

ILLINOIS POLLUTION CONTROL BOARD  
October 3, 2019

SIERRA CLUB, )  
 )  
 Complainant, )  
 )  
 v. ) PCB 19-78  
 ) (Citizen's Enforcement – Water)  
 ILLINOIS POWER GENERATING )  
 COMPANY, ILLINOIS POWER )  
 RESOURCES GENERATING, LLC, )  
 ELECTRIC ENERGY, INC., and VISTRA )  
 ENERGY CORPORATION, )  
 )  
 Respondents. )

ORDER OF THE BOARD (by B. F. Currie):

On April 15, 2019, respondents Illinois Power Generating Company (IPGC), Illinois Power Resources Generating, LLC (IPRG), Electric Energy, Inc. (EEI), and Vistra Energy Corp. (Vistra) (collectively, respondents) filed a motion to bifurcate (Mot.). The motion requests that the Board bifurcate hearings on the alleged violations and the remedy. Mot. at 1. Respondents also ask that the Board delay expert discovery on remedy until after the violations have been decided. *Id.* Complainant, Sierra Club, opposes the motion for bifurcation.

For the reasons discussed below, the Board grants respondents' motion to bifurcate hearings between the alleged violations phase and remedy phase and delay any expert discovery on remedy until after the violations phase.

In this opinion, the Board first summarizes the case's procedural, factual, and legal background. The Board then summarizes the parties' positions and discusses the issues raised by the parties before making its findings.

**BACKGROUND**

**Procedural Background**

On December 18, 2018, Sierra Club filed a three-count complaint (Comp.) alleging respondents violated open dumping and water pollution prohibitions of the Environmental Protection Act (Act), as well as water quality standards of the Board. On February 28, 2019, the Board accepted the complaint for hearing. On April 15, 2019, respondents filed an answer to Sierra Club's complaint in which respondents deny all material allegations.

Also on April 15, 2019, respondents filed a motion to bifurcate (Mot.). Sierra Club filed its response (Resp.) opposing the motion on April 29, 2019. On May 13, 2019, respondents filed

their reply (Rep.) attached to a motion for leave to reply. The Board grants respondents' motion for leave to reply and accepts the reply.

### **Factual Background**

Sierra Club's complaint alleges violations by Vistra and its three subsidiaries (IPGC, IPRG, and EEI) at three separate facilities: (1) Coffeen Power Station (Coffeen), owned and operated by IPGC; (2) E.D. Edwards Generation Plant (Edwards), owned and operated by IPRG and (3) Joppa Steam Plant (Joppa), owned and operated by EEI. Each of these facilities is in a different county. Coffeen is in Montgomery County, Edwards in Peoria County, and Joppa in Massac County.

The complaint alleges that IPGC uses two unlined ash ponds, a landfill, and two gypsum ponds at Coffeen to dispose of and store coal ash and other coal combustion waste. Comp. at 2. The complaint alleges that IPRG stores and disposes coal ash and other coal combustion waste in one unlined pond, as well as in other repositories at Edwards. *Id.* at 3. Lastly, Sierra Club alleges that EEI stores and disposes of coal ash and other coal combustion waste in an unlined pond, as well as in other repositories at Joppa. *Id.* at 4.

Sierra Club alleges that the storage and disposal of coal ash and coal combustion waste have caused water pollution resulting in exceedances of Illinois Class I groundwater quality standards for eight pollutants: arsenic, beryllium, boron, chromium, iron, lead, manganese, and sulfate. Comp. at 5. In addition, the complaint alleges exceedances of Illinois Class II groundwater quality standards at Joppa for five pollutants: arsenic, boron, iron, lead, and sulfate. *Id.*

Sierra Club asks that the Board impose civil penalties on respondents and order them to: (1) cease and desist from causing or threatening to cause water pollution; (2) modify coal ash and coal residual disposal practices to avoid future groundwater contamination; and (3) remediate the contaminated groundwater so that it meets applicable Illinois groundwater quality standards. Comp. at 17-18.

### **Legal Background**

Section 103.212 of the Board's procedural rules addresses hearings in enforcement cases. 35 Ill. Adm. Code 103.212. Subsection (d) provides that the Board, in its discretion, may hold a hearing on the alleged violations and a separate hearing on the remedy. 35 Ill. Adm. Code 103.212(d).

The Board has previously bifurcated hearings in citizen enforcement cases. *See Charter Hall Homeowner's Association v. Overland Transportation System, Inc.*, PCB 98-81 (Oct. 1, 1998). The Board has also found it appropriate, after finding violations, to order additional hearings on remedy. *See, e.g., Johns Manville v. Illinois Department of Transportation*, PCB 14-3, slip op. at 22 (Dec. 15, 2016) (*Johns Manville*); *see also, e.g., Sierra Club v. Midwest Generation, LLC*, PCB 13-15, slip op. at 92 (June 20, 2019) (*Midwest Generation*).

## **DISCUSSION**

### **Respondents' Motion to Bifurcate**

Respondents ask the Board to bifurcate the hearings into an alleged violations phase and a remedy phase. Mot. at 1. They argue that bifurcation is appropriate due to the complexity of the complaint's allegations and requests for relief. *Id.* at 2. Respondents further argue that the case is complicated because there are three separate facilities, each with a different owner, operational history, geology, and hydrology. *Id.*

Further, respondents cite cases in which the Board ordered additional hearings on remedy after finding violations. Mot. at 4-6. One of the cases cited is Midwest Generation, which respondents argue is analogous to this case. *Id.* at 5-6. They contend that both cases involve allegations that coal ash and other coal combustion residuals at multiple power plants have polluted groundwater for multiple years. *Id.* at 5. Respondents also argue that Midwest Generation only involved one owner for all facilities, while this case is complicated by multiple owners. *Id.* at 2, 5. Respondents maintain that bifurcating in this case would be consistent with Board precedent. *Id.* at 8.

Respondents also ask that if the Board decides to bifurcate, the Board delay expert discovery on remedy until the violations phase is complete. Mot. at 1, 8. Respondents argue that delaying expert discovery in this way will save the parties time and resources. *Id.* at 8. Respondents assert that discovery on remedy will not be necessary if no violation is established. *Id.*

### **Sierra Club's Response Opposing Bifurcation**

Sierra Club argues that although its complaint addresses three separate facilities, bifurcation is not necessary because of the "simplicity of the issues raised here." Resp. at 2. Sierra Club also worries about unnecessarily delaying the proceeding and, as a result, wasting the parties' and the Board's time. *Id.* In addition, Sierra Club is concerned with delaying remediation of on-going pollution. *Id.*

Further, Sierra Club asserts that this case is distinguishable from Midwest Generation because that case dealt with four facilities and involved Groundwater Management Zones, as well as Compliance Commitment Agreements between respondent and the Illinois Environmental Protection Agency (IEPA). Resp. at 7. Sierra Club argues that this case is more like Sierra Club v. City Water, Light & Power, PCB 18-11 (CWLP), a case in which bifurcation has not been ordered, multiple unlined impoundments are at issue, and remediation activity with IEPA has not begun. *Id.*

Sierra Club requests that the Board not limit expert discovery on remedy now. Resp. at 11. Sierra Club asserts that because the parties will already be discussing and contesting discovery responses, to bar discovery requests on remedy would unnecessarily delay any eventual remedy. *Id.*

### **Respondents' Reply to Sierra Club's Response**

Respondents argue that Sierra Club, in its effort to analogize this case and CWLP, mischaracterizes three aspects of the two cases. Rep. at 2-5. First, respondents argue that CWLP involves one facility and one owner, while this case involves four respondents and three facilities across the State, each with different hydrology and geology. *Id.* at 4. Second, respondents state that at least four of the repositories in this case are lined. *Id.* Third, respondents state that they have taken steps toward remediation. *Id.* Specifically, respondents state that (1) IEPA has approved measures to establish Groundwater Management Zones in four of the eight repositories, (2) an IEPA-approved closure of one repository has begun, and (3) de-watering wells have been installed at one repository, while another repository now has a cover. *Id.*

### **The Board's Analysis and Finding**

The Board agrees with respondents that this case is more analogous to Midwest Generation than to CWLP. Like Midwest Generation, this case involves multiple sites across the State, each with different hydrology and geology, making remedies, if required, more complex. Conversely, CWLP concerns one facility with a single owner. The Board also notes that the CWLP is only in the early stages of discovery. Whether the Board will ultimately bifurcate CWLP hearings is currently unknown.

Further, in Johns Manville and Midwest Generation, due to the complex technical nature of the cases and the insufficiencies of the respective records on remedy, the Board found it necessary to hold additional hearings on remedy. Given the complexity of this case, it seems likely that additional hearings on remedy would be necessary even if the Board did not bifurcate hearings.

The Board has discretion to bifurcate between a hearing on alleged violations and a hearing on remedy. 35 Ill. Adm. Code 103.212(d). The Board finds that bifurcating in this case will aid administrative economy and preserve Board and party resources by narrowing the scope of the hearings to the issue of violations first, and then, only if necessary, to the issue of remedy. The Board recognizes that the timeline of a case varies based on amended pleadings, the amount of discovery, and how many hearings are required. The Board also recognizes Sierra Club's concern over unnecessary delay. The Board directs the hearing officer and the parties to proceed expeditiously with discovery and hearings on the alleged violations. If the Board finds any violations, the case will proceed to the remedy phase without delay.

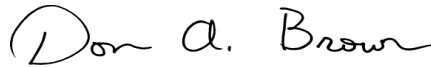
Therefore, the Board exercises its discretion under Section 103.212(d) and grants respondents' motion to bifurcate hearings. During the alleged violations phase, expert discovery is limited to issues of violation. If the Board finds any violations, the parties will proceed to expert discovery on remedy. Even when hearings in a proceeding are bifurcated, however, there remains only one record. Anything entered into the record during the alleged violations phase may be relied on during any remedy phase.

**CONCLUSION**

For the reasons stated above, the Board grants respondents' motion to bifurcate the hearings and delays any expert discovery on remedy until after the alleged violations phase of the case.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 3, 2019, by a vote of 4-0.

A handwritten signature in cursive script that reads "Don A. Brown". The signature is written in black ink and is positioned above a horizontal line.

Don A. Brown, Clerk  
Illinois Pollution Control Board