

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

**SIERRA CLUB, PRAIRIE RIVERS
NETWORK, and NATIONAL
ASSOCIATION FOR THE
ADVANCEMENT OF COLORED
PEOPLE,**)

Complainants,)

v.)

**CITY OF SPRINGFIELD, OFFICE OF
PUBLIC UTILITIES d/b/a CITY WATER,
LIGHT AND POWER,**)

Respondent.)

PCB 18-11
(Citizen Enforcement – Water)

NOTICE OF FILING

To: Don Brown, Clerk
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, IL 60601

Please take notice that on July 25, 2022, I served a true and correct copy of **The CITY OF SPRINGFIELD, OFFICE OF PUBLIC UTILITIES d/b/a CITY WATER, LIGHT AND POWER’S RESPONSE TO COMPLAINANTS’ RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT**, upon the parties listed on the attached service list.

Respectfully submitted,

THE CITY OF SPRINGFIELD,
a municipal corporation

Dated: July 25, 2022

By: *Deborah J. Williams*
One of its Attorneys

Deborah J. Williams
Special Assistant Corporation Counsel
Office of Public Utilities
800 East Monroe, 4th Floor
Springfield, Illinois 62701
(217) 789-2116

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

SIERRA CLUB, PRAIRIE RIVERS NETWORK,)	
and NATIONAL ASSOCIATION FOR)	
THE ADVANCEMENT OF COLORED PEOPLE,)	
)	
Complainants,)	
)	PCB 18-11
v.)	(Citizens Enforcement –
)	Water)
CITY OF SPRINGFIELD, OFFICE OF PUBLIC)	
UTILITIES d/b/a CITY WATER, LIGHT)	
AND POWER,)	
)	
Respondent.)	
)	

**RESPONSE TO COMPLAINANTS’ RENEWED MOTION FOR PARTIAL
SUMMARY JUDGMENT**

NOW COMES Respondent, the City of Springfield, Office of Public Utilities (“City”) d/b/a City Water, Light and Power (“CWLP”), by and through its counsel, and pursuant to 35 Ill. Adm. Code 101.500 and 101.516 and responds to Complainants’ Renewed Motion for Partial Summary Judgment on liability only. In support of thereof, the City states as follows:

I. Procedural Background

1. On September 27, 2017, Complainants Sierra Club, Prairie Rivers Network (“Prairie Rivers”) and National Association for the Advancement of Colored People (“NAACP”) filed a single Count Complaint with the Pollution Control Board (“Board”) alleging violations of Sections 12(a) and 12(d) the Environment Protection Act (“Act”) [415 ILCS 5/12(a) and(d)] and Sections 620.115, 620.301(a) and 620.405 of the Board’s regulations. 35 Ill. Adm. Code

620.115, 620.301(a) and 620.405.¹ Complainants' filed an Amended Complaint on April 19, 2019 and an Errata to the Amended Complaint on June 24, 2019. The City's Amended Answer and Affirmative Defenses were filed on July 5, 2019. Complainants' Reply to Respondents Affirmative Defenses to the Amended Complaint were filed on September 16, 2019.

2. In the Amended Complaint, Sierra Club, Prairie Rivers and NAACP narrowed the issues covered in the single count complaint to remove allegations that monitoring data from background wells upgradient from the City's surface impoundments were violating the Act and regulations and to remove allegations that the on-site permitted landfill was causing violations of the Act and regulations. Amended Complaint at pp. 2-3, ¶2 - 6.

3. Complainants filed a Motion for Partial Summary Judgment on the issue of liability on January 29, 2020. The City filed its own Motion for Summary Judgment of the issue of remedy on the same date. Responses to cross-motions for summary judgment were filed on February 13, 2020 and on February 27, 2020, Complainants filed a motion for permission to file a Reply to the City's Response.

4. On June 17, 2021, the Board denied both parties requests for Summary Judgment and directed the Hearing Officer "to proceed expeditiously to hearing on all violations alleged in the amended complaint." *See*, PCB 18-11, Slip. Op. at 31-32 (June 17, 2021). The hearing officer scheduled a hearing for June 7, 2022.

5. The June 7, 2022 hearing was scheduled to allow for additional evidence on the remaining issues of material fact identified in the Board's June 17, 2021 Interim Order. On May 25, 2022, the Parties filed an agreed set of stipulated facts and requested cancellation of the hearing. The Joint Stipulation consisted of the following three facts:

¹ Complainants abandoned their claim under 12(d) of the Act prior to the Board's Interim ruling on Motions for Summary Judgment.

1. The groundwater in the basal sand deposit beneath the Dallman and Lakeside surface impoundments is Class I;

2. The groundwater at monitoring wells AP-1, AP-1R, AP-2, AP-2R, and AP-3 is Class I;

3. A hearing before the Board regarding (i) the classification of groundwaters at the site; and (ii) the cause of exceedances of groundwater quality standards at AP-1, AP-1R, AP2, AP-2R, AP-3, or AW-3 is not necessary, and the parties agree to forego the June 7, 2022 hearing.

See, Joint Stipulations at p. 3.

6. In addition, in the Joint Stipulation the parties agreed to a summary of the remaining issues of material fact in the Board's Order. Those issues are as follows:

“WHEREAS, the Board made no finding as to the classification of groundwaters at the site. Bd Order at 29;

WHEREAS, the Board found a genuine issue of material fact as to whether exceedances of the Class I or Class II groundwater quality standards for arsenic, chromium, iron, lead, and manganese that were detected at certain downgradient monitoring wells (AP-1, AP-1R, AP-2, AP-2R, AP-3, or AW-3) at concentrations less than their corresponding background levels were caused by the Dallman or Lakeside surface impoundments. Bd. Order at 24; and

WHEREAS, the Board found a genuine issue of material fact as to whether the Dallman or Lakeside surface impoundments caused exceedances of

the Class I or Class II groundwater quality standards at monitoring well AW-3.

Bd. Order at 24;”

See, Joint Stipulations at p. 2.

7. On June 24, 2022, Complainants’ filed their “Renewed” Motion for Summary Judgment in lieu of Post Hearing Briefs to allow the Parties to brief the Board on their positions on the remaining issues of material fact and questions of law prior to the Board’s final decision on the issue of liability.²

II. Responses to Renewed Motion for Summary Judgment

8. Classification of Groundwater at the Dallman and Lakeside Ash Pond Site. The most prominent disputed material fact impacting the issue of liability at the initial summary judgment stage was whether the Sierra Club, Prairie Rivers Network, and NAACP had met their burden of demonstrating the proper Classification of Groundwater at the site and as a result, which regulations in 35 Ill. Adm. Code Part 620 apply. The parties have stipulated for purposes of this proceeding that Class I Groundwater is the proper classification of monitoring wells AP-1, AP-1R, AP-2, AP-2R and AP-3. The parties did not stipulate the groundwater classification of well AW-3/RW-3 and since no additional evidence was presented at hearing, the Complainants have conceded that their burden of proof is not met with regard to the groundwater classification of well AW-3/RW-3.

9. There is insufficient evidence in the Record to determine the cause of impacts identified at well AW-3/RW-3. On page 23 of its Interim Opinion the Board found “because

² In the Interim Order, the Board also chose to bifurcate the liability and remedy phases of this matter on its own motion. “If, after hearing, the Board finds that CWLP violated the Act or Board regulations as alleged by Citizen Groups, the Board will order a separate hearing on remedies, including civil penalties. See 35 Ill. Adm. Code 103.212(d) (“The Board in its discretion may hold a hearing on the violation and a separate hearing on the remedy.”).” PCB18-11, Interim Opinion and Order at p. 32 (June 17, 2021).

the record lacks laboratory reports of analytical results to substantiate this allegation, the Board finds a genuine issue of material fact as to whether RW-3 had elevated contaminant concentrations.” PCB18-11, Slip. Op. at 23 (June 17, 2021). The Board also stated that it “finds a genuine issue of material fact as to whether the surface impoundments caused Class I or Class II groundwater quality standard exceedances at AW-3.” Interim Board Opinion at p. 24 (June 17, 2021). In addition to these Board’s findings in the Board’s Interim Opinion, it is also the case that a genuine issue of material of fact exists as to whether if elevated contaminants were found, would the contaminants correlate to the Lakeside and Dallman ash ponds or to an alternate source or sources. As explained in footnote 1 of Complainants’ Memorandum of Law in support of its Renewed Motion, “For those questions regarding which the Board did find genuine issues of material fact—specifically, whether CWLP surface impoundments caused exceedances of groundwater quality standards at monitoring well AW-3; whether exceedances of groundwater quality standards for arsenic, chromium, iron, lead, and manganese detected at downgradient monitoring wells AP-1, AP-1R, AP-2, AP-2R, AP-3, and AW-3 at concentrations less than corresponding background levels were caused by CWLP surface impoundments; and whether isolated manganese and arsenic concentrations detected reflect contaminant releases from CWLP surface impoundments – Complainants do not seek findings. Board Order at 24-27.” Memorandum of Law at p. 2. CWLP is in agreement with Complainants that no findings from the Board are warranted as to well AW-3/RW-3 as there is insufficient evidence in the Record to support a scientifically defensible finding on this issue of material fact.

10. Groundwater monitoring at levels below background concentrations or in isolated instances. There has been no dispute raised in this matter that CWLP has not properly

established background concentrations at the Lakeside and Dallman ash pond site through wells AP-4 and AP-5. In its Interim Opinion, the Board left open an issue of material fact regarding these background levels and the relationship to the upgradient wells and the ash ponds when it stated “But Citizen Groups seek summary judgment on CWLP having allowed releases from its surface impoundments resulting in groundwater contamination. For purposes of this motion, the Board accepts that constituents present in downgradient groundwater at concentrations up to CWLP’s background values might be naturally occurring or otherwise have resulted from sources other than the impoundments....Some downgradient exceedances of the Class I or Class II groundwater quality standards for arsenic, chromium, iron, lead and manganese were detected in AP-1, AP-1R, AP-2, AP-2R, AP-3, or AW-3 at concentrations less than their corresponding background levels.” Interim Board Opinion, Slip Op. at p. 23 (June 17, 2021). The parties have agreed not to put additional evidence in the Record on this issue and Complainants have stated they are seeking no finding from the Board on this issue. Therefore, the Board may not find that groundwater monitoring values that are below background but above the Part 620 standards are caused by the Lakeside and Dallman ash ponds or that CWLP has violated Section 12(a) of the Act or the Part 620 regulations in those instances.

11. Clarification of Undisputed Issues of Fact. In Complainants’ Renewed Motion for Summary Judgment five undisputed facts upon which the Parties Joint Stipulation is based are listed. CWLP does not dispute these facts directly, but would like to provide some additional factual clarification for the Record on two of these – Number 3 and Number 5.

“3. Stabilize, Inc. performed a groundwater characterization for CWLP that determined that the basal sand layer at the site is the “uppermost aquifer.” Bd. Order at 10 (citing CWLP SJ Resp., Group Ex. F at 01715);”

The text from the Stabilize report this statement is based on states “The basal sand is considered the uppermost aquifer at the site.” CWLP SJ Resp., Group Ex. F at 01715. In 2010 when this document was prepared, this terminology would have relied on the landfill regulations, specifically 35 Ill. Adm. Code Section 810.103, for the definition of that term as it was never defined in the report itself. This definition of “Uppermost aquifer” states that it means “the first geologic formation above or below the bottom elevation of a constructed liner or wastes, if no liner is present, that is an aquifer, and includes any lower aquifer that is hydraulically connected with this aquifer within the facility’s permit area.” 35 Ill. Adm. Code 801.103. The applicability of this defined term to the surface impoundments has not been legally established. Nevertheless, CWLP does not dispute the ultimate conclusion this document is relied upon to support.

The Second undisputed fact that CWLP would like to provide additional clarification of for the Record is:

“5. The groundwater at AP-1, AP-1R, AP-2, AP-2R, and AP-3 is at least ten feet below the land surface. Bd Order at 29.”

Based on well screen intervals and the depth of the basal sand, groundwater at wells AP-1, AP-1R, and AP-3 is coming from a deposit that is semi-confined deeper than 10 feet. The sand deposit at wells AP-2 and AP-2R is at approximately 16 - 17 feet in depth, overlain by a relatively low hydraulic conductivity clayey silt. However, the screen interval and top of sand pack extend to approximately 6 feet below the ground surface. The argument could be made that because of this, the groundwater within AP-2R is automatically a Class II groundwater pursuant to 35 Ill. Adm. Code 620.610(a). However, since the sand is semi-confined, is located 16 - 17 feet in depth, and has a hydraulic conductivity of greater than 1×10^{-4} cm/sec, CWLP is

therefore willing to concede that this is more likely than not a Class I groundwater.

III. Exceedances of 620 regulations after April 21, 2021

In its Renewed Motion, Complainants have supplemented the Record with groundwater data and lab reports collected by CWLP since the date relied on by the Board in its June 17, 2021 Interim Order. On page 6 of the Memorandum of Law in Support of its Renewed Motion, Complainants provided a table listing exceedances from the applicable wells of the applicable groundwater protection standards for the period of May 2018 through March 2022. The total number of exceedances for this period were calculated by Complainants at 73. Though not addressed directly in Complainants' Motion, CWLP argues that the proper period for analysis in the chart developed by Complainants should be May 2018 – April 20, 2021. Using data from this period, the 73 exceedances would be reduced to 48.^{3 4}

The reason the sampling utilized to evaluate whether violations under Complainants' Amended Complaint have been proven should terminate at those samples taken in January 2021, is because this is the final sampling event CWLP undertook solely under the federal Coal Combustion Residual Regulations in 40 C.F.R. Part 257. The next set of samples which were taken May 27, 2021, were taken under the quarterly sampling CWLP was required to begin under 35 Ill. Adm. Code Part 845. Once Part 845 took effect, on April 21, 2021, CWLP was no

³ CWLP feels it is necessary to raise the legal issue to the Board of the applicability of Part 620 and Part 845; however, the precise "number of exceedances" is determined solely by the number of times CWLP chose or was required to take samples. To place an undue importance on the number of exceedances rather than the cause, how they are addressed, or the magnitude and severity of pollutants identified, is misleading to the public and serves to discourage property owners from voluntarily investigating groundwater issues beyond the minimum number of samples required by law.

⁴ In addition to the total number, the range of values in Complainants' Table would also be altered by this change in time period.

longer subject to the 620 regulations for the constituents regulated by Part 845 (which includes boron, sulfate and TDS, among others), although CWLP remains subject to separate semi-annual sampling requirements under 40 C.F.R. Part 257 until the Illinois Environmental Protection Agency (“Illinois EPA” or “Agency”) seeks and obtains approval from the United States Environmental Protection Agency for its Coal Combustion Residuals (“CCR”) surface impoundment permitting program.

CWLP recognizes this is an issue of first impression for the Board, so will briefly refresh the Board’s memory on the Administrative Record of Part 845. As the Agency witnesses testified in their Pre-filed Answer to Question 48a submitted by Illinois Environmental Regulatory Group:

Q: “Please clarify whether CCR surface impoundments regulated under Part 845 would be subject Part 620 standards other than Section 620.450(a)(4) during operation, closure and post closure.”

A: “A CCR surface impoundment regulated under Part 845 is generally subject to Part 620. However, the Agency envisions regulation of CCR surface impoundments under Part 845 and Part 620 as a step-wise process, because Part 620 is comprised of more than numerical standards. Part 257 and hence Part 845, don’t recognize Illinois’ groundwater classification system. To be protective the GWPS in Section 845.600(a) are set at the lower of the Class I groundwater standard or the numerical values of Part 257. A CCR surface impoundment subject to Part 620, sighted within an area of Class II groundwater could have a higher groundwater quality standard, than the GWPS. The GWPS of Part 257 and Part 845 have a compliance point at the waste boundary (the Agency assumes this to be the downstream toe of the impoundment berm or edge of the impoundment if incised) and extend to the identified edge of the plume where constituent concentrations exceed the GWPS. Part 620 has a point of compliance as much as 25 feet from toe of the berm or edge of the impoundment. The applicable Part 620 numerical standard extends as far as the geologic material yielding the particular Class of groundwater extends. ***Due to these conflicts, Part 845 must be applied first for any constituent with a GWPS. For any constituent which has no GWPS, and after the active life of a CCR surface impoundment as defined by Part 845, the requirements of Part 620 are applicable.***” (Emphasis added).

See, Agency Response to Pre-filed Questions, August 3, 2020 at pp. 167-168 (In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments, Proposed New 35 Ill. Adm. Code 845, R20-19).

In addition, Illinois EPA witness Lynn Dunaway further clarified this issue during questioning at the August 13, 2020 Hearing:

MR. MORE: “The Agency talks about a step-wise approach and then states ‘For any constituent which has no GWPS, and after the active life of a CCR surface impoundment as defined by Part 845, the requirements of Part 620 are applicable.’ Is the inverse also true?”

MR. DUNAWAY: “Will you state the inverse?”

MR. MORE: “Yeah, let's use an example. Boron. There's a groundwater protection standard under 845 for boron, correct?”

MR. DUNAWAY: “Right”

MR. MORE: “And there's also a corresponding groundwater quality standard under Part [620] for boron, correct?”

MR. DUNAWAY: “Correct.”

MR. MORE: “So for boron, are the corresponding Part 620 standards applicable during the active life of a CCR surface impoundment?”

MR. DUNAWAY: “No, they're not.”

MR. MORE: “Okay. And can you give me an example of a constituent where the Part 620 standards would be applicable during the active life of a CCR surface impoundment?”

MR. DUNAWAY: “An example would be nitrate.”

MR. MORE: “Thank you. Can you point to any language in Part 845 that sets forth this concept that we just went over that is that for constituents which have no groundwater protection standard under Part 845 and after the active life of a CCR surface impoundment is defined by Part 845, so the requirements of Part 620 are applicable? So, in essence, the stepwise approach that you've described in your testimony, where in 845 is that?”

MR. DUNAWAY: “845.600(c).”

August 13, 2020 Hearing Transcript at 29–30.

The Record of Part 845 establishes that compliance with 845 supplants the requirements of 35 Ill. Adm. Code 620 in those instances where the two parts address the same constituents. Generally, 845 will be more stringent and specific and actually provides a methodology for addressing contamination. CWLP believes this is the most appropriate regulatory structure for surface impoundments as Part 620 was never intended to stand on its own and achieve compliance without being paired with a clean-up program. But as Complainants have not alleged any violations of Part 845, it would not be appropriate for the Board to making findings under the 620 regulations with regard to sampling undertaken by CWLP under Part 845 after its effective date of April 21, 2021.

V. Conclusion

In its June 17, 2021 Interim Opinion and Order the Board held that: “If, after hearing the Board finds that CWLP violated the Act or Board regulations as alleged by Citizen Groups, the Board will order a separate hearing on remedies, including civil penalties.” PCB18-11 Slip. Op. at 32. For the reasons stated herein, Respondent, City of Springfield, Office of Public Utilities d/b/a City Water, Light and Power respectfully requests that the Board issue a supplemental opinion on Complainants’ Renewed Motion for Partial Summary Judgment on liability consistent with the Joint Stipulation of Facts and the arguments presented herein.

Respectfully submitted,

THE CITY OF SPRINGFIELD,
a municipal corporation

By *Deborah J. Williams*
One of its Attorneys

Dated: July 25, 2022

Deborah J. Williams, Special Asst. Corp. Counsel
City of Springfield,
800 East Monroe, Ste. 313
Springfield, Illinois 62701
(217) 789-2116

CERTIFICATE OF SERVICE

The undersigned, Deborah J. Williams, an attorney, certifies that I have served electronically upon the Clerk and by email upon the individuals named in the attached Service List, a true and correct copy of the **NOTICE OF FILING** and **THE CITY OF SPRINGFIELD, OFFICE OF PUBLIC UTILITIES d/b/a CITY WATER, LIGHT AND POWER'S RESPONSE TO COMPLAINANTS' RENEWED MOTION FOR SUMMARY JUDGMENT**, from the email address deborah.williams@cwlp.com of this **15** page document before 5:00 p.m. Central Time on July 25, 2022 to the email address provided on the attached Service List.

Deborah J. Williams _____

SERVICE LIST PCB 18-11

Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois
62794-9274
carol.webb@illinois.gov

Faith E. Bugel
1004 Mohawk
Wilmette, Illinois
60091
fbugel@gmail.com

Gregory E. Wannier
Staff Attorney
Sierra Club
2101 Webster St. Suite 1300
Oakland, CA
94612
greg.wannier@sierraclub.org

Bridget Lee
Senior Attorney
Sierra Club Env't'l Law Program
50 F Street NW, Floor 8
Washington, D.C. 20001
bridget.lee@sierraclub.org