

ILLINOIS POLLUTION CONTROL BOARD
July 8, 2020

SIERRA CLUB, ENVIRONMENTAL LAW)
AND POLICY CENTER, PRAIRIE RIVERS)
NETWORK, AND CITIZENS AGAINST)
RUINING THE ENVIRONMENT,)
)
Complainants,)
)
v.) PCB 13-15
) (Enforcement – Water, Land)
MIDWEST GENERATION, LLC,)
)
Respondent.)

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

On October 3, 2012, Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (collectively, Environmental Groups) filed a seven-count complaint against Midwest Generation, LLC (Midwest, MWG, or MWGen). The complaint was later amended and alleged groundwater contamination and open dumping in violation of the Environmental Protection Act (Act) and Board regulations. The Environmental Groups alleged that Midwest discharged contaminants into the environment through coal ash disposal ponds and historical coal ash storage sites at four of Midwest’s electric generation stations (Stations) in Illinois. On June 20, 2019, the Board found that Midwest violated Sections 12(a), 12(d), and 21(a) of the Act (415 ILCS 5/12(a), 12(d), 21(a) (2016)), as well as Sections 620.115, 620.301(a), and 620.405 of the Board groundwater quality regulations (35 Ill. Adm. Code 620.115, 620.301(a), 620.405).

On February 10, 2021, Midwest filed a combined motion to stay and a motion *in limine* to exclude sections of the Environmental Groups’ expert opinion as it pertains to Midwest’s parent company, NRG Energy, Inc. (NRG). The Environmental Groups opposed the motion. The hearing officer split the combined motion, granted the motion *in limine*, and deferred to the Board on the motion to stay. The Environmental Groups filed an interlocutory appeal of the hearing officer’s order. Today, the Board grants Midwest’s motion to stay.

PROCEDURAL BACKGROUND

Procedural History

The extensive record in this case is described in detail in the June 20, 2019, Board order. See Sierra Club, et al. v. Midwest Generation, LLC, PCB 13-15, slip op. at 4 (June 20, 2019) (Interim Order). The Board had bifurcated the matter into a liability and remedy phase. To conclude the liability phase, the Board issued the Interim Order which held that Midwest violated Sections 12(a), 12(d), and 21(a) of the Act (415 ILCS 5/12(a), 12(d), 21(a) (2016)), as

well as Sections 620.115, 620.301(a), and 620.405 of the Board groundwater quality regulations (35 Ill. Adm. Code 620.115, 620.301(a), 620.405). Subsequently, Midwest filed a motion to reconsider and clarify on September 9, 2019. The motion was opposed by the Environmental Groups.

On February 6, 2020, the Board issued an order granting in part and denying in part Midwest's motion to reconsider. The Board did not alter the substance of the previous Interim Order ruling which found Midwest violated the above-mentioned sections of the Act and regulations. However, the Board found that groundwater management zones at three of the Stations are still in operation and therefore violations of 35 Ill. Adm. Code Sections 620.115, 620.301(a) and 620.405 have been stayed since the creation of the groundwater management zones in 2013. This February 6, 2020, Board order directed the parties to proceed expeditiously to discovery in the remedy phase of this matter.

Interlocutory Appeal and Motion to Stay

Following the Board's February 6, 2020, order, the parties set a discovery schedule by agreement, which was subsequently approved by the hearing officer. Hearing Officer Order (Oct. 19, 2020). During discovery, the Environmental Groups submitted the expert opinion of its witness, Jonathan S. Shefftz (Shefftz Opinion).

On February 10, 2021, Midwest filed a combined motion *in limine* to exclude sections of Complainants' expert report (Mot. *in limine*) and a motion for stay (Mot. to Stay) pending the Board's decision with memorandum in support (Memo) and the Shefftz opinion attached as a non-disclosable exhibit.

On February 24, 2021, the Environmental Groups filed a response in opposition to Midwest's combined motion (Resp.). On March 10, 2021, Midwest filed a motion for leave to file, *instanter*, a reply along with the reply (Reply).

On April 13, 2021, the hearing officer issued an order (April HOO) that split Midwest's combined motion, granted the motion *in limine*, and deferred to the Board as to the motion to stay. On April 19, 2021, the Environmental Groups filed a motion to reconsider or, in the alternative, clarify (Mot. to Reconsider) the hearing officer order that granted Midwest's motion. On May 3, 2021, Midwest responded in opposition (Resp. Mot. to Reconsider). In addition, on April 27, 2021, the Environmental Groups filed a Motion for interlocutory appeal from the hearing officer's order granting the motion *in limine* (Interlocutory Appeal). On May 11, 2021, Midwest filed a response in opposition to the Interlocutory Appeal (Resp. Interlocutory Appeal). On June 4, 2021, the hearing officer denied the Environmental Groups' motion to reconsider.

LEGAL BACKGROUND

The Board's rules on motions to stay are found at 35 Ill. Adm. Code 101.514.

Motions to Stay Proceedings

- a) Motions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed, and in decision deadline proceedings, by a waiver of any decision deadline. A status report detailing the progress of the proceeding must be included in the motion.

DISCUSSION

In this part of the opinion, the Board begins by summarizing the arguments against and in favor of the motion to stay. Next, the Board discusses why granting the motion to stay is appropriate given the Board's rules.

April 13, 2021, Hearing Officer Order

In granting Midwest's motion *in limine*, the hearing officer found that the cases cited by the Environmental Groups were distinct from the present case. April HOO at 5. "Several of the cases cited by complainants involve issues regarding an inability to pay; however MWG does not make that argument here. And as noted above the inability to pay is not a consideration found in Section 42(h) of the Act." *Id.*

Finding that the Environmental Groups failed to establish that NRG is responsible for any of the violations, the hearing officer therefore found that NRG's financial information was not relevant to the penalty determination. *Id.* For these reasons, the hearing officer granted Midwest's motion *in limine* to exclude portions of the Shefftz Opinion that discuss NRG. *Id.*

Shefftz Opinion

In accordance with the discovery schedule, the Environmental Groups submitted two expert opinions on January 25, 2021. One of the expert opinions was authored by Jonathan S. Shefftz and is titled "Expert Opinion on Economic Benefit and Noncompliance and economic Impact of Penalty Payment and Compliance Costs." The Shefftz Opinion has been labeled as "non-disclosable information" by the parties. In general, the opinion reviews publicly available financial information and information produced through discovery. The opinion then determines the economic benefit of noncompliance that has been accrued by Midwest, as well as the economic impact of a civil penalty and cost of compliance for both Midwest and NRG. Interlocutory Appeal at Attachment A.

Motion to Stay

In its combined motion *in limine* and motion to stay, Midwest requests that the Board exclude sections of the Shefftz Opinion that relate to Midwest's parent corporation, NRG. Motion *in limine* at 1. "MWGen is the only party named in the complaint and the only party the [Board] found to have violated the [Act]. Any discussion or opinions concerning NRG are beyond the Board's opinion, not relevant, and must be stricken." *Id.*

Until the Board decides the motion *in limine*, Midwest asks that the Board issue a stay of discovery as to NRG-specific economic issues. “Until the Board confirms that the only relevant party is MWGen, the Board should stay any further discovery on this issue pending the Board’s review.” *Id.* Arguing that it would be “irreparably harmed” as the issue of including information on NRG in discovery will affect Midwest’s decisions in allocating its resources during discovery and ability to identify expert witnesses, Midwest concludes that a stay is necessary. *Id.* at 4. “Without a stay, MWGen will be forced to prepare and produce detailed financial opinions about an entity that its not named in this proceeding.” Memo at 7.

Further, “MWGen’s request for a stay is limited *only* to the expert opinion on economic issues. MWGen is not requesting a stay on discovery on the other issues identified by the Board, thus discovery will proceed on the more complex issues of whether any remedy or corrective action is required at the four MWGen stations.” *Id.* (emphasis in original).

The Environmental Groups oppose both the motion *in limine* and the motion for stay. Resp. at 2. Arguing that Midwest’s request for a stay is based on a legal argument that has no merit, the Environmental Groups say that Midwest’s motion to exclude NRG financial information is directly contrary to Board caselaw. *Id.* at 4. They argue that the caselaw cited by Midwest to support its request to exclude is distinguishable from the case at hand. *Id.* at 4.

Further, the Environmental Groups say that a stay is improper because Midwest’s claim of irreparable harm, “is not as significant as the irreparable environmental harm that staying this case would impose upon the people of Illinois.” Resp. at 2. Citing a Board case involving a motion to stay pending a direct review to the Appellate Court, the Environmental Groups point to four factors the Board may consider when deciding on a stay. Resp. at 10, citing Phillips 66 Company v. IEPA, PCB 12-101, slip op at 5-6 (Aug. 8, 2013).

Also, the Environmental Groups argue that the motion *in limine* to exclude NRG should have been made earlier in the discovery process. Resp. at 2.

Per Section 101.514 of the Board’s rules, motions to stay must be directed to the Board. The hearing officer correctly deferred to the Board on this motion. April HOO at 2. Without reaching the decision on whether the motion *in limine* should be granted, the Board finds that there are significant arguments derived from case law to support both Midwest’s request and the Environmental Groups’ opposition. The legal argument made by Midwest in this matter is not meritless, as claims the Environmental Groups, but requires further analysis by the Board.

Midwest’s claim of irreparable harm should the Board not grant the motion to stay is based on litigation costs that would be incurred. Mot. *in limine* at 4. The Board is also keenly aware of the ongoing risk of environmental harms, as described by the Environmental Groups. Resp. at 12. The Board will expeditiously decide the matter of the motion *in limine* and issue its order shortly.

The factors described by the Environmental Groups in Phillips 66 are those that the Board considers when a party requests a stay pending direct appeal to the Appellate Court. Here, the Board is required to follow its rule in 35 Ill. Adm. Code 101.514. The Board finds that

Midwest has provided sufficient information as to why a stay is required and therefore grants Midwest's motion for a stay of discovery that is limited to NRG's financial information. The stay is further limited to the duration of time until the Board issues its order on the motion *in limine*.

CONCLUSION

The Board grants Midwest's motion to stay discovery as to the financial issues related to its parent company, NRG.

ORDER

1. The Board grants Midwest's motion to stay discovery as limited in the following manner: the stay applies only to discovery of financial issues as related to Midwest's parent company, NRG; and the stay is limited to the duration of time until the Board decides Midwest's motion *in limine*.
3. The Board directs the hearing officer to continue discovery as to all other matters.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 8, 2021, by a vote of 4-0.



Don A. Brown, Clerk
Illinois Pollution Control Board