

ILLINOIS POLLUTION CONTROL BOARD
September 7, 2023

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

INTERIM OPINION AND ORDER OF THE BOARD (by M. Gibson):

On September 27, 2017, Sierra Club, Prairie Rivers Network, and the National Association for the Advancement of Colored People (collectively, Citizen Groups) filed a complaint against the City of Springfield, Office of Public Utilities, doing business as “City Water, Light and Power” (CWLP). Citizen Groups allege that CWLP has polluted the groundwater at CWLP’s Dallman Power Station, a coal-burning power plant located on Lake Springfield in Springfield, Sangamon County. The complaint also concerns CWLP’s Lakeside Power Station, a former coal-burning power plant located on the same site.

On June 17, 2021, the Board denied the parties’ cross motions for partial summary judgment. The Board denied Citizen Groups’ motion for partial summary judgment because they failed to meet their burden of proof that the downgradient groundwaters are Class I or Class II groundwater. The Board did find that CWLP allowed releases of some contaminants from one or both coal ash disposal ponds, which caused exceedances of the Board’s Class I and Class II groundwater quality standards at some of the downgradient monitoring wells. However, since the classification of downgradient groundwaters as Class I or Class II is central to Citizen Groups’ alleged violations, they failed to meet their burden of persuasion that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. Additionally, the Board denied CWLP’s motion for partial summary judgment because the requested remedies challenged are neither premature nor beyond the Board’s authority.

Today, the Board rules on the Citizen Groups’ renewed motion for partial summary judgment. The Board grants the Citizen Groups’ partial motion for summary judgment. Specifically, the Board finds that there are no issues of genuine fact that CWLP violated Sections 12(a) of the Environmental Protection Act (Act) and Sections 620.115, 620.301(a) and 620.405 of the Board’s groundwater rules for discharge of boron, sulfate, and total dissolved solids (TDS). Those discharges occurred at monitoring wells AP-1R, AP-2, AP-2R, and AP-3.

The Board begins with an abbreviated procedural history, and then sets forth the legal background. The Board then delineates the undisputed facts and the relevant portions of the June 17, 2021 order denying summary judgment; and summarizes stipulated facts, additional groundwater monitoring results submitted by the Citizen Groups, and CWLP's response. Finally, the Board discusses its reasoning for granting the Citizen Groups' motion.

PROCEDURAL BACKGROUND

On September 27, 2017, Citizen Groups filed a single-count complaint against CWLP. On November 3, 2017, CWLP filed a motion to dismiss the complaint or, alternatively, to strike one of the alleged violations. Citizen Groups opposed this motion on November 17, 2017, after which CWLP filed a reply. On December 21, 2017, the Board denied CWLP's motion and accepted the complaint for hearing. During 2018 and the beginning of 2019, the parties engaged in discovery.

On April 19, 2019, Citizen Groups filed an unopposed motion for permission to file an amended complaint, accompanied by the amended complaint. The hearing officer granted that motion on April 23, 2019. The hearing officer's order of June 19, 2019, noted that Citizen Groups intended to file a modification of the amended complaint to correct minor errors in its exhibits, which they did on June 24, 2019. The Board cites the amended complaint, so modified, as "Am. Comp." CWLP filed an answer and claimed affirmative defenses on July 5, 2019. On September 16, 2019, Citizen Groups replied to CWLP's claimed affirmative defenses. The parties continued to exchange discovery documents during this time.

On January 29, 2020, the parties filed their cross motions for partial summary judgment. The parties filed responses to the cross motions on February 13, 2020. CWLP's response requested oral argument but the request was unsupported and therefore denied. *See* 35 Ill. Adm. Code 101.700(b). On February 27, 2020, Citizen Groups filed a motion for permission to file a reply to CWLP's response, attaching their reply, which the Board granted. *See* 35 Ill. Adm. Code 101.500(e). On June 17, 2021, the Board denied both parties' cross motions for summary judgment (2021 Order).

On May 25, 2022, the parties submitted a joint stipulation of facts (Stip.). On June 24, 2022, the Citizen Groups filed a renewed motion for partial summary judgment (Mot.) and on July 25, 2022, CWLP filed a response (Resp.).

LEGAL BACKGROUND

The Board first describes the standards it applies when considering motions for summary judgment. After that, the Board sets forth the provisions of the Act and Board regulations allegedly violated, along with pertinent definitions.

Standard for Summary Judgment

Under its procedural rules, the Board grants summary judgment when “the record, including pleadings, depositions, and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law.” 35 Ill. Adm. Code 101.516(b). As this standard mirrors the standard applying to Illinois trial courts, cases interpreting Illinois’ summary judgment standard can inform how the Board interprets its own standard.

“The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine question of material fact exists.” Illinois Environmental Protection Agency v. Illinois Pollution Control Bd., 386 Ill. App. 3d 375, 391 (3rd Dist. 2008). “In determining whether a genuine issue of material fact exists, the pleadings, depositions, admissions and affidavits must be construed strictly against the movant and liberally in favor of the opponent.” Adames v. Sheahan, 233 Ill. 2d 276, 295-96 (2009). A genuine issue of material fact precluding summary judgment exists when “the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts.” *Id.* at 296. Summary judgment “is a drastic means of disposing of litigation, and therefore, should be granted only when the right of the moving party is clear and free from doubt.” *Id.*

“In a summary judgment proceeding, the burden of persuasion is always on the moving party to establish that there are no genuine issues of material fact and that moving party is entitled to judgment as a matter of law.” Performance Food Group Co., LLC v. ARBA Care Center of Bloomington, LLC, 2017 IL App (3d) 160348, ¶ 18. “The burden of production, however, may shift during the course of the proceedings.” *Id.* “Initially, the burden of production is on the moving party.” *Id.*

The party moving for summary judgment may meet its initial burden of production by “presenting facts which, if uncontradicted, would entitle it to judgment as a matter of law.” Estate of Sewart, 236 Ill. App. 3d 1, 8 (1st Dist. 1992). Once the party moving for summary judgment “produces such evidence, the burden of production shifts to the party opposing the motion, who . . . is required to come forth with some facts which create a material issue of fact.” *Id.* Although the party opposing the motion “need not prove her case at this point, she must provide some factual basis which would arguably entitle her to a judgment under the applicable law.” *Id.* If the party opposing the motion “fails to produce such evidence, summary judgment is properly granted.” *Id.*

Provisions Allegedly Violated

Citizen Groups’ amended complaint alleges that since June 1, 2010, CWLP violated Section 12(a) of the Act, 415 ILCS 5/12(a) (2018). Section 12(a), which is a prohibition concerning water pollution, provides that “[n]o person shall . . . [c]ause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources” 415 ILCS 5/12(a) (2018). The Act defines “water pollution” as follows:

such alteration of the physical, thermal, chemical, biological or radioactive

properties of any waters⁴ of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life. 415 ILCS 5/3.545 (2022).

In addition, Citizen Groups' amended complaint alleges that CWLP violated Sections 620.115, 620.301(a), and 620.405 of the Board's groundwater rules, 35 Ill. Adm. Code 620.115, 620.301(a), and 620.405. These three sections are also prohibitions. Section 620.115 provides that "[n]o person shall cause, threaten or allow a violation of the Act, the [Illinois Groundwater Protection Act] or regulations adopted by the Board thereunder, including but not limited to this Part [620]." 35 Ill. Adm. Code 620.115.

Section 620.301(a) states:

No person shall cause, threaten or allow the release of any contaminant to a resource groundwater such that:

- 1) Treatment or additional treatment is necessary to continue an existing use or to assure a potential use of such groundwater; or
- 2) An existing or potential use of such groundwater is precluded. 35 Ill. Adm. Code 620.301(a).

Section 620.405 provides that "[n]o person shall cause, threaten or allow the release of any contaminant to groundwater so as to cause a groundwater quality standard set forth in this Subpart [D of Part 620] to be exceeded." 35 Ill. Adm. Code 620.405.

Subpart D of Part 620 contains the Illinois groundwater quality standards for potable resource groundwater (Class I) and general resource groundwater (Class II). See 35 Ill. Adm. Code 620.410, 620.420. Below are the Class I and Class II groundwater quality standards in milligrams per liter (mg/L) for the chemical constituents at issue:

Chemical Constituent	Class I Groundwater Quality Standard	Class II Groundwater Quality Standard
Boron	2.0 mg/L	2.0 mg/L
Sulfate	400.0 mg/L	400.0 mg/L
Total Dissolved Solids (TDS)	1,200.0 mg/L	1,200.0 mg/L

35 Ill. Adm. Code 620.410(a) (Class I), 620.420(a) (Class II).

Generally, concentrations of these inorganic chemicals "must not be exceeded" in Class I or Class II groundwater, as applicable, "[e]xcept due to natural causes." *Id.*

All groundwaters of the State are designated as: Class I potable resource groundwater; Class II general resource groundwater; Class III special resource groundwater; Class IV other groundwater; or a groundwater management zone. 35 Ill. Adm. Code 620.201. Class I potable resource groundwater includes “[g]roundwater located 10 feet or more below the land surface and within . . . [a]ny geologic material which is capable of a . . . [h]ydraulic conductivity of 1 x 10⁻⁴ [centimeters per second] or greater using” a “[s]lug test.” 35 Ill. Adm. Code 620.210(a)(4)(B)(2). “Any portion of the thickness associated with the geologic materials . . . should be designated as Class I: Potable Resource Groundwater if located 10 feet or more below the land surface.” 35 Ill. Adm. Code 620.210 (Board Note). Class II general resource groundwater is “[g]roundwater which does not meet the provisions of Section 620.210 (Class I), Section 620.230 (Class III), or Section 620.240 (Class IV).” 35 Ill. Adm. Code 620.220(a).

2021 ORDER AND UNDISPUTED FACTS

The undisputed facts in this case are described in detail in the June 17, 2021 Board Order (June 2021 Order), and will not be repeated in total here. In sum, the Board found that there are “no genuine issue of material fact that [certain] contaminants have been detected in ‘groundwaters,’ which are accumulations of underground waters and therefore ‘waters’ of the State. The Board also found “no genuine issue of material fact that CWLP allowed releases from one or both impoundments resulting in elevated contaminant levels at AP-1R, AP-2, AP-2R, and AP-3.” June 2021 Order, slip op. at 23, 26. However, a genuine issue of material fact existed as to the proper classification of the groundwater at the site. *Id.* at 29.

The evidence in the record considered in the June 2021 Order includes monitoring results from the wells at issue. The following tabulates groundwater sample concentrations exceeding Class I groundwater quality standards and CWLP’s proposed background values for boron, sulfate, and TDS:

Exceedances of Class I Groundwater Quality Standards (GWQS) and CWLP Background Levels					
Downgradient Monitoring Well	Chemical Constituent	Date Range of Sampling	CWLP Background Level	Number of Exceedances of CWLP Background and Class I GWQS	Range of Concentrations Exceeding CWLP’s Background and Class I GWQS (mg/L)
AP-1R					
	Boron	02/12 – 11/17	0.787	23	3.9 – 22.5
	Sulfate	02/12 – 11/17	84.5	23	436 – 672
	TDS	05/13 – 11/17	97.94	15	1230 – 1490
AP-2					
	Boron	06/10	0.787	1	2.63

AP-2R					
	Boron	02/12 – 11/17	0.787	23	3.16 – 10
	Sulfate	11/14 – 05/16	84.5	6	418 - 711
	TDS	05/15 – 08/15	97.94	3	1460 – 1520
AP-3					
	Boron	06/10 – 11/17	0.787	24	8.03 – 29.1
Total				118	

June 2021 Order slip op. at 14-15.

2022 stipulated facts

On May 25, 2022, the parties filed a joint stipulation agreeing that the groundwater in the basal sand deposit beneath the Dallman and Lakeside surface impoundments as well as the groundwater at monitoring wells AP-1, AP-1R, AP-2, AP-2R, and AP-3 is Class I groundwater. Stip. at 3. They also stipulate that a hearing is not necessary to determine the cause of the exceedances of groundwater quality standards at AP-1, AP-1R, AP-2, AP-2R, AP-3, or AW-3 is not necessary, and the parties agree to forego hearing on this issue. *Id.* Additionally, the parties have agreed not to put additional evidence on the issue of whether exceedances of the Class I or Class II groundwater quality standards for arsenic, chromium, iron, lead, and manganese 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 nor do they seek a finding from the Board on this issue. Joint Stip. at 3-4. Thus, the only remaining issue before the Board is whether discharges of boron, sulfates, and TDS from CWLP's impoundments violated Section 12(a) of the Act and Sections 620.115, 620.301(a), and 620.405 of the Board's groundwater rules at the CWLP Site as alleged by Citizen Groups.

DISCUSSION

The Board grants Citizen Groups' renewed motion for partial summary judgment concerning the Dallman Ash Pond and the Lakeside Ash Pond. In determining whether a genuine issue of material fact exists, precluding summary judgment in favor of Citizen Groups, the Board construes the record strictly against Citizen Groups and liberally in favor of CWLP.

The Board's June 2021 Order found no issue of genuine fact regarding the discharge of boron, sulfate, and TDS exceeding both the Class I and Class II groundwater standards. June 2021 Order, slip op. at 23, 26. The only issue of fact remaining was groundwater classification. As noted above, the parties stipulated that the proper classification for the groundwater in the basal sand deposit beneath the Dallman and Lakeside surface impoundments as well as the groundwater at monitoring wells AP-1, AP-1R, AP-2, AP-2R, and AP-3 was Class I. Therefore, based on the findings in the Board's June 2021 Order, the facts establish that CWLP allowed contaminant releases from one or both surface impoundments resulting in exceedances of Class I groundwater quality standards for boron, sulfate, and TDS at some downgradient monitoring wells. As a result of the releases, the Board finds that CWLP violated Sections 12(a) of the Act

and Sections 610.115, 620.301(a) and 620.405 of the Board’s groundwater rules for discharge of boron, sulfate, and TDS. Those discharges occurred at wells AP-1R, AP-2, AP-2R, and AP-3.

Groundwater Monitoring Results Since 2017

In its renewed motion for partial summary judgment concerning the Dallman and Lakeside Ash Ponds, the Citizen Groups submitted CWLP’s recent (2018-2022) self-reported groundwater monitoring results for monitoring wells AP-1, AP-2R and AP-3. These results continue to show exceedances of the Class I GWQS for boron, sulfate, and TDS as well as CWLP’s background values. Mot. at 9-10, Exh. B. The Citizen Groups argue that CWLP’s groundwater monitoring results indicate ongoing exceedances of the Class I GWQS on 191 separate occasions, including 73 exceedances from May 2018 to March 2022, which are shown below. *Id.* at 13.

Exceedances of Class I Groundwater Quality Standards and Background Levels (May 2018 – March 2022)				
Downgradient Monitoring Well	Chemical Constituent	Background Level (mg/L)	Range of Concentrations Exceeding Background (mg/L)	Number of Exceedances of Background
AP-1	Boron	0.787	5.03 – 22.3	11
AP-1	Sulfate	84.5	573 – 976	10
AP-1	TDS	97.94	1300 – 1520	10
AP-2R	Boron	0.787	2.94 – 5.62	11
AP-2R	Sulfate	84.5	467 – 816	10
AP-2R	TDS	97.94	1310 – 1860	9
AP-3	Boron	0.787	15.8 – 20.7	9
AP-3	Sulfate	84.5	401 – 410	3
Total Number of Exceedances				73

CWLP’s Response

CWLP submitted its response to the Citizen Groups’ renewed motion for partial summary judgment on July 25, 2022. While CWLP generally agrees with the five undisputed facts listed in the Complainants’ motion, it provides some additional factual clarification regarding two of the stipulated facts. First, regarding the characterization of the basal sand unit as the uppermost aquifer, CWLP clarifies that the definition of “Uppermost aquifer”, which is based on the landfill regulations under 35 Ill Adm Code 810.103, may not be legally applicable to a coal combustion residuals (CCR) surface impoundment. Resp. at 7. Second, CWLP states that groundwater within monitoring well AP-2R could be classified as a Class II groundwater under 35 Ill. Adm. Code 620.610(a) because the screen interval and top of sand pack in AP-2R extends to approximately 6 feet below the ground surface. *Id.*

Additionally, CWLP takes issue with the Complainants' submittal of a table listing 73 exceedances of the applicable groundwater standards at the downgradient monitoring wells AP-1, AP-2R, and AP-3 for the period of May 2018 through March 2022. Resp. at 8-9. CWLP asserts that the Complainants should not have used samples taken in January 2021 and beyond because CWLP was no longer subject to Part 620 standards after the CCR surface impoundment regulations under Part 845 became effective in April 2021. *Id.* CWLP relies on the record in Docket R20-19 to support its assertions regarding the appropriate time period for the groundwater monitoring samples. *Id.* at 9-11. CWLP argues that the number of exceedances would be 48 if the Complainants had used data from May 2018 to April 20, 2021 instead of March 2022. *Id.* at 8.

CWLP does not argue against summary judgment in general. However, CWLP takes issue with including the exceedances of the Part 620 standards after the Board's adoption of rules governing coal combustion residuals in surface impoundments in April 2021. *See Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845, R20-19 (Apr. 15, 2021).* CWLP asserts that it was no longer subject to the Part 620 regulations upon the adoption of Part 845, which includes groundwater protection standards for boron, sulfate, and TDS. *Id.* at 9. Thus, CWLP states that the number of exceedances after 2017 included in the Citizen Groups' renewed motion for partial summary judgment would be reduced from 73 to 48.

CWLP asserts that the administrative record of the CCR surface impoundment rulemaking supports this argument. CWLP asserts that those provisions indicated that the Illinois Environmental Protection Agency (IEPA) did not intend for the Part 620 standards to apply during the active life of a CCR impoundment. Therefore, CWLP argues that exceedances of the Class I groundwater standards after April 20, 2021, the effective date of the CCR rules, are not a violation of the Board's groundwater standards. Resp. at 8.

Board Finding on CWLP Argument

The Board disagrees with CWLP's assertion regarding the application of Part 620 standards to CCR surface impoundments regulated under Part 845. While the administrative record in Docket R20-19 cited by CWLP may show IEPA's intention for Part 620 standards to not apply during the active life of a CCR impoundment, the Board did not codify the Agency's intent as an exemption in Part 845. Further, neither the Board's second nor final notice opinion in Docket R20-19 offer a position on this issue. Because the plain language of the Part 845 rules does not establish an exemption from Part 620 standards, the Board is not persuaded by CWLP's argument.

However, the Board notes that the complaint and amended complaint do not specify a duration of the violations. While the Citizen Groups did include monitoring results after April 2021 in their motion, they did not argue the significance of the monitoring results other than noting that they show continued exceedances. Further, both the complaint as well as the amended complaint allege when the violations began (June 1, 2010), but they offer no end date. Therefore, while the Board is not persuaded that the Part 845 rules offer a defense to the Part 620 violations, the Board will allow CWLP raise the argument again when addressing the factors of

Section 42(h) (415 ILCS 5/42(h)). Section 42(h)(1) of the Act specifically allows the Board to consider the duration and gravity of violations in determining the proper remedy for a violation. CWLP may present this argument at that time and the Board will consider it in the context of determining an appropriate remedy.

Issues Not Raised in Renewed Motion for Partial Summary Judgment

Having resolved the contested allegations in the renewed motion for partial summary judgment, the Board does not make a finding on the following allegations from the complaint and the amended complaint that the Citizen Groups are not seeking a finding on:

1. whether CWLP surface impoundments caused exceedances of groundwater quality standards at monitoring well AW-3;
2. 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
3. whether isolated manganese and arsenic concentrations detected reflect contaminant releases from CWLP surface impoundments. Mot. at 2.

Therefore, the Board makes no findings on those specific issues, and instead relies on the findings of the June 2021 Order.

CONCLUSION

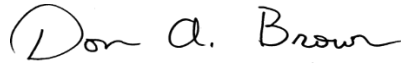
The Board grants the Citizen Groups' partial motion for summary judgment. Specifically, the Board finds that there are no issues of genuine fact that CWLP violated Section 12(a) of the Act (415 ILCS 5/12(a)) and Sections 610.115, 620.301(a) and 620.405 of the Board's groundwater rules (35 Ill. Adm. Code 620.115, 620.301(a), 620.405) for the discharge of boron, sulfate, and TDS. Those discharges occurred at monitoring wells AP-1R, AP-2, AP-2R, and AP-3.

ORDER

The Board grants the Citizen Groups motion for summary judgment. The Board finds that there are no issues of genuine fact that CWLP violated Sections 12(a) of the Act and Sections 620.115, 620.301(a) and 620.405 of the Board's groundwater rules for the discharge of boron, sulfate, and TDS at wells AP-1R, AP-2, AP-2R, and AP-3.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on September 7, 2023, 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 the printed name and title.

Don A. Brown, Clerk
Illinois Pollution Control Board