ILLINOIS POLLUTION CONTROL BOARD
July 24, 2014

SIERRA CLUB,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 14-134
	)	(Citizens Enforcement - Air)
AMEREN ENERGY MEDINA VALLEY COGEN, LLC and FUTUREGEN INDUSTRIAL ALLIANCE INC.,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by D. Glosser):

On June 16, 2014, Sierra Club filed a complaint against Ameren Energy Medina Valley Cogen, LLC (Medina Valley) and FutureGen Industrial Alliance Inc. (FutureGen) (collectively respondents). Accompanying the complaint was a motion by an out-of-state attorney to appear *pro hac vice*. The complaint concerns respondents' proposed construction of Boiler #7 at their Meredosia Energy Center power plant located in Meredosia, Morgan County. On July 3, 2014, two out-of-state attorneys filed a motion to appear *pro hac vice* on behalf of FutureGen. For the reasons below, the Board accepts the complaint for hearing and denies the motions to appear *pro hac vice*.

Respondents filed a motion for summary judgment on July 15, 2014, and FutureGen filed a motion for expedited review on July 16, 2014. Sierra Club's response time has not expired and the Board takes no actions on these motions today.

MOTION TO APPEAR *PRO HAC VICE*

Before addressing whether to accept the complaint for hearing, the Board rules upon the *pro hac vice* motions of the three out-of-state attorneys. Eva Schueller seeks to appear on behalf of Sierra Club in this proceeding. Her motion states that she is licensed and registered to practice law in the State of California. Dale N. Johnson and Christopher Zentz seek to appear on behalf of FutureGen in this proceeding. Their motion states that each is licensed and registered to practice law in the State of Washington.

The motions to appear *pro hac vice* were filed pursuant to Section 101.400(a)(3) of the Board's procedural rules (35 Ill. Adm. Code 101.400(a)(3)). Under this provision, the Board has allowed out-of-state attorneys (*i.e.*, not licensed and registered in the State of Illinois) to appear before the Board in particular proceedings, if the out-of-state attorney's *pro hac vice* motion represents that the attorney is licensed and registered to practice law in another state. *Id*. The Illinois Supreme Court, however, recently overhauled the process for permitting out-of-state

attorneys to appear *pro hac vice* in Illinois by amending its Rule 707. Ill. S. Ct. R. 707 (eff. July 1, 2013).

The Supreme Court's amended Rule 707 applies to cases "before an agency or administrative tribunal of the State of Illinois . . . if the representation by the out-of-state attorney constitutes the practice of law in Illinois or the agency or tribunal requires that a representative be an attorney." Ill. S. Ct. R. 707(c)(3). The Board, an agency and administrative tribunal of the State of Illinois (415 ILCS 5/5 (2012)), has long held that its adjudicatory proceedings involve the practice of law. *See, e.g.*, Petition of Recycle Technologies, Inc. for an Adjusted Standard from 35 Ill. Adm. Code 720.131(c), AS 97-9, slip op. at 3-5 (July 10, 1997); *see also* Stone Street Partners, LLC v. City of Chicago Dept. of Admin. Hrgs., 2014 IL App (1st) 123654, ¶ 15 (City of Chicago administrative hearings, like judicial proceedings, entail admission of evidence and examination of sworn witnesses, "all of which clearly constitute the practice of law"). Further, under the Board's procedural rules, though an individual may represent himself or herself, a party other than an individual must be represented by an attorney. 35 Ill. Adm. Code 101.400(a)(2), (a)(3). The Board therefore finds that Rule 707 applies to adjudicatory proceedings before the Board.

For Ms. Schueller to represent Sierra Club, and Messrs. Johnson and Zentz to represent FutureGen, they must comply with Supreme Court Rule 707. Their motions to appear *pro hac vice* do not mention Rule 707. The Rule establishes a procedure by which "an eligible out-of-state attorney . . . is permitted to appear as counsel and provide legal services in the proceeding *without order of the tribunal*." Ill. S. Ct. R. 707(a) (emphasis added). Under these circumstances, the Board denies the pending *pro hac vice* motions. The Board plans to propose amendments to its procedural rules to reflect the Supreme Court's changes to Rule 707. In the meantime, the Board will permit out-of-state attorneys to appear *pro hac vice* in an adjudicatory proceeding only if they comply with Rule 707.

Accordingly, the out-of-state attorneys seeking to represent Sierra Club and FutureGen here are granted leave until August 25, 2014, to file new appearances with the Board. Each appearance must include the out-of-state attorney's representation that he or she is in, and will maintain throughout the proceeding, compliance with Rule 707. One requirement of Rule 707 is "the filing of an appearance of an active status Illinois attorney associated with the [out-of-state] attorney in the proceeding." Ill. S. Ct. R. 707(a). Therefore, each out-of-state attorney's appearance must identify the active status Illinois attorney with whom the out-of-state attorney is associated in this proceeding, as well as the date on which the active status Illinois attorney filed an appearance.

ACCEPT FOR HEARING

Under the Environmental Protection Act (Act) (415 ILCS 5 (2012)), any person may bring an action before the Board to enforce Illinois' environmental requirements. *See* 415 ILCS 5/3.315, 31(d)(1) (2012); 35 Ill. Adm. Code 103. In this case, Sierra Club alleges that respondents' proposed Boiler #7 is a "major modification" under the Clean Air Act (CAA), which requires a permit under the CAA's Prevention of Significant Deterioration (PSD) Program, incorporated into Illinois law through Section 9.1(d) of the Act. 415 ILCS 5/9.1(d)

(2012); *see* 42 U.S.C. §§ 7475(a), 7479(2)(c). Absent this permit, Sierra Club alleges that construction of Boiler #7 violates Section 9.1(d) of the Act (415 ILCS 5/9.1(d) (2012)) and National Ambient Air Quality Standards (NAAQS) under the CAA (42 U.S.C. § 7409) by threatening to release impermissible levels of nitrogen oxides, sulfur dioxides, particulate matter, and other pollutants.

Sierra Club asks the Board to enjoin respondents from proposing to or constructing Boiler #7, except in accordance with the Act, the CAA, and any applicable regulatory requirements. It further asks the Board to order respondents to apply for and obtain a PSD permit from the United States Environmental Protection Agency before proposing to or constructing Boiler #7. Lastly, Sierra Club asks the Board to order respondents to pay civil penalties under Section 42 of the Act (415 ILCS 5/42 (2012)), declare that respondents were required to obtain a PSD permit for Boiler #7, and award any other relief that the Board finds just and equitable. The Board finds that the complaint meets the content requirements of the Board's procedural rules. *See* 35 Ill. Adm. Code 103.204(c), (f).

Section 31(d)(1) of the Act provides that "[u]nless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2012); *see also* 35 Ill. Adm. Code 103.212(a). A complaint is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.* Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicative or frivolous. 35 Ill. Adm. Code 103.212(b). Respondents have filed no motion to dismiss on the basis that the complaint is duplicative or frivolous. No evidence before the Board indicates that Sierra Club's complaint is duplicative or frivolous.

The Board accepts the complaint for hearing. *See* 415 ILCS 5/31(d)(1) (2012); 35 Ill. Adm. Code 103.212(a). A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if respondents fail within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider respondents to have admitted the allegation. *See* 35 Ill. Adm. Code 103.204(d).

The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2012). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as

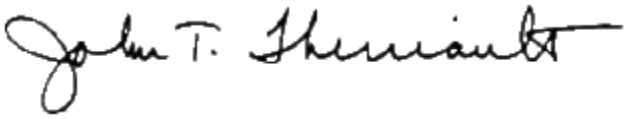
the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount. These factors include the following: the duration and gravity of the violation; whether the respondent showed due diligence in attempting to comply; any economic benefits that the respondent accrued from delaying compliance based upon the "lowest cost alternative for achieving compliance"; the need to deter further violations by the respondent and others similarly situated; and whether the respondent "voluntarily self-disclosed" the violation. 415 ILCS 5/42(h) (2012). Section 42(h) requires the Board to ensure that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship." *Id*. Such penalty, however, "may be off-set in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent." *Id*.

Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any (including whether to impose a civil penalty), and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 24, 2014, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board