ILLINOIS POLLUTION CONTROL BOARD
September 9, 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. On July 8, 2021, the Board granted the motion to stay discovery as to the economic issues related to NRG until a Board ruling was issued as to the motion *in limine*. Today, the Board affirms the hearing officer and denies the Environmental Group's interlocutory appeal.

In this order, the Board first provides a brief procedural history relevant to the interlocutory appeal. Next, the Board summarizes the filings regarding the motion, after which the Board analyzes and provides the reasons for denying the interlocutory appeal.

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
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> 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.

The Board's rule on motions for interlocutory appeals are found at 35 Ill. Adm. Code 101.518.

> Motions for Interlocutory Appeal from Hearing Officer Orders
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> A party may take to the Board an interlocutory appeal from a hearing officer ruling by filing a motion within 14 days after the party receives the hearing officer's written order. However, if the hearing officer makes the ruling on the record at hearing, any motion for interlocutory appeal must be filed within 14 days after the Board receives the hearing transcript. Filing a motion for interlocutory appeal will not postpone a scheduled hearing, stay the effect of the hearing officer's ruling, or otherwise stay the proceeding.

The Board's rule on admissibility of evidence is found, in part, at 35 Ill. Adm. Code 101.626.

> Information Produced at Hearing
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> In compliance with Section 10-40 of the IAPA, the hearing officer will admit evidence that is admissible under the rules of evidence as applied in the civil courts of Illinois, except as otherwise provided in this Part or 35 Ill. Adm. Code 105.
>
> a) Evidence. The hearing officer may admit evidence that is material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs, unless the evidence is privileged.

DISCUSSION

In this part of the opinion, the Board begins by summarizing the arguments against and in favor of the interlocutory appeal. Next, the Board discusses why denying the interlocutory appeal is appropriate given the Board's rules and relevant case law.

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.

Interlocutory Appeal

In its motion *in limine*, Midwest asks the Board or the hearing officer to enter an order excluding portions of the Shefftz Opinion that refer to Midwest's indirect parent company, NRG, and barring any witness from opining or testifying about an entity other than Midwest. Mot. *in limine* at 7-8. "Because the Shefftz Opinion contains non-relevant information about NRG, an entity that is not party to this litigation, not named in the Complaint, and not found in violation of the Act by the Board, the Board must exclude the portions of the Shefftz Opinion that concern NRG, and bar Mr. Shefftz or any other witness from offering an opinion on any entity other than MWGen." *Id*.

When determining the appropriate remediation and penalty for violations of the Act and Board regulations, the Board must consider two sets of factors, those found at 33(c) and 42(h) of the Act. 415 ILCS 5/33(c), 42(h) (2020). In Section 33(c), the Board is directed to take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to: (1) how the pollution has injured or interfered with the protection of the health, welfare and physical property of people; (2) the social and economic value of the pollution source; (3) the suitability or unsuitability of the pollution source to the area where it is located; (4) the technical practicability and economic reasonableness of reducing or eliminating the pollution; and (5) any subsequent compliance. *Id.*

Section 42(h) of the Act describes the considerations the Board can take into account when determining the appropriate civil penalty. 415 ILCS 5/42(h) (2020). These include eight factors that the Board is authorized to consider, but is not limited to consider: (1) duration and gravity of the violation; (2) due diligence of the respondent in complying with the Act; (3) any economic benefit gained by the respondent in delaying compliance; (4) the amount of monetary penalty that will serve to deter future violations; (5) the number, proximity in time, and gravity of previous violations of the Act by the respondent; (6) whether the respondent voluntarily self-disclosed the violation; (7) whether the respondent agreed to undertake a supplemental environmental project; and (8) whether the respondent successfully completed a Compliance Commitment Agreement. *Id.*

Separate from the 33(c) and 42(h) factors, it is possible that a respondent might claim it is unable to pay the civil penalty ordered by the Board. In past cases, respondents have voluntarily produced parent corporation financial information to support an inability to pay argument. *See* People v. Panhandle Eastern Pipeline, PCB 99-191 (Nov. 15, 2001). Inability to pay is not currently at issue in this case. However, Midwest has said that it expressly reserves the right to make an inability to pay argument at a later date. Resp. Interlocutory Appeal at 3.

Midwest's Arguments Against Granting Interlocutory Appeal

Midwest cites several federal cases in support of its argument that evaluating economic benefit does not require the Board to look at non-named parent company financial information. In Adams v. Teck Cominco Alaska, Inc., residents of a village in Northwestern Alaska located near the mouth of the Wulik River, obtained their drinking water and food from the river, brought a citizen's suit against Teck, a company operating a zinc mine in the area. Adams v. Teck Cominco Alaska, Inc., 399 F.Supp.2d 1031, 1032 (D. Alaska 2005). The residents alleged that Teck was violating its NPDES permit discharge limits. *Id.* at 1033.

In the process of determining penalty, Teck moved to exclude testimony from the residents' expert witness that included the economic benefits obtained by non-parties. *Id.* at 1032. The residents' expert economic witness testified that Teck's ultimate parent company gained an economic benefit from Teck's failure to comply with the NPDES Permit. *Id.* at 1037. The Court concluded that, "[p]laintiffs do not cite, nor has the court's research located, any controlling authority which supports considering a parent corporation's financial statements in determining the economic benefit of a subsidiary's violation of the Clean Water Act where the parent corporation is not named as a party." *Id.* at 1039. Further, the Court found that "[i]n this matter, it is undisputed that the violator is Teck, not Teck Cominco Limited, and that any penalty imposed in this matter would be imposed on Teck, not Teck Cominco Limited. As this court reads the case law, the economic benefits allegedly received by non-parties, here Teck Cominco Limited, are not relevant at this juncture." *Id.*

In US v. Dico, Dico argued it had no ability to pay civil penalties related to the release of polychlorinated biphenyls at a facility in Ottumwa, Iowa. United States v. Dico, Inc., 4 F.Supp.3d 1047 (S.D. Iowa 2014). The Court declined to consider the assets of Dico's parent corporation, Titan International, when evaluating Dico's ability to pay for two reasons. First, the case was far from settled, and second, "the proposition of considering the assets of the parent

company, which is not a party to the lawsuit, when assessing civil penalties against a subsidiary is somewhat at odds with the basic principle of corporate law that each incorporated business entity enjoys a separate legal existence." *Id.*

Midwest argues that, "Complainants have never pled nor claimed an exception to the rules of parent liability and cannot do so through an expert for the remedy stage of this case." Memo at 5. Midwest concludes that since NRG is not a party to the case and since Midwest has not yet made an inability to pay argument, NRG's finances should not be at issue before the Board.

Environmental Groups' Argument in Favor of Granting Interlocutory Appeal

In support of its interlocutory appeal, the Environmental Groups argue that examining a non-party parent corporation's finances is appropriate when determining ability to pay. In looking at People v. Panhandle Eastern Pipeline, the Environmental Groups argue that the Board considered parent company financing without first requiring the piercing of the corporate veil. Resp. at 3, citing People v. Panhandle Eastern Pipeline, PCB 99-191, slip op. at 29-30 (Nov. 15, 2001). The Environmental Groups point to the Board's analysis of the Section 42(h)(3) factor of economic benefit accrued. The Board in that case noted that both parties in the matter used data on Panhandle's parent company, as Panhandle was a wholly-owned subsidiary and was financially managed by its parent corporation. *Id.* at 30. When determining the penalty amount that will deter future violations and aid in enhancing voluntary compliance, the Board found that "[u]nder this Section 42(h) factor, to arrive at a penalty amount that will have a deterrent effect, the size of the violator is an appropriate consideration." Panhandle at 33, citing Charter Hall Homeowner's Association v. Overland Transportation System, Inc., PCB 98-81, slip op. at 13 (May 6, 1999). The Board in Panhandle found that, "[t]his dollar amount will help to ensure that Panhandle and companies like it actually review the permits they accept, and take the steps necessary to monitor their compliance." *Id.* at 33.

The Environmental Groups argue that considering a parent's financial condition when assessing a penalty on a subsidiary, "is a far cry from piercing the corporate veil and holding the parent liable for the actions of its subsidiary." Resp. at 6, citing United States v. Mun. Auth. Of Union Township, 150 F.3d 259 at 268 (3d Cir. 1998). "This distinction has been affirmed by the U.S. EPA's Environmental Appeals Board, which noted 'it is not necessary to include related entities as liable parties in order to determine a respondent's ability to pay because 'evaluation of ability to pay is separate from liability.'" Resp. at 6, citing In re Carroll Oil Company, 10 E.A.D. 635, at 27, RCRA Appeal No. 01-02 (EAB July 31, 2002), (citing Union Twp., 150 F.3d at 268-69.). The Environmental Groups argue they do not seek to pierce the corporate veil; they merely ask to use NRG's financial information in proving Midwest's ability to pay.

Additionally, the Environmental Groups seek an interlocutory appeal of the hearing officer's April 13, 2021 order because the order is based on premature assessment of the issues in the case. "It is too early to [ ] preclude that MWG's ability to pay for a remedy or penalty will not be contested; indeed, Complainants anticipate that it likely will become an issue before the Board." Interlocutory Appeal at 2. Arguing that the operational relationship between NRG and Midwest would be relevant to any disputes over ability to a civil penalty in this matter, the

Environmental Groups note that, "although inability to pay is not explicitly listed among the Section 33(c) or 42(h) factors, the issue is often a factor in Board decisions." *Id.* at 3. The hearing officer's order should be overturned, they argue, because as it stands, it would, "prevent Complainants from developing the evidence that could ultimately assist the Board in making a fully informed decision on the question of MWG's ability to afford different remedies and penalties." *Id.* at 4.

Further, the Environmental Groups argue that the hearing officer's order misstates the relevant law. In discussing the Board case, People v. Panhandle, the hearing officer notes a difference between Panhandle and the present case was that the parent company of Panhandle was owner of the subsidiary before the violations occurred. April HOO at 5. In this case, NRG became the parent company well after the case was filed. Indeed, NRG announced its intent to acquire Midwest on October 18, 2013. Midwest Motion to Stay, (Feb. 19, 2014), citing to affidavit of Maria Race, attached as Ex. A. The Environmental Groups filed their amended complaint on December 15, 2014. The Environmental Groups argue that making this distinction, "betrays a fundamental misconception of what it means to consider parent company finances: it is not a punishment for bad behavior, nor is it a stand-in for piercing the corporate veil, as Respondent argued." Interlocutory Appeal at 4.

The Environmental Groups say that they are not attempting to impose liability on NRG in this matter. "In this case, NRG's finances are relevant because Respondent will likely claim that certain penalties would pose an undue burden on them, at which point NRG's finances will provide helpful context to help the Board decide what costs MWG can and should be expected to shoulder." Interlocutory Appeal at 5.

ANALYSIS

In Panhandle, the Board considered the assets of the parent company when reviewing the statutory factors and determining remedies. However, in Charter Hall, the Board declined to consider the assets of the parent company. Here the Board finds that the facts are more closely aligned with Charter Hall than Panhandle. Clearly, the Board may consider parent company finances when determining appropriate civil penalties under the 33(c) and 42(h) factors of the Act. The April 13, 2021, hearing officer order found that, "[c]omplainants have not established NRG is responsible for the violations nor have they demonstrated that this information is relevant to the penalty." April HOO at 5. The Environmental Groups have presented no argument to persuade the Board that the hearing office was incorrect, and the Board agrees with the hearing officer's finding. NRG is not a party to the case, nor has it been alleged to have violated the Act or Board regulations in this matter. The April 13, 2021, hearing officer order correctly stated that inability to pay is not a consideration found in the Act. April HOO at 5, and 415 ILCS 5/42(h) (2018).

Further at this time, the Board finds that the Environmental Groups have not yet demonstrated the relevance of NRG's finances. Should the facts being considered change, and should the Environmental Groups make a future argument regarding the relevance of NRG's finances, the Board will consider it at that time. Per the Board's rule 101.626(a), the Board finds

the information regarding NRG's finances, as found in the Shefftz Opinion, are not relevant and should not be admitted in this case at this time. 35 Ill. Adm. Code 101.626(a).

The Environmental Groups say that Midwest Generation misstates the result of Charter Hall. Resp. at 5, citing Charter Hall. The Environmental Groups argue that Charter Hall, "does not forbid the Board's consideration of parent company finances; indeed, the Board declined to consider parent company finances only after the complainants in that case had failed to demonstrate why the information was relevant." Resp. at 5. The Board agrees that this is the finding in Charter Hall. As in this case, the Board declined to consider a parent company's financial information because complainants "have not established that [the parent company] is responsible for these violations or adequately demonstrated that this information is relevant to the penalty to be imposed." *Id.* at 13. The Environmental Groups acknowledge that Charter Hall, "stands for the proposition that a parent corporations' finances need not automatically be considered; indeed, often companies operating under a parent display an independence of conduct and decision-making that might make a parent's finances irrelevant." Interlocutory Appeal at 6. Here the Environmental Groups have failed to establish that NRG finances are relevant.

Further, the Board agrees with the hearing officer order that found Panhandle is distinct from the case at hand. Panhandle, the subsidiary, did not object to looking at its parent's financial information when deciding the economic benefit incurred.

An economic benefit analysis will need to be undertaken in this matter by the Board. The Board agrees with Midwest that the Environmental Groups have not pierced the corporate veil or made an alter ego argument that would make NRG liable for the violations in this case. However, piercing the corporate veil is not necessary to assess the parent company's financial information when determining inability to pay arguments.

Midwest has not put forth an inability to pay argument at this time. It is therefore inappropriate to consider NRG's financials when evaluating Midwest's economic benefit under Section 42(h) of the Act, as NRG is not a named party in this matter. The Board denies the interlocutory appeal of the April 13, 2021 hearing officer order.

The Board denies Midwest's request in its motion *in limine* to bar any witness from opining or testifying about an entity other than Midwest. Such a blanket request expands far beyond the limited exclusion of NRG from the Shefftz report. NRG information is barred from the expert report but will be allowed to be introduced if Midwest makes an inability to pay argument. Any further request to bar testimony or evidence must be based on specific objections and explanations as to why that information may not be relevant.

CONCLUSION

The Board affirms the hearing officer and denies the Environmental Group's interlocutory appeal. The financial information of NRG, a non-party to the case, is not relevant at this time. Should Midwest make an inability to pay argument in the future, or should the facts

being considered change, the Board will consider it at that time and the Environmental Groups may then renew their request for admission of NRG's financial information.

ORDER

1. The Board denies the Environmental Groups' interlocutory appeal of the April 13, 2021 hearing officer order.

2. The Board directs the hearing officer to resume discovery and proceed to hearing on remedy.

IT IS SO ORDERED.

I, Timothy J. Fox, Acting Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 9, 2021 by a vote of 4-0.

Timothy J. Fox, Acting Clerk
Illinois Pollution Control Board