling on this matter, deny MWG's appeal, and uphold the Hearing Officer's decision, because MWG's entire argument here is based on a fundamental misunderstanding of the nature of Mr. Shefftz's expertise and the function of financial expert testimony more broadly. If the Board were to adopt MWG's position, it would set a precedent significantly limiting the availability of expert testimony on economic benefit issues, and diminish the Board's ability to satisfy its statutory obligations.

A. Mr. Shefftz's Expertise—and the Sole Purpose of His Testimony—Is Appropriately Focused on Providing an Economic Model Framework for Determining Economic Benefit.

The fundamental flaw in the argument put forward by MWG in its Appeal (which was also a flaw in MWG's briefing on the MIL) is that it entirely misunderstands the role of an economic expert in a remedy proceeding such as this, and overlooks the critical importance of Mr. Shefftz's testimony in enabling the Board to make the determinations necessary for resolution of this proceeding. The primary component of Mr. Shefftz's testimony is an economic model that utilizes formulas to account for economic factors such as discounting, compounding, inflation, tax deductions, and present value when calculating economic benefit. *See* Ex. 1201, Jonathan S. Shefftz, Expert Op. on Econ. Benefit of Noncompliance and Econ. Impact of Penalty Payment and Compliance Costs (Jan. 25, 2021) ("Shefftz Initial Report"), at 9-11. MWG has not objected to the admissibility or utility of any element of the model itself or its underlying formulas. In order to produce an output, Mr. Shefftz must enter certain inputs into this model, including estimates of remedy costs, dates of initial non-compliance, dates of compliance, length of remedy, and anticipated penalty payment dates. Shefftz Initial Report at 22-24. By definition, these inputs are outside of Mr. Shefftz's area of expertise. Mr. Shefftz has been explicit and consistent throughout his report, deposition testimony, and hearing testimony, that these inputs are outside of his expertise. *See, e.g.,* Shefftz Initial Report at 22 ("As I am an economist, not an engineer, I have no

independent expert opinion on the cost estimates that were prepared in that report."). Mr. Shefftz emphasized this point at several occasions in the course of this litigation. At the hearing, he offered an analogy when describing the inputs he used:

> I made sure that it was the type of information that I wanted. In other words, typically in these cases the outputs from an environmental engineer serve as some of the inputs to my analysis. It's almost like a relay race in that sense. He hands off the baton to me which, bottom line, are these costs in Table 6. But it's beyond my expertise to say whether this type of remedy or the magnitude of the costs are accurate.

May 16, 2023 Conf. Hr'g Tr. at 24:17-25-2. What MWG continues to ignore is that at this stage of the proceedings *there is no way* for an economic expert to rely on precise, finalized remedy cost inputs, because those inputs will ultimately be determined by the Board, and not by either party (or their experts) independently.

To restate our previous briefing on this point: Mr. Shefftz presents in his reports, and will provide via his testimony at the remedy hearing, the economic model framework into which the Board will provide the final inputs based on its eventual determination what the appropriate remedy should be in this case. This is *economic* testimony, which means that he must establish an adequate foundation for his economic testimony; and he has indisputably done so. At no point in its Appeal does MWG challenge Mr. Shefftz's economic qualifications or the basis of the economic model he employs. Nor could they. Mr. Shefftz is a prominent authority in economic benefit calculations who regularly appears as an expert witness on various economic matters in U.S. District Court trials and hearings, Administrative Court hearings of the U.S. Environmental Protection Agency ("EPA"), and state courts trials. Shefftz Initial Report at 3. Because MWG has failed to raise any legitimate issues challenging Mr. Shefftz's economic expertise or the validity of the economic model he has devised, there is no basis for the Board to grant MWG's extreme request here.

Complainants do not disagree with any of the conclusions reached in the cases MWG cited; they just do not support MWG's extreme request to excise Mr. Shefftz's analysis from this case. *See* MWG Appeal Mem. at 8-10 (citing numerous authorities). For example, the single example MWG offers of the Board rejecting an expert's opinion "because it was solely based upon assumptions" does not in fact involve removal of an expert's testimony from the record. The Board in *Timber Creek Homes, Inc. v. Village of Round Lake Park, Round Lake Village Board and Groot Industries, Inc.* did *not* exclude the expert report (as MWG is requesting here), but only found that the Village Board (not this Board) reasonably relied on other experts rather than the one in question. *Timber Creek Homes, Inc. v. Vill. of Round Lake Park, Round Lake Vill. Bd. and Groot Indus., Inc.,* No. 2014-099 Slip Op. and Order of Bd. at 72 (Ill. Pol. Control Bd. 2014). Nothing in *Timber Creek Homes* supports the proposition that the Board can wholly exclude expert testimony because it incorporates "assumptions." Complainants have offered from the start that the Board is free to weight Mr. Shefftz's specific numerical conclusions based on its assessment of the inputs Mr. Shefftz used; that is very different from MWG's request to eliminate his testimony entirely from the record.

Two additional cases cited by MWG, both of which confirm the unremarkable requirement that an expert's testimony have an adequate foundation, illustrate Respondent's apparent inability to understand the nature or purpose of Mr. Shefftz's testimony. First, MWG claims that the circumstances in *Dura Automotive Systems of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609, 613-14 (7th Cir. 2002) "involved almost the same scenario" as is present in this case—but that could not be further from the truth. In *Dura Automotive*, a hydrogeologist, Nicholas Valkenburg, was barred from offering an opinion on groundwater flow that was entirely dependent on models he did not understand. This is an appropriate decision (and distinct from Mr. Shefftz's analysis here) because

Mr. Valkenburg's opinion was inextricably tied to the modeling he did not understand—his testimony could not stand without the underlying modeling that helped him develop it. By contrast, Mr. Shefftz has offered a complete and self-contained economic benefit assessment that uses, but does not ultimately depend upon, the inputs he used; as he testified, it would be trivial to update his numeric conclusions with updated assumptions and inputs without undermining the substance of his analysis. May 16, 2023 Conf. Hr'g Tr. at 63:2-66:5. Second, MWG cites to *Citibank, N.A. v. McGladrey & Pullen, LLP*, 2011 IL App (1st) 102427, ¶ 19 (Ill. App. Ct. 1st Dist. 2011), for the proposition that a financial expert cannot testify as to technical opinions (of other experts) over which he/she has claimed no expertise. Again, this is a sensible ruling that has no bearing on what Mr. Shefftz has undertaken here. In *Citibank*, the financial expert was essentially seeking to present the opinions of other experts as his own; here, Mr. Shefftz has been clear from the very beginning that he is offering no testimony on any subjects outside of his economic expertise. In fact, the only economic expert who has made a habit in this case of offering testimony on topics that go well beyond their stated expertise is MWG's economic expert, Gayle Koch.

Ms. Koch has also critiqued Mr. Shefftz's analytical process, and MWG's discussion of that critique in its Appeal further underscores Respondent's apparent misunderstanding of the role an economic expert can (and should) play at this stage of the proceeding. MWG goes to great lengths to emphasize Ms. Koch's "efforts" to "verify the information" she relies on. MWG Appeal Mem. at 6, 16. Complainants will examine those "efforts" at length in the post-hearing briefing, but it is worth pointing out here that they do not all fall within the appropriate bounds of an economic expert. Take, for instance, Ms. Koch "not[ing] that removal as a remedial option is the 'worst case scenario,' and not the least expensive compliance option," MWG Appeal Mem. at 7.

Ms. Koch has absolutely no basis for that conclusion. She is not opining in this case about what minimum remedy is required to achieve compliance with Illinois groundwater standards, so it's ludicrous to suggest that she has a basis for that conclusion. Conf. Hr'g Tr. at 68:13-69:21. Complainants are not seeking to disqualify Ms. Koch as an expert; we believe the bias inherent in her analysis (for instance, her uncritical and unsupported "assessment" that the Weaver witnesses have offered the best remedy here) will undermine her credibility to the Board on its own merit. But claims like this, where MWG differentiates Mr. Shefftz's decision to stay in his analytical lane from Ms. Koch's efforts to be a half-expert at everything and opine on topics well outside her stated expertise in this case, underscore how fundamentally MWG misunderstands the appropriate role of an economic benefit expert at this stage of the proceeding. Complainants are fully aware that any economic benefit calculation will necessarily derive from the Board's remedy determination, and in the absence of that information Mr. Shefftz has presented a financial analysis using reasonable assumptions drawn from the current case record; Respondent's apparent confusion about the role of economic experts should not detract from his seasoned analysis.

B. The Inputs Used by Mr. Shefftz in Creating his Economic Model Constitute Reasonable Assumptions of the Type Regularly Used by Expert Witnesses.

Because it cannot effectively critique Mr. Shefftz's economic expertise or other elements for the foundation of his economic model, MWG focuses its arguments entirely on the inputs to Mr. Shefftz's model. Those arguments also fail. Courts have regularly concluded that experts may rely on reasonable assumptions arising from the factual evidence in a case. "As long as the hypothetical assumptions are within the realm of circumstantial or direct evidence, as supported by the facts or reasonable inferences, the question is permissible. Moreover, the facts suggested in hypothetical questions need not be undisputed but only supported by the record." *Carter v. Johnson*, 247 Ill. App. 3d 291, 297, 617 N.E.2d 260, 265 (Ill. App. Ct. 1st Dist. 1993) (internal

citations omitted). Applying that standard here, the operational assumptions that were necessary as inputs into Mr. Shefftz's model in order to produce his reports come directly from previous expert reports in this case, or arise naturally by reasonable inference from the record in this case or expert reports.

MWG's Appeal takes issue with two primary types of inputs that inform Mr. Shefftz's financial analysis: cost estimates associated with full removal of coal ash materials provided by Complainants' original remedy expert James Kunkel; and compliance dates and remedy schedules provided by Complainants' counsel. MWG Appeal Mem. at 4-6. The first inputs can be defended easily: the remedy cost figures are drawn directly from the expert report that was submitted by Complainants' expert Dr. Kunkel, and which is heavily supported by extensive documentation and expert analysis. As MWG points out, Complainants' current remedy expert, Mark Quarles, has recommended an iterative approach based around a nature and extent study. *See* MWG Appeal Mem. at 6. Although that approach will ultimately yield the most targeted remedy, it cannot immediately produce a cost estimate. However, coal ash removal is among the potential remedies discussed in Mr. Quarles' report and that may result from his recommended nature and extent study. *See* Ex. 1101, Expert Op. of Mark A. Quarles, P.G. at 21 (Jan. 2021) ("Quarles Initial Report"). ("Closure-by-removal is particularly common at power plants where there is not adequate separation between the bottom of the wastes and the uppermost aquifer, or where the disposal area is located close to surface water bodies – conditions that exist at each of the four MWG power plants."). As a result, while Mr. Shefftz did not have available to him a cost estimate for any potential remedy from Mr. Quarles, he did have available to him a cost estimate for a course of work that might actually remediate MWG's violations: the estimate from Dr. Kunkel's

report, which describes a full ash removal approach.[2] Mr. Shefftz's decision to use these cost estimates is reasonable and well "within the realm of circumstantial or direct evidence, as supported by the facts or reasonable inferences" that is required by *Carter*. By using the cost estimates provided by Dr. Kunkel—for a remedy Mr. Quarles has identified as "particularly common" in analogous circumstances—as a starting point for his economic benefit calculation (such a cost estimate is a necessary precondition for that analysis), Mr. Shefftz effectively illustrates how the Board can satisfy its obligation to consider economic benefit pursuant to Sections 42(h)(3) of the Illinois Environmental Protection Act.

The second set of assumptions Mr. Shefftz relied on that MWG takes issue with is the hypothetical compliance schedule MWG would have followed had it immediately remediated the groundwater contamination for which it has now been found liable, as well as the compliance schedule MWG will follow should it now remediate the groundwater contamination for which it has been found liable. These two schedules provide the inputs necessary for Mr. Shefftz to perform his analysis, because the economic benefit of noncompliance by its nature must compare the costs associated with implementing any remedy that may be required by the Board with the costs the company would have incurred had it pursued that remedy in the first place, instead of waiting for a court to order them to do so. As an initial matter, Mr. Shefftz assumed that the coal ash removal should have begun when MWG first began groundwater sampling because that is the time when MWG first became aware of its ongoing groundwater contamination—the contamination that the

[2] MWG offers a critique of Mr. Shefftz's use of "Table 6" of Dr. Kunkel's remedy report based on its interpretation of that table. MWG Appeal Mem. at 4. The remainder of Dr. Kunkel's remedy report is not currently part of the record, so Complainants do not offer a full rebuttal of their interpretation. However, in the interest of providing a complete set of information for the Board to consider, Complainants note that Mr. Shefftz has provided very specific testimony explaining the exact impact MWG's interpretation of Table 6 would have on his economic benefit calculation. May 17, 2023 Conf. Hr'g Tr. at 22:24-28:2.

Board has now confirmed violated the Illinois Environmental Protection Act. In turn, Mr. Shefftz's assumption regarding when a potential future remedy would be initiated is based on the timing of when he prepared his reports.

Mr. Shefftz also relied on a 10-year removal schedule that was provided to him by Complainants' counsel for purposes of his economic benefit analysis. This assumption, while a simplifying one because MWG has not indicated how long it would take to remove all the coal ash from its sites, is well "within the realm of circumstantial or direct evidence, as supported by the facts or reasonable inferences." *Carter v. Johnson*, 247 Ill. App. 3d 291, 297, 617 N.E.2d 260, 265 (Ill. App. Ct. 1st Dist. 1993). Specifically, Dr. Kunkel's report laying out the costs of coal ash removal also discusses the scope of activities that would be required. With this context, as well as Complainants' counsel's knowledge of how long similar cleanup projects have taken at other sites and in other states, a 10-year removal timeline represents a reasonable hypothetical timeline for Mr. Shefftz to employ as an input into his model. And in any event Mr. Shefftz has offered, for the Board's context, testimony describing how his economic benefit calculation would likely shift if the expenditure pattern shifted. May, 16 2023 Conf. Hr'g Tr. at 63:20-65:16.

Mr. Shefftz has provided extensive testimony on the record explaining why he felt it was appropriate to rely both on information from Table 6 of Dr. Kunkel's Remedy Report and on reasonably tailored assumptions provided by Complainants' counsel. May 17, 2023 Conf. Hr'g Tr. at 12:18-15:13. As that testimony makes clear, in Mr. Shefftz's decades-long career as a financial expert, he has regularly relied both on analyses from technical experts and on representations from legal counsel about what the appropriate timeframe for his analysis might be. *Id.* This has been his regular practice in state, federal, and administrative proceedings, and he has never had an opinion excluded for any reason relating to the adequacy of his analysis or

appropriateness of his selected inputs. And again, Mr. Shefftz's testifying experience in the economic field is exceptionally broad: he has testified dozens of times in federal, state, and administrative proceedings.

MWG has suggested that Mr. Shefftz cannot speak to typical behavior in the field of economic expert analysis, because he can only speak to his own experience. MWG Appeal Mem. at 14-15. This perspective represents an exceedingly rigid view of how typical expert behavior can be determined, and does a disservice to Mr. Shefftz's decades of experience in the field. Taken to its logical conclusion, MWG's assertion that Mr. Shefftz cannot speak to general practice in the field of expert financial analysis would necessarily preclude any person from being able to offer such an opinion. At the very least, it similarly invalidates any critiques Ms. Koch may offer: Shefftz's experience in the field of economic analysis is at least equivalent to and in fact likely much more extensive than that of Ms. Koch. He has testified "several dozen times" exclusively on financial matters, whereas Ms. Koch has testified a few dozen times on a dizzying range of topics, which constitute some combination of technical and economic issues. May 16, 2023 Hr'g Tr. at 128:12-131:5; June 15, 2023 Conf. Hr'g Tr. at 9:15-24. And Mr. Shefftz helped develop U.S. EPA's BEN Model that Ms. Koch used unquestioningly in her analysis. Shefftz Initial Report at 3; Ex. 1901, Expert Rep. Prepared by Gayle Schlea Koch at 26 (Apr. 22, 2021).

Mr. Shefftz has explained that it is common practice for financial experts to rely both on inputs from experts (whether testifying or not), and from legal counsel. Ms. Koch claims to be shocked by Mr. Shefftz's practical perspective on the matter. But the available evidence suggests that Mr. Shefftz's experience and perspective is likely more reflective of the general practice specifically among financial experts than Ms. Koch, given that Ms. Koch's apparent practice is to maintain technical expertise in multiple fields at once. Thus, to the extent the Board relies on

representations from an expert in this case as to typical or appropriate economic expert behavior, Mr. Shefftz is a more reliable source than Ms. Koch.

C. MWG's Interpretation of the Rules of Evidence Would Preclude the Board from Relying on Economic Witnesses, Particularly for the Purpose of Determining Economic Benefit.

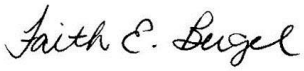
The extreme nature of the position MWG continues to take regarding the allowable use of economic experts is highlighted by MWG's argument that an economic expert must possess "independent knowledge [and] expertise" as to every fact or assumption incorporated into that expert's report. MWG Appeal Mem. at 4, 13, 19. Such a rule, if adopted by the Board, would require every economic expert providing testimony to assist the Board to possess not only economic expertise, but expertise in additional areas such as engineering, chemistry, and environmental remediation. Such an absurd policy would have the effect of depriving the Board of testimony from qualified economists.

In the face of significant uncertainty, Mr. Shefftz has offered to the Board exactly what it will need to meet its obligation to consider economic benefit pursuant to Sections 42(h)(3) of the Act; and he has calculated Complainants' best estimate of that benefit based either directly on established facts, or on reasonable inferences from those facts. Throwing out this analysis would deprive the Board of expert "testimony [that] will assist [the Board] in understanding the evidence" before it, and it would be inconsistent with Illinois courts' consistent practice of allowing expert testimony that is reliably supported by the record. *See Taylor v. Cnty. of Cook*, 2011 IL App (1st) 093085, ¶ 32, 957 N.E.2d 413, 426 (Ill. App. Ct. 1st Dist. 2011).

For all of these reasons, the Hearing Officer's decision should be affirmed, and MWG's latest appeal seeking to strike Mr. Shefftz's economic benefit testimony should be denied.

Dated: August 21, 2023

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned, Gregory E. Wannier, an attorney, certifies that I have served electronically upon the Clerk and by email upon the individuals named on the attached Service List a true and correct copy of the **COMPLAINANTS' PUBLIC RESPONSE TO MIDWEST GENERATION, LLC'S APPEAL OF THE HEARING OFFICER'S RULING DENYING ITS OBJECTION TO JONATHAN SHEFFTZ'S OPINIONS** before 5 p.m. Central Time on August 21, 2023, to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 60 pages.

Respectfully submitted,

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Dated: August 21, 2023

Attachment 1

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS' RESPONSE TO MIDWEST GENERATION, LLC'S APPEAL OF THE HEARING OFFICER'S RULING DENYING ITS MOTION *IN LIMINE* TO EXCLUDE JONATHAN SHEFFTZ'S OPINIONS** copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

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Attorney for Sierra Club

Dated: August 10, 2022

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
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COMPLAINANTS' RESPONSE TO MIDWEST GENERATION, LLC'S APPEAL OF THE HEARING OFFICER'S RULING DENYING ITS MOTION *IN LIMINE* TO EXCLUDE JONATHAN SHEFFTZ'S OPINIONS

Complainants Sierra Club, Environmental Law & Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment ("Complainants") hereby respond to Midwest Generation, LLC's ("MWG") July 27, 2022 Appeal of the Hearing Officer's Ruling Denying Its Motion *In Limine* to Exclude Jonathan Shefftz's Opinions ("MWG Appeal").

MWG seeks an extremely broad exclusion of "Mr. Shefftz's economic benefit opinion, his deterrence opinion and his affordability opinion in his Expert Opinion, Supplemental Opinion, and Second Supplemental Opinion," as well as "any related testimony." MWG Motion *in* Limine for Shefftz Opinions, Feb. 4, 2022 ("MWG Motion"), at 8, 11; MWG Memorandum in Support of its Appeal, July 27, 2022 ("MWG Appeal Memo"), at 8. In other words, MWG seeks to exclude every portion of each of Mr. Shefftz's three reports, and to prohibit Mr. Shefftz from testifying at the remedy hearing.

In its motion, MWG asserted that Mr. Shefftz's reports and testimony should be excluded because information incorporated into Mr. Shefftz's reports "is predicated on speculative information provided by Petitioners' attorneys and information rejected by Petitioners' groundwater expert and therefore lacks foundation and is otherwise irrelevant." MWG Motion at 1; MWG Appeal Memo at 8.[1] The Hearing Officer rejected this argument, holding that

> [e]xperts oftentimes rely on assumptions to formulate their opinions but that does not require the Board to be bound by the opinions of the expert. *Timber Creek Homes, Inc. v. Village of Round Lake Park, Round Lake Village Board and Groot Industries, Inc*. PCB 14-99 slip at 18, (Aug. 21, 2014). Experts relying on counsel's assumptions or hypotheticals within the realm of direct or circumstantial evidence for their opinion is proper if based on direct or circumstantial evidence. The Board may exercise its own technical expertise in reviewing the assumptions when determining a proper remedy.

Order at 9.[2]

The Board should deny MWG's appeal and uphold the Hearing Officer's decision because MWG's motion and appeal are based on a fundamental misunderstanding of the nature of Mr. Shefftz's expertise and the function of his testimony. If the Board were to adopt MWG's position, it would set a precedent significantly limiting the availability of expert testimony on economic benefit, and diminish the Board's ability to satisfy its statutory obligations.

[1] MWG's Motion also asserted that Mr. Shefftz's reports and testimony should be excluded because Mr. Shefftz provided a legal opinion that usurped the Board's role of interpreting the law. MWG Motion at 9. MWG makes no mention of that argument in its appeal of the Hearing Officer's Order. Accordingly, MWG has waived that argument. *See Smith v. Intergovernmental Solid Waste Disposal Ass'n*, 239 Ill. App. 3d 123, 127, 605 N.E.2d 654, 656 (1992) (arguments not presented in appellant's initial brief are waived).

[2] In support of their argument that the Board should uphold the Hearing Officer's decision, Complainants incorporate by reference "Complainants' Response to Respondent MWG's Motion *In Limine* to Exclude Jonathan Shefftz Opinions" (March 4, 2022), and "Complainants' Opposition to Respondent's Motion for Leave to File, Instanter, Its Reply In Support of Its Motion *In Limine* to Exclude Jonathan Shefftz Opinions" (April 1, 2022).

A. Mr. Shefftz's Expertise—and the Sole Purpose of His Testimony—is in Providing an Economic Model Framework for Determining Economic Benefit.

The fundamental flaw in the argument put forward by MWG in its motion and appeal is that it entirely misunderstands the role of an economic expert in a remedy proceeding such as this, and overlooks the critical importance of Mr. Shefftz's testimony in enabling the Board to make the determinations necessary for resolution of this proceeding. The primary component of Mr. Shefftz's testimony is an economic model that utilizes formulas to account for economic factors such as discounting, compounding, inflation, tax deductions, and present value when calculating economic benefit. *See* Jonathan S. Shefftz, Expert Opinion on Economic Benefit of Noncompliance and Economic Impact of Penalty Payment and Compliance Costs (Jan. 25, 2021) ("Shefftz Initial Report") (Ex. 3 to MWG Appeal) at 9-11. MWG has not objected to the admissibility or utility of any element of the model itself or its underlying formulas. In order to produce an output, Mr. Shefftz must enter certain inputs into this model, including estimated remedy costs, dates of initial non-compliance, dates of compliance, length of remedy, and anticipated penalty payment dates. Shefftz Initial Report at 22-24. By definition, these inputs are outside of Mr. Shefftz's area of expertise. Mr. Shefftz has been explicit throughout his reports and deposition testimony that these inputs are outside of his expertise. *See, e.g.*, Shefftz Initial Report at 22 ("As I am an economist, not an engineer, I have no independent expert opinion on the cost estimates that were prepared in that report."); Jonathan Shefftz deposition transcript (Oct. 28, 2021) ("Shefftz depo") (Ex. 6 to MWG Appeal) at 61:12-15 ("I have no plans to become an engineer and develop an understanding that would allow me to develop an alternative opinion or verify the information in Dr. Kunkel's report.").

What MWG has apparently failed to grasp is that at this stage of the proceedings these inputs must be flexible, because they will ultimately be determined by the Board, and not by

either party (or their experts) independently. Mr. Shefftz presents in his reports, and will provide via his testimony at the remedy hearing, the economic model framework into which the Board will provide the final inputs. To the extent MWG has raised any legitimate issues with any of the inputs utilized by Mr. Shefftz in his reports (and Complainants do not concede that MWG has), those concerns would go only to the weight the Board may choose to place on those suggested inputs, not to Mr. Shefftz's economic expertise or the validity of the economic model he has devised.

MWG's failure to understand the nature or purpose of Mr. Shefftz's testimony is well illustrated by Respondent's expansive discussion of the unremarkable requirement that an expert's testimony have an adequate foundation. *See* MWG Appeal Memo at 10-12 (citing numerous authorities). As Mr. Shefftz is providing expert economic testimony, the relevant question is whether Mr. Shefftz and Complainants have established an adequate foundation for this economic testimony, including Mr. Shefftz's model. They have. At no point in the dozens of pages of its appeal does MWG challenge Mr. Shefftz's economic qualifications or the basis of the economic model he employs. Nor could they. Mr. Shefftz is a widely recognized authority in economic benefit calculations who regularly appears as an expert witness on various economic matters in U.S. District Court trials and hearings, Administrative Court hearings of the U.S. Environmental Protection Agency ("EPA"), and state courts trials. Shefftz Initial Report at 3. He helped develop and refine the "BEN" economic benefit model currently used by EPA (Shefftz Initial Report at 3), and employs a similar economic benefit model in his reports (*Id*. at 3, 10). Nor does MWG's economic expert, Ms. Koch, critique Mr. Shefftz's fundamental choice of methods for conducting his analysis. Expert Report of Gayle Schlea Koch (April 22, 2021) ("Koch Report"), attached as Ex.1, at 25. Ms. Koch's primary criticism of Mr. Shefftz's methods

related to his approach to calculating the "weighted average cost of capital" or "WACC," though Ms. Koch eventually conceded that Mr. Shefftz's approach is sound. *Compare* Koch Report at 25 *with* Gayle Koch deposition transcript (Oct. 22, 2021) ("Koch Depo"), attached as Ex. 2, at 51:17 to 53:8.

Instead of critiquing Mr. Shefftz's economic expertise or other elements for the foundation of his economic model—because it cannot—MWG instead focuses its arguments entirely on the inputs to Mr. Shefftz's model. Those arguments also fail, for the reasons explained below.

B. The Information Relied on By Mr. Shefftz as Inputs Into His Economic Model Includes Reasonable Assumptions of the Type Regularly Used By Expert Witnesses.

MWG's assertion that the assumptions incorporated into Mr. Shefftz's expert opinion are unsupported or otherwise improper are similarly unpersuasive. Courts have regularly concluded that experts may rely on reasonable assumptions arising from the factual evidence in a case. "As long as the hypothetical assumptions are within the realm of circumstantial or direct evidence, as supported by the facts or reasonable inferences, the question is permissible . . . . Moreover, the facts suggested in hypothetical questions need not be undisputed but only supported by the record." *Carter v. Johnson*, 247 Ill. App. 3d 291, 297, 617 N.E.2d 260, 265 (1993) (internal citations omitted). Applying that standard here, the operational assumptions that were necessary as inputs into Mr. Shefftz's model in order to produce his reports come directly from previous expert reports in this case, or arise naturally by reasonable inference from the record in this case or expert reports.

Hearing Officer Halloran appropriately cited to the Board's decision in *Timber Creek Homes, Inc. v. Village of Round Lake Park, Round Lake Village Board and Groot Industries, Inc*

(PCB 14-99 (Aug. 21, 2014)) for the proposition that "[e]xperts oftentimes rely on assumptions to formulate their opinions." HO Opinion at 9. That Board decision involved a dispute between a homeowner's association petitioner challenging a village board's approval of a developer's proposal to construct a waste transfer station. *Id.* at 1. Among the criteria the village board was required to consider was the impact on neighboring properties. *Id.* at 16. The developer retained multiple experts to provide opinions on this factor, including Lannert and Poletti. *Id.* at 16-18. Lannert reviewed aerial photos, visited the area, prepared 3D models, calculated land use ratios, and developed a site and landscape plan. *Id.* at 16-18. Poletti's expert review built on that of Lannert, as Poletti "used the map provided by Mr. Lannert and then looked at published literature concerning transfer stations" and "then performed a quantitative analysis looking at actual sales that have occurred around transfer stations to see if there is an impact on property values." *Id.* at 19. The homeowner's association petitioner challenged the reliability of the opinions of both Lannert and Poletti, asserting that "Mr. Lannert based his opinion on 'impermissible speculation regarding trends of development' in the area," and "that Dr. Poletti's opinion was flawed since he relied on Mr. Lannert's analysis." *Id.* at 38 (internal citations omitted). The Board ultimately rejected these critiques and held that "the Village Board had evidence to rely on in making its determination," and that "based on the evidence in the record, the Village Board's decision that [the project] met criterion III is not against the manifest weight of the evidence." *Id.* at 72. Accordingly, the Board's decision in *Timber Creek* stands for the dual unremarkable propositions that expert opinions may be based at least in part on speculation, and that it is not objectionable for an expert to incorporate someone else's analysis.

MWG's Motion and its Appeal take issue with two primary types of inputs that inform Mr. Shefftz's financial analysis: cost estimates associated with full removal of coal ash materials

provided by Complainants' original remedy expert James Kunkel; and compliance dates and remedy schedules provided by Complainants' counsel. MWG Appeal Memo at 12-13.

The first inputs can be defended easily: the remedy cost figures are drawn directly from the expert report that was submitted by Complainants' expert Dr. Kunkel, and which is heavily supported by extensive documentation and expert analysis. As MWG points out, Complainants' current remedy expert, Mark Quarles, has recommended an iterative approach based around a nature and extent study. *See* MWG Appeal Memo at 6. Although that approach will ultimately yield the most targeted remedy, by definition it cannot immediately produce a cost estimate. As a result, Mr. Shefftz reasonably relied on the estimate from Dr. Kunkel's report, which describes a full ash removal approach. Coal ash removal is among the potential remedies discussed in Mr. Quarles' report and that may result from his recommended nature and extent study. *See* Expert Opinion of Mark A. Quarles, P.G. (Jan. 25, 2021) ("Quarles Initial Report"), attached as Ex. 3, at 21 ("Closure-by-removal is particularly common at power plants where there is not adequate separation between the bottom of the wastes and the uppermost aquifer, or where the disposal area is located close to surface water bodies – conditions that exist at each of the four MWG power plants."). By using the cost estimates provided by Dr. Kunkel for such a removal approach, Mr. Shefftz's economic benefit report effectively illustrates how the Board can satisfy its obligation to consider economic benefit pursuant to Sections 42(h)(3) of the Act.

The second set of assumptions Mr. Shefftz relied on that MWG takes issue with is the hypothetical compliance schedule MWG would have followed had it immediately remediated the groundwater contamination for which it has now been found liable, as well as the compliance schedule MWG will follow should it now remediate the groundwater contamination for which it has been found liable. These two schedules provide the inputs necessary for Mr. Shefftz to

perform his analysis, because the economic benefit of noncompliance by its nature must compare the costs associated with a remedy with the costs the company would have incurred had it pursued that remedy in the first place, instead of waiting for a court to order them to do so. The economic benefit typically comes from the monetary windfall the violating entity has gained by delaying the process of cleaning up its violations. *See generally* Shefftz Initial Report. As an initial matter, Mr. Shefftz assumed that the coal ash removal should have begun when MWG first began groundwater sampling because that is the time when MWG first became aware of its ongoing groundwater contamination—the contamination that the Board has now confirmed violated the Illinois Environmental Protection Act. In turn, Mr. Shefftz's assumption regarding the start of a possible remedy is based on the present calendar date, assuming the Board requires such a remedy. Mr. Shefftz has already updated his expert opinion to reflect the continued passage of time while MWG does nothing, and he can do so again should it aid the Board.

Mr. Shefftz also relied on a 10-year removal schedule that was provided to him by Complainants' counsel for purposes of his economic benefit analysis. This assumption, while a simplifying one because MWG has not indicated how long it would take to remove all the coal ash from its sites, is well "within the realm of circumstantial or direct evidence, as supported by the facts or reasonable inferences." *Carter v. Johnson*, 247 Ill. App. 3d 291, 297, 617 N.E.2d 260, 265 (1993). Specifically, Dr. Kunkel's report laying out the costs of coal ash removal also discusses the scope of activities that would be required. With this context, as well as Complainants' Counsel's knowledge of how long similar cleanup projects have taken at other sites and in other states, a 10-year removal timeline represents a reasonable hypothetical timeline for Mr. Shefftz to employ as an input into his model.

Mr. Shefftz's model further assumes that there is ongoing groundwater contamination causing violations of the Illinois Environmental Protection Act at each of the sites. This assumption of course goes beyond Mr. Shefftz's field of expertise, but it is also supported by extensive and ongoing groundwater monitoring at each of the four sites in this case, which Complainants have received through supplemental discovery and will be entering into evidence at the forthcoming remedy hearing in this matter. Thus, there can be no reasonable dispute with Mr. Shefftz relying on this information.

The final set of assumptions to which MWG objects relates to Mr. Shefftz's reliance on Counsel's representations that MWG would have relined ponds and conducted groundwater monitoring even in Mr. Shefftz's hypothetical compliance scenario. MWG Appeal Memo at 7-8. Mr. Shefftz's hypothetical to calculate economic benefit assumed MWG removed coal ash from the ponds and fill areas at the four sites when it first became aware of the groundwater contamination from the coal ash. Shefftz Initial Report at 22; Jonathan S. Shefftz, Supplemental and Rebuttal Expert Opinion on Economic Benefit of Noncompliance and Economic Impact of Penalty Payment and Compliance Costs, at 14 (July 16, 2021) (Ex. 4 to MWG Mot.). The idea that MWG would have relined the ponds and monitored groundwater in any scenario is not controversial—MWG did in fact reline the ash ponds and conducted groundwater monitoring, and did so pursuant to compliance agreements with Illinois EPA, which means that these activities would have occurred in any event. *See* Hr'g Exs. 626, 636, 647, and 656. In fact, IEPA communicated in 2009 that it was requiring groundwater monitoring of MWG's ponds. *See* Hr'g Exs. 621.[3] The conclusion that MWG would have relined the ponds even if MWG removed all of the onsite ash stems from the fact that, historically, MWG did reline the ponds even though

[3] MWG may dispute IEPA's authority to do so but that doesn't translate to the groundwater monitoring being voluntary. Hr'g Ex. 621.

MWG regularly removed the ash from the ponds. See, e.g., Joint Agreed Stipulations (Oct. 2, 2017); Hr'g Tr. at 58:22-59:6, 61:4-12, 101:1-6, 111:15-21, 118:13-24, 192:13-22, 208:29-209:2 (Jan. 30, 2018). It is clear from the record that removing the ash from the active ponds did not affect MWG's decision to reline those ponds. If MWG were going to continue to manage the ash wet (which it did), then it needed to use those ash ponds (which it did). If MWG were going to continue to use the ash ponds (which it did), then it needed to reline them (which it did). Removing additional ash from outside those ponds is not related in any way to the Respondent's decision to reline the ponds. The fact that MWG would have relined the ponds and monitored groundwater regardless of any removal scenario is absolutely "supported by the record" that has been established in this case, as demonstrated above. *See Carter v. Johnson*, 247 Ill. at 297.

In short, each set of assumptions to which MWG objects arises either directly from the record or through reasonable inference and is therefore entirely appropriate and cannot justify excluding Mr. Shefftz's testimony. While MWG is free to develop the record at the hearing with the goal of challenging any of the inputs utilized in Mr. Shefftz's model, the model itself and Mr. Shefftz's expert testimony on the methodology for calculating economic benefit are well within the scope of expert testimony Illinois courts have regularly allowed to be admitted.

C. MWG's Interpretation of the Rules of Evidence Would Preclude the Board From Relying on Economic Witnesses, Particularly for the Purpose of Determining Economic Benefit.

The extreme nature of the position taken by MWG regarding the allowable use of economic experts is highlighted by MWG's argument that an economic expert must possess "independent knowledge [and] expertise" as to every fact or assumption incorporated into that expert's report. MWG Appeal Memo at 13. Such a rule, if adopted by the Board, would require every economic expert providing testimony to assist the Board to possess not only economic

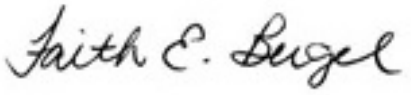
expertise, but expertise in additional areas such as engineering, chemistry, and environmental remediation. Such an absurd policy would have the effect of depriving the Board of testimony from qualified economists.

In the face of significant uncertainty, Mr. Shefftz has offered to the Board exactly what it will need to meet its obligation to consider economic benefit pursuant to Sections 42(h)(3) of the Act; and he has calculated Complainants' best estimate of that benefit based either directly on established facts, or on reasonable inferences from those facts. Throwing out this analysis would deprive the Board of expert "testimony [that] will assist [the Board] in understanding the evidence" before it, and it would be inconsistent with Illinois courts' consistent practice of allowing expert testimony that is reliably supported by the record. *See Taylor v. Cty. of Cook*, 2011 IL App (1st) 093085, ¶ 32, 957 N.E.2d 413, 426.

For all of these reasons, the Hearing Officer's decision should be affirmed, and MWG's appeal seeking to strike Mr. Shefftz's economic benefit testimony should be denied.

Dated: August 10, 2022

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned, Faith E. Bugel, an attorney, certifies that I have served electronically upon the Clerk and by email upon the individuals named on the attached Service List a true and correct copy of **COMPLAINANTS' RESPONSE TO MIDWEST GENERATION, LLC'S APPEAL OF THE HEARING OFFICER'S RULING DENYING ITS MOTION *IN LIMINE* TO EXCLUDE JONATHAN SHEFFTZ'S OPINIONS** before 5 p.m. Central Time on August 10, 2022, to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 29 pages.

Respectfully submitted,

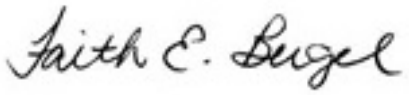

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EXHIBIT 1

THIS EXHIBIT IS NON-DISCLOSABLE IN ITS ENTIRETY AND IS SEPARATELY PROVIDED TO THE ILLINOIS POLLUTION CONTROL BOARD AND ELIGIBLE PARTIES

EXHIBIT 2

Transcript of Gayle Schlea Koch

Date: October 22, 2021
Case: Sierra Club, et al. -v- MidWest Generation, LLC

Planet Depos
Phone: 888.433.3767
Email: transcripts@planetdepos.com
www.planetdepos.com

what I'm -- I'm confused by what I perceive to be a difference between what you have said today in this deposition and what your report says, so I would love it if you could clarify that.

A The --

MS. GALE: Same objection.

THE WITNESS: Sorry?

MS. GALE: I said, same objection.

A I would say some or all of these costs should be credited.

Q (BY MR. WANNIER) Okay. Thank you.

Let's turn to Page -- the bottom of Page 24, this -- this section, "Invalid Input Data to Economic Benefit Analysis and Economic Reasonableness Evaluation." Do you see that?

A Yes.

Q Okay. And, again, I direct you to the bottom of Page 24, but my question is really about the top of Page 25. You state there, "In his financial gain/economic benefit of noncompliance opinion, Mr. Shefftz employs NRG's weighted average cost of capital or WACC and equity beta as the basis for interest rate calculations."

Do you see that?

A Yes.

Q And it's your opinion that using the -- using NRG's weighted average cost of capital -- well, let me -- rather than stating it for you, I'll just ask, do you believe it is appropriate to use NRG's WACC when in the economic benefit calculation?

A I have concerns about doing that which I detail in this first bullet, which is that NRG, as an indirect parent, has a lot of other businesses, the risks of which would be in their WACC, but should not be in Midwest Gen's. So I -- I certainly have concerns about doing that.

I have read Mr. Shefftz's -- I guess it's rebuttal report or subsequent report -- and he talks about the NRG WACC potentially being better than the average industrial WACC used in the BEN model which I use. And I have some sympathy for that.

He also talks about how it would be more appropriate to look for similar industries that are pure plays in coal-fired electric generation and look at their WACCs, which I also would agree with. And it's something I looked at and could not find at the time, and certainly, I encourage him to do that if he can find it.

I am guessing since he didn't present that information, that he didn't find it either. But I certainly would look forward to him providing that

information.

So, no, using NRG data is -- one, it's a parent that's not involved in this, and I know there have been lots of briefs and orders and things related to that whole issue. But I have some sympathy to his argument that the NRG WACC, since it includes Midwest Gen operations, might be more appropriate than the overall industrial average. And I am somewhat persuaded by that.

If I had used the NRG WACC, my numbers would have been lower. So I also believe when I give testimony, I tend to want to maintain my credibility by not trying to go out on a limb and use the number that gives my client the absolute best number. I want to use something that's credible and that the board or whoever I'm recommending this to can understand and feel that it's credible. So I used what was in the BEN as the default, but I'm okay using the energy WACC.

That's a long way of answering your question.

Q Okay. So at this point after having reviewed Mr. Shefftz's rebuttal report, would you agree that the NRG WACC is a credible estimate to use?

MS. GALE: Objection; misstates her testimony.

EXHIBIT 3

Expert Opinion of Mark A. Quarles, P.G.

January 2021

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

Prepared for:

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50 F Street NW
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Washington, DC 20001

Prepared by:

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Mark A. Quarles, P.G.
Georgia Professional Geologist No. 2266
New York Professional Geologist No. 779
Tennessee Professional Geologist No. 3834

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4.0 REMEDIAL ACTION

4.1 Recent Cases of Coal Ash Removal Actions

The CCR Rule requires coal ash disposal sites meeting certain criteria to close by two options: closure-by-removal where wastes are excavated and hauled to a lined disposal area or beneficially used or closure-in-place where wastes remain separated from groundwater and are covered by an impermeable membrane. (40 CFR Part 257.102 (c) and (d)). Saturated coal ash cannot be closed in-place according to the CCR Rule because leaching to groundwater will continue from unlined disposal areas. (40 CFR Part 257.102 (d)(i.)). Also, disposal units that contain coal ash that is located too close to the uppermost aquifer are required to close. (40 CFR Part 257.60(c)(4)).

Utilities across the United States began closure activities in response to the CCR Rule, based upon the results of the required assessments. Commonly, utilities have chosen to close disposal areas by closure-by-removal where the coal ash is excavated and then placed into a lined landfill. A list of 127 coal ash disposal units located in 27 states that was previously provided to MWG, is included in **Table 1**. Of those units, seven MWG ash ponds at Joliet (Ash Pond #2), Powerton (Ash Surge Basin and Ash Bypass Basin), Waukegan (East and West Ponds), and Will County (Ash Ponds 2S and 3S) and seven additional units in Texas owned by MWG's parent company (NRG) are all planned for closure-by-removal.

Nationally and in particular in Illinois, utilities have therefore determined that closure-by-removal is technically feasible and economically reasonable – even for very large disposal areas that are sometimes hundreds of acres in size and contain millions of cubic yards of coal ash. Closure-by-removal is particularly common at power plants where there is not adequate separation between the bottom of the wastes and the uppermost aquifer, or where the disposal area is located close to surface water bodies – conditions that exist at each of the four MWG power plants.

4.2 Investigative Results Used to Evaluate Remedies

Any current groundwater remedy needs to consider that both the historical and current disposal areas are possible source areas, consistent with the Board's conclusion that active *and* historical coal ash disposal areas are likely sources of contamination. To know which historical and active source areas are contributors to contamination, MWG needs to know where all those areas are (i.e., source identification) and under what conditions the coal ash exists in those areas (i.e., nature and extent of contamination).

Source identification and defining the nature and extent of contamination are fundamental first steps for selecting a remedy under IEPA and Federal programs such as the Resource Conservation and Recovery Act (RCRA, 42 U.S.C. Sections 6901 – 6992k), the Comprehensive Environmental Response, Compensation and Liability Act (CERLCA, 42 U.S.C. Sections 9601 - 9675), and other state-equivalent programs.

Attachment 2

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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

Respectfully submitted,

Faith E. Bugel

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1004 Mohawk
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(312) 282-9119
FBugel@gmail.com

Attorney for Sierra Club

Dated: March 4, 2022

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

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

Pursuant to 35 Ill. Adm. Code 101.500, Complainants offer the following response to Midwest Generation, LLC's Motion *in Limine* to exclude Jonathan Shefftz Opinions ("MWG Motion"). MWG's Motion demonstrates a misunderstanding of the nature and purpose of Mr. Shefftz's testimony, and bases its extreme request—to completely remove crucial expert testimony that sets forth a process by which penalties should be calculated from this case—on an incomplete and ultimately unreliable retelling of the relevant caselaw.

I. Expert Testimony May Be Based on Circumstantial Evidence and Reasonable Assumptions

It is well established that "[e]xpert testimony is admissible if the proffered expert is qualified as an expert by knowledge, skill, experience, training, or education and the testimony will assist the trier of fact in understanding the evidence." *Taylor v. Cty. of Cook*, 2011 IL App (1st) 093085, ¶ 32, 957 N.E.2d 413, 426 (internal quotations omitted). Indeed, this statement of

the rule comes from the first authority cited by MWG in its Motion. MWG's Motion does not challenge Mr. Shefftz's qualifications, training, or experience. Instead, MWG claims that because Mr. Shefftz relied on information from Complainants' counsel regarding MWG's date of noncompliance—which included reasonable assumptions based on the available data regarding the length of time a hypothetical remedy would take to implement—his testimony describing a detailed process for calculating economic benefit of noncompliance is somehow invalidated. This is false.

In support of its assertion that experts may not incorporate reasonable assumptions into their expert opinions, MWG offers citations to multiple decisions. MWG Mot. at para. 4, 5. But those decisions do not support MWG's argument. Instead, they stand only for the unremarkable proposition that an expert opinion should be excluded if the expert fails to explain his or her own methodology, or otherwise fails to explain the analysis applied to relevant facts and assumptions. *See Kruzek v. Estate of Kruzek*, 2012 IL App (1st) 121239-U, ¶ 31 (excluding the opinion of a forensic document examination expert that failed to disclose her own methodology for identifying the authenticity of signatures); *People v. Safford*, 392 Ill. App. 3d 212, 221 (1st Dist. 2009) (excluding the opinion of a fingerprint expert that failed to disclose his methodology for identifying fingerprints or the steps he followed); *Soto v. Gaytan*, 313 Ill. App. 3d 137, 146-48 (2d Dist. 2000) (excluding the opinion of a medical expert where his testimony failed to establish the reasonableness of his reliance on a physical examination that occurred more than 2.5 years prior); *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781, 800 (1st Dist. 2009) (excluding the opinion of an expert that constituted not an opinion on fact, but a legal conclusion); *In re Marriage of Cutle*r, 334 Ill. App. 3d 731, 736–37 (5th Dist. 2002) (excluding the opinion of an expert who based his valuation of a business on a "rule of thumb" calculation that ignored

numerous circumstances lowering the value of the business). None of the holdings of those decisions apply here. The decisions cited by MWG deal with fundamental flaws in experts' communication of their own methodology that rendered those expert opinions inadmissible. In contrast, Mr. Shefftz provided an exhaustively thorough description of the process he used to develop his opinions, meticulously laid out all assumptions (including the financial inputs he used to calculate a potential penalty), and developed a well-supported economic benefit of noncompliance.

Far more relevant are a series of decisions establishing that experts can and in fact regularly do base their opinions on assumptions, even where those assumptions remain uncertain. In Illinois, "[t]he fundamental requirement with respect to expert testimony is that the assumptions that support the expert's opinion must be within the realm of direct or circumstantial evidence, supported by the facts or reasonable inferences from the facts." *Nelson v. Speed Fastener, Inc.*, 101 Ill. App. 3d 539, 544, 428 N.E.2d 495, 499 (1981) (*citing Guardian Elec. Mfg. Co. v. Industrial Com.*, 53 Ill.2d 530, 535, 293 N.E.2d 590 (1973)); *see also People v. Negron*, 2012 IL App (1st) 101194, ¶ 49, 984 N.E.2d 491, 502, as modified on denial of reh'g (Jan. 31, 2013) ("'Under settled evidence law, an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true.'") (*quoting Williams v. Illinois*, 567 U.S. 50, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012)). Thus, assumptions supported by inferences from the facts may be reasonably replied upon by experts, and Mr. Shefftz was well within the bounds of permissible expert conduct in basing his financial analysis on reasonable inferences from the record in this case.

MWG is also wrong to suggest that Mr. Shefftz may not properly rely on assumptions that Complainants' counsel provided. MWG Mot. at para. 9. MWG has identified no

prohibition against counsel providing experts with assumptions that should underly their analysis, because no such prohibition exists. And no such prohibition exists because it is in fact common practice for counsel to work with experts to determine what reasonable assumptions must be made to support the expert's opinions. Indeed, the Federal Rules of Civil Procedure explicitly anticipate this practice and set forth discovery rules around it: as part of the duty to disclose, parties must "identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed." Fed. R. Civ. P. 26(b)(4)(C)(iii). MWG cites to only a single unpublished decision to support its assertion that an expert report may not rely in any form on statements provided by counsel: *Ross v. City of Rockford*. MWG Mot. at para. 11 (*citing* 2018 U.S. Dist. LEXIS 51398, *9). But that decision actually only cautions against those reports where the attorney's influence is so great that "it cannot be fairly said that the report was 'prepared' by the expert." *Johnson v. City of Rockford*, No. 15 CV 50064, 2018 WL 1508482, at *4, n.1 (N.D. Ill. Mar. 27, 2018).[1] Here, there can be no question that Mr. Shefftz's report is his own work, or that Mr. Shefftz's expert analysis is based entirely on his own extensive financial analysis.

MWG's concerns regarding Mr. Shefftz's expert opinion boil down to disputes they have with the usefulness of the assumptions Mr. Shefftz relied on. But excluding Mr. Shefftz's testimony is not the appropriate way to resolve these disputes. In cases where an expert relies on factual assumptions or circumstantial evidence, the "better course" for tribunals to take is generally "to admit the testimony of [an] expert witness and allow extensive cross-examination with respect to the disputed and unclear facts." *Nelson v. Speed Fastener,* 101 Ill. App. 3d at

[1] While the case cited by Respondent appears under a different name (*Ross v. City of Rockford* compared to *Johnson v. City of Rockford*), counsel for Complainants is confident that these are the same case.

545. MWG will have its opportunity to cross examine Mr. Shefftz regarding the assumptions underlying his expert opinion. But MWG may not short-circuit this process and avoid engaging with the well-reasoned financial analysis Mr. Shefftz provided. For these reasons, MWG's Motion should be denied.

II. The Remedy Cost and Expenditure Timeline Assumptions Mr. Shefftz Relied Upon Were Supported by Record Evidence and Reasonable Inferences

MWG's assertion that the assumptions incorporated into Mr. Shefftz's expert opinion are unsupported or otherwise improper also fails. MWG Mot. at paras. 7–12. Courts have regularly concluded that experts may rely on reasonable assumptions arising from the factual evidence in a case. "As long as the hypothetical assumptions are within the realm of circumstantial or direct evidence, as supported by the facts or reasonable inferences, the question is permissible. . . . Moreover, the facts suggested in hypothetical questions need not be undisputed but only supported by the record." *Carter v. Johnson*, 247 Ill. App. 3d 291, 297, 617 N.E.2d 260, 265 (1993) (internal citations omitted). Applying that standard here, the operational assumptions that were necessary for Mr. Shefftz to reach his opinion in this case either come directly from previous expert reports in this case, or arise naturally by reasonable inference from the record in this case or expert reports.

MWG's Motion takes issue with four sets of assumptions that underlie Mr. Shefftz's financial analysis: a) the capital investment costs associated with full removal of coal ash materials propounded by Complainants' expert James Kunkel; b) the compliance dates and remedy schedule that serve as the infrastructure for his financial analysis; c) the existence of ongoing violations at the MWG sites; and d) information relating to remediation activities that would have taken place regardless of when MWG fully removed coal ash materials from its sites.

MWG Mot. at para. 8–12. The first set of assumptions can be defended easily: the remedy cost figures are drawn directly from an expert report that was submitted by Complainants' expert Dr. Kunkel, and which is heavily supported by extensive documentation and expert analysis. The idea that it would be improper for Mr. Shefftz to base his economic benefit calculation on such a fully reasoned remedy report, even one that MWG disagrees with, is absurd.

The second set of assumptions Mr. Shefftz relied on that MWG takes issue with is the hypothetical compliance schedule MWG would have followed had it immediately remediated the groundwater contamination for which it has now been found liable, as well as the compliance schedule MWG will follow should it now remediate the groundwater contamination for which it has been found liable. These two schedules provide the inputs necessary for Mr. Shefftz to perform his analysis, because the economic benefit of noncompliance by its nature must compare the costs associated with a remedy with the costs the company would have incurred had it pursued that remedy in the first place, instead of waiting for a court to order them to do so. The economic benefit typically comes from the monetary windfall the violating entity has gained by delaying the process of cleaning up its violations. *See generally* Jonathan S. Shefftz, Expert Opinion on Economic Benefit of Noncompliance and Economic Impact of Penalty Payment and Compliance Costs (Jan. 25, 2021) ("Shefftz Initial Report") (Ex. 1 to MWG Mot.). As an initial matter, Mr. Shefftz assumed that the coal ash removal should have begun when MWG first began groundwater sampling because that is the time when MWG first became aware of its ongoing groundwater contamination—the contamination that the Board has now confirmed violated the Illinois Environmental Protection Act. In turn, Mr. Shefftz's assumption regarding the start of a possible remedy is based on the present calendar date, assuming the Board requires such a remedy. Mr. Shefftz has already updated his expert opinion to reflect the continued

passage of time while MWG does nothing, and he can do so again should it aid the Board.

Mr. Shefftz also relied on a 10-year construction schedule that was provided to him by Complainants' counsel as a schedule that he could rely on for purposes of his economic benefit analysis. This assumption, while a simplifying one because MWG has not offered how long it would take to organize removal of coal ash from its sites, is well "within the realm of circumstantial or direct evidence, as supported by the facts or reasonable inferences." *Carter v. Johnson*, 247 Ill. at 297. Specifically, Dr. Kunkel's report laying out the costs of coal ash removal also discusses the scope of activities that would be required. With this context, as well as Complainants' Counsel's knowledge of how long similar cleanup projects have taken at other sites and in other states, a 10-year removal timeline represented a reasonable hypothetical timeline from which to base Mr. Shefftz's opinions.

The third set of assumptions MWG takes issue with is that there is ongoing groundwater contamination causing violations of the Illinois Environmental Protection Act at each of the sites. This assumption of course goes beyond Mr. Shefftz's field of expertise, but it is also supported by extensive and ongoing groundwater monitoring at each of the four sites in this case, which Complainants have received through supplemental discovery and will be entering into evidence at the forthcoming remedy hearing in this matter. Thus, there can be no reasonable dispute with Mr. Shefftz relying on this information.

The final set of assumptions to which MWG objects relates to Mr. Shefftz's reliance on Counsel's representations that MWG would have relined ponds and conducted groundwater monitoring even in Mr. Shefftz's hypothetical compliance scenario. MWG Mot. at para. 12. Mr. Shefftz's hypothetical to calculate economic benefit assumed MWG removed coal ash from the ponds and fill areas at the four sites when it first became aware of the groundwater

contamination from the coal ash. Shefftz Initial Report at 22; Jonathan S. Shefftz, Supplemental and Rebuttal Expert Opinion on Economic Benefit of Noncompliance and Economic Impact of Penalty Payment and Compliance Costs, at 14 (July 16, 2021) (Ex. 2 to MWG Mot.). The idea that MWG would have relined the ponds and monitored groundwater in any scenario is not controversial—MWG did in fact reline the ash ponds and conducted groundwater monitoring, and did so pursuant to compliance agreements with Illinois EPA, which means that these activities would have occurred in any event. *See* Hr'g Exs. 626, 636, 647, and 656. In fact, IEPA communicated in 2009 that it was requiring groundwater monitoring of MWG's ponds. *See* Hr'g Exs. 621.[2] The conclusion that MWG would have relined the ponds even if MWG removed all of the onsite ash stems from the fact that, historically, MWG did reline the ponds even though MWG regularly removed the ash from the ponds. See, e.g., Joint Agreed Stipulations (Oct. 2, 2017); Hr'g Tr. at 58:22-59:6, 61:4-12, 101:1-6, 111:15-21, 118:13-24, 192:13-22, 208:29-209:2 (Jan. 30, 2018). It is clear from the record that removing the ash from the active ponds did not affect MWG's decision to reline those ponds. If MWG were going to continue to manage the ash wet (which it did), then it needed to use those ash ponds (which it did). If MWG were going to continue to use the ash ponds (which it did), then it needed to reline them (which it did). Removing additional ash from outside those ponds is not related in any way to the Respondent's decision to reline the ponds. The fact that MWG would have relined the ponds and monitored groundwater regardless of any removal scenario is absolutely "supported by the record" that has been established in this case, as demonstrated above. *See Carter v. Johnson*, 247 Ill. App. 3d 291, 297, 617 N.E.2d 260, 265 (1993). In short, each set of assumptions to which MWG objects

[2] MWG may dispute IEPA's authority to do so but that doesn't translate to the groundwater monitoring being voluntary. Hr'g Ex. 621.

arises either directly from the record or through reasonable inference and is therefore entirely appropriate and cannot justify excluding Mr. Shefftz's testimony. While MWG is free to challenge those assumptions in the course of a hearing, Mr. Shefftz's testimony is well within the scope of expert testimony Illinois courts have regularly allowed to be admitted.

III. MWG's Motion Reveals a Fundamental Misunderstanding of the Scope and Purpose of Mr. Shefftz's Testimony

MWG's entire Motion is premised on a challenge to the very concept that potential penalties may be discussed before a final remedy is determined. MWG Mot. at para. 14. MWG's apparent argument is that in cases where the remedy for a violation of the Illinois Environmental Protection Act requires long-term action, the Board should ignore the explicit statutory section of the Act requiring that the Board consider in its penalty determination "any economic benefits accrued by the respondent because of delay in compliance with requirements." 415 ILCS 5/42(h)(3). This position runs contrary to the core penalty provisions of the Act and is wholly unsupported by any caselaw. MWG's argument also fails to grasp that the primary function of Mr. Shefftz's testimony is to provide a methodology which may be applied to the facts established in this case to determine the appropriate penalty.

MWG cites to two Board Orders that it claims stand for the proposition that the Board should not calculate economic benefit of noncompliance where long-term remediation is required, but even a cursory review of those two orders makes clear that neither order actually supports this position. MWG's Mot. at para. 14. The first case, *Illinois v. Poland et al.*,[3] involved an open dumping enforcement claim by the state against a series of parties operating a landfill. PCB 98–148, 2003 WL 21995867 (Aug. 7, 2003). MWG asserts that the notable and relevant

[3] *Available at* https://pcb.illinois.gov/documents/dsweb/Get/Document-39766.

component of that decision, as applied to this case, is the complainant's apparent acknowledgment that "a precise quantification of the economic benefit" may not be possible. But MWG fails to acknowledge that in reaching its decision the Board first recognized that the complainant contended it had "introduced testimony and documentary evidence regarding . . . the accrual of economic benefit," and that the Board imposed the specific penalty recommended by the complainant. *Compare Illinois v. Poland*, 2003 WL 2199586, at *7 (complainant discussing economic benefit and requesting a $25,000 penalty) *with id.* at *12–13 (Board imposing $25,000 penalty). The second case, *Illinois v. Lowell Null*,[4] involved an enforcement action against a pallet shredding company that illegally stored and burned waste on-site. PCB 11-26, 2011 WL 4863705, at *2 (Oct. 6, 2011). There, the Board only declined to meaningfully apply Section 42(h)(3) because it was simply unable to: there was no apparent attempt by either party to quantify the Respondent's economic benefit from delayed compliance. *Id.* at *11. This is obviously distinguishable from the situation here, where Complainants have proffered a robust quantification of MWG's economic benefit based on the remedy Complainants believe is appropriate here (full removal of all coal ash materials from all four sites).

More broadly though, this argument—and MWG's Motion overall—fails because it assumes that the facts and assumptions Mr. Shefftz relied upon must remain static as the case continues to progress. This is demonstrably not true: already, Mr. Shefftz has updated his economic benefit calculation to reflect the passage of time (resulting in an increased value due to the added delay MWG has benefitted from). This figure will need to be further updated as time continues to pass, but the passage of time is far from the only way in which his analysis may need to be updated depending on how this case progresses. Complainants asked Mr. Shefftz to

[4] *Available at* https://pcb.illinois.gov/documents/dsweb/Get/Document-73890.

calculate an economic benefit based on the remedy Complainants believe is appropriate to remediate the statutory violations MWG has committed and continues to commit; but as will be demonstrated by Complainants' expert Mark Quarles in the upcoming hearing in this matter, a nature and extent study will be needed to identify the scope of contamination and ash material locations that will need to be cleared. The exact timeline of a remedy thus depends not merely on the Board's future decisions in this proceeding and the length of time it takes to begin remedial action, but also on the scope of the ash, contamination, and necessary cleanup that is identified through any nature and extent study the Board requires MWG to conduct.

At its core, the expert analysis and opinions provided by Mr. Shefftz offer a methodology for calculating the economic benefit MWG reaped by failing to remediate groundwater contamination at any of the four sites, despite being aware of it for eleven to twelve years and counting. The specific inputs to that methodology were never going to be exact, because the Board (and not Complainants) ultimately has the authority and obligation to determine a remedy for MWG's violations that addresses the ongoing violations. The extent of such a remedy will by its very nature impact the ultimate determination of penalties, because the economic benefit of delay is higher when the overall delayed costs are higher. Because of this reality, the Board could order Mr. Shefftz to update his calculations to account for new or updated inputs. But that does not mean that his current testimony is unsupported. To the contrary, in the face of this significant uncertainty, Mr. Shefftz has offered to the Board exactly what it will need to meet its obligation to consider economic benefit pursuant to Section 42(h)(3) of the Act; and he has calculated Complainants' best estimate of that benefit based either directly on facts established in the record today, or on reasonable inferences from those facts. Throwing out this analysis would deprive the Board of expert "testimony [that] will assist [the Board] in understanding the

evidence" before it, and it would be inconsistent with Illinois courts' consistent practice of allowing expert testimony that is reliably supported by the record. *See Taylor v. Cty. of Cook,* 2011 IL App (1st) at ¶ 32. For these reasons, MWG's Motion's request to strike Mr. Shefftz's economic benefit should be denied.[5]

IV. Mr. Shefftz's Opinion on Financial Deterrence Does Not Constitute a Legal Opinion, but Merely Offers Financial Context to Help Guide the Penalty Calculation

Finally, MWG's Motion also seeks to exclude sections of Mr. Shefftz's testimony discussing the importance of factoring in likelihood of enforcement as part of its penalty determination. MWG Mot. at paras. 17–21. This section of Mr. Shefftz's report makes the point that any penalty imposed should ensure that the economic cost of noncompliance, as measured by the probabilistic penalty amount (i.e., the penalty multiplied by the likelihood of enforcement), matches the economic benefit of noncompliance. MWG takes exception to this opinion, and offers two reasons it believes the opinion should be excluded: a) because Mr. Shefftz's opinion constitutes a "legal interpretation"; and b) because Mr. Shefftz's opinion "actually contradicts Board precedent." MWG Mot. at para. 20. Neither of these purported justifications is supported by caselaw or common sense.

MWG's claim that Mr. Shefftz's opinion constitutes a legal interpretation fails upon review of the actual language of Mr. Shefftz's report. In the section entitled "General Concepts and Probability Adjustments," Mr. Shefftz offers appropriate context to the Board for its determination of an appropriate penalty in this case. Mr. Shefftz refers to a panel of "EPA-

[5] Complainants reserve the right to contest MWG's request to exclude Mr. Shefftz's opinion that the recommended $41.6 million economic benefit penalty is affordable to MWG, based on the claim that it will be moot if Mr. Shefftz's economic benefit opinions are excluded. MWG's Motion at para. 21. This request is irrelevant, because there is no basis for excluding Mr. Shefftz's economic benefit opinions.

convened *academic* experts" that was constituted as the "Science Advisory Board," discusses their recommendations, offers additional context through analogy and based on his own expertise on the topic, and closes with an explanation why this consideration could help the Board ensure that it ultimately makes MWG "financially indifferent between compliance versus noncompliance."[6] Shefftz Initial Report at 7–9 (emphasis added). Nothing in any of this discussion seeks to interpret or apply any law, rule, regulation, or other legal standard. In fact, the Illinois Environmental Protection Act penalty factors under 415 ILCS 5/42(h), which the Board is obligated to follow, are not even mentioned in this section of his report. Complainants do not dispute that experts' opinions on legal matters are inadmissible and cannot be relied upon by the Board; but MWG has not identified any place in this discussion where Mr. Shefftz proffers a legal opinion.

MWG's second argument, that Mr. Shefftz's deterrence discussion recommends that the Board conduct a penalty analysis that runs contrary to Board precedent, is also untrue. Specifically, while MWG is correct that the Act does not contain any *specific* "requirement to adjust a penalty by probability of detection, prosecution, or ultimate payment" (MWG Motion at para. 19), it is incorrect that a specific reference is needed for the Board to enact such an adjustment. This is because the civil penalty factors are not presented as an exclusive list: the Board is authorized to "consider *any matters of record* in mitigation or aggravation of penalty, including, *but not limited to*," the specifically delineated factors. 415 ILCS 5/42(h). MWG's chain of citations to previous Board cases in which the Board did not consider this factor is largely irrelevant: the Board is not obligated to conduct the same penalty analysis in every case,

[6] The fundamental concept of economic benefit of noncompliance is based on the common understanding that without penalties, and even where remedial action is ultimately required, violators will find themselves incentivized *not* to comply with laws and regulations.

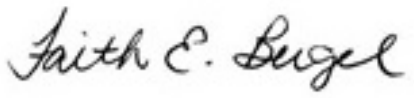
and it is not limited by its previous penalty determinations as to what it may consider in future penalty determinations. In fact, MWG's first citation underscores this point: MWG's Motion cites to *IEPA v. Barry* for the proposition that the Board "recognizes that no formula exists to determine how to adjust for deterrence." MWG's Motion at para. 19; *see IEPA v. Barry*, 1990 WL 271319, at *25, PCB 1988-71. But the Board was not discussing deterrence adjustments: it was explaining that no formula exists that dictates how it must balance the delineated (or nondelineated) factors in its Section 42(h) penalty determination, meaning that it can conduct this assessment for each individual case based on the specifics of that case.

V. Conclusion

For the reasons stated in more detail in the preceding Sections, Complainants Respectfully Request that the Hearing Officer Deny MWG's Motion *In Limine* to Exclude Jonathan Shefftz Opinions in its entirety.

Dated: March 4, 2022

Respectfully submitted,



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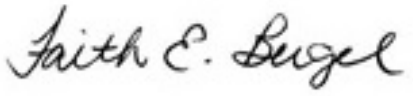
CERTIFICATE OF SERVICE

The undersigned, Faith E. Bugel, an attorney, certifies that I have served electronically upon the Clerk and by email upon the individuals named on the attached Service List a true and correct copy of **COMPLAINANTS' RESPONSE TO RESPONDENT MIDWEST GENERATION, LLC'S MOTION *IN LIMINE* TO EXCLUDE JONATHAN SHEFFTZ OPINIONS** before 5 p.m. Central Time on March 4, 2022, to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 17 pages.

Respectfully submitted,



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