

ILLINOIS POLLUTION CONTROL BOARD
January 19, 2017

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

OPINION AND ORDER OF THE BOARD¹ (by G.M. Keenan):

Coal combustion creates residual products known generally as coal ash. Coal plant operators often manage coal ash by mixing it with liquid, forming a slurry, and depositing it into a structure called an ash pond. Ash ponds exist at four coal-fired power plants that Midwest Generation, LLC (Midwest Gen) operates: Joliet 29 Generating Station, Powerton Generating Station, Waukegan Generating Station, and Will County Generating Station (collectively, the facilities).

The Sierra Club, Environmental Law & Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (collectively, the Citizen Groups) filed a complaint before the Board alleging that Midwest Gen, through its management of coal ash at the facilities, caused or allowed open dumping and water pollution, violating the Environmental Protection Act.²

The Citizen Groups moved for summary judgment regarding alleged violations in areas outside of the ash ponds that the Citizen Groups define as “Historic Ash Areas.”³ Midwest Gen contests the motion, claiming that genuine issues of material fact regarding the Historic Ash Areas preclude summary judgment. The Board finds that there are genuine issues of material fact concerning the Historic Ash Areas, including the existence of coal ash in those areas, the existence of coal ash constituents, and whether coal ash in those areas caused groundwater contamination. The Board therefore denies the Citizen Groups’ motion for summary judgment.

¹ Chad Kruse, attorney-advisor at the Board, previously worked for the Illinois Environmental Protection Agency. He took no part in the drafting or deliberation in this matter.

² 415 ILCS 5/12(a), 12(d) (2014) (water pollution); 415 ILCS 5/21(a) (2014) (open dumping). Citizen Groups do not allege open dumping at Joliet 29.

³ Citizen Groups’ Motion for Summary Judgment (June 1, 2016) (Mot.) at 2.

The order begins by providing background on undisputed facts, applicable laws, and the case's procedural history. Next, the order discusses the issue of fact that precludes summary judgment. The order concludes by directing the hearing officer to proceed to hearing.

BACKGROUND

Undisputed Facts

Midwest Gen operates the four facilities discussed in this case: Joliet 29 Generating Station in Joliet, Will and Kendall Counties; Powerton Generating Station in Pekin, Tazewell County; the Waukegan Generating Station in Waukegan, Lake County; and the Will County Generating Station in Romeoville, Will County.⁴ At each facility, Midwest Gen deposits coal ash into coal ash ponds and has installed groundwater monitoring wells near the coal ash ponds.⁵

Statutes and Regulations

Open Dumping

When sludge from an air pollution control facility or other discarded material from an industrial operation contaminates groundwater, this violates the open dumping provisions of the Environmental Protection Act (Act) in Section 21(a). However, this is not immediately apparent, and requires examining definitions and cross-references that underlie Section 21(a).

Section 21(a) of the Act prohibits “open dumping of any waste” and defines “open dumping” as “the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill.”⁶ The Act further defines several of these terms. Refuse is defined as “waste,” which includes “sludge from a[n] . . . air pollution control facility or other discarded material [from industrial operations].”⁷ A “sanitary landfill” is defined as a facility “permitted by the [Illinois Environmental Protection] Agency for the disposal of waste on land meeting the requirements of the Resource Conservation and Recovery Act” (RCRA).⁸

Water Pollution

When discharged contaminants cause an exceedance of the Board's groundwater quality standards, this violates the Act's water pollution provisions (Section 12(a), (d)). This similarly requires some cross-referencing to understand.

Sections 12(a) and 12(d) of the Act prohibit discharging contaminants into the environment “so as to cause or tend to cause water pollution” and depositing contaminants on

⁴ See Midwest Gen's Answer to Second Complaint (Apr. 20, 2015) (Ans.) at 1-3.

⁵ *Id.*

⁶ 415 ILCS 5/21(a) (prohibition), 5/3.305 (definition) (2014).

⁷ 415 ILCS 5/3.385, 3.535 (2014).

⁸ 415 ILCS 5/3.445 (2014); 42 USC § 6901 *et seq.* (RCRA).

land “so as to create a water pollution hazard.”⁹ Releasing any contaminant so as to cause an exceedance of the Board’s groundwater quality standards (GQSs) violates Sections 12(a) and 12(d).¹⁰

Different GQSs apply depending on the type of groundwater. For example, in “potable resource groundwater,” Class I GQSs apply; the Class I limit for arsenic is 0.01 mg/L.¹¹ But in “general resource groundwater,” Class II GQSs apply; the Class II limit for arsenic is 0.024 mg/L.¹² The Board’s rules also provide limits for “special resource groundwater” (Class III) and “other groundwater” (Class IV).¹³

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.”¹⁴

As this standard mirrors the standard that applies in Illinois trial courts, cases interpreting Illinois’ summary judgment standard can inform how the Board interprets its own standard. Illinois courts have held that when “ruling on a motion for summary judgment, pleadings, depositions, and affidavits must be considered strictly against the movant and in favor of the opposing party 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.”¹⁵ 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.”¹⁶

Procedural History

The Citizen Groups originally filed their complaint on October 3, 2012, but for reasons immaterial to this opinion, they filed an amended complaint on January 14, 2015.¹⁷ The amended complaint alleges facts that form the basis of the Citizens Groups’ motion for summary judgment. Midwest Gen’s answer to the amended complaint, filed April 20, 2015, admits some allegations and denies others.¹⁸

⁹ 415 ILCS 5/12(a) (water pollution), 12(d) (water pollution hazard) (2014).

¹⁰ 35 Ill. Adm. Code 620.405.

¹¹ 35 Ill. Adm. Code 620.210.

¹² 35 Ill. Adm. Code 620.220

¹³ 35 Ill. Adm. Code 620.230 (Class III), 620.240 (Class IV).

¹⁴ 35 Ill. Adm. Code 101.516(b).

¹⁵ Illinois Env’tl Prot. Agency v. Illinois Pollution Control Bd., 386 Ill. App. 3d 375, 391, 896 N.E.2d 479, 493 (3d Dist. 2008) (citations omitted).

¹⁶ Adames v. Sheahan, 233 Ill. 2d 276, 296, 909 N.E.2d 742, 754 (2009).

¹⁷ Citizen Groups’ Amended Complaint (Jan. 14, 2015) (Compl.).

¹⁸ Ans., *supra* n. 3.

The Citizen Groups moved for partial summary judgment on June 1, 2016.¹⁹ The motion seeks judgment only concerning alleged areas of coal ash “in and on the ground or in unlined repositories” at the facilities that the Citizens Group refer to as “Historic Ash Areas,” not alleged contamination from the ash ponds themselves.²⁰ Midwest Gen filed a response to the motion on July 19, 2016.²¹ The Citizen Groups filed a reply on September 2, 2016.²² Lastly, Midwest Gen filed a sur-reply on October 3, 2016.²³

DISPUTES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT

The parties agree that Midwest Gen places coal ash in coal ash ponds at the facilities. They further agree that during the period relevant to the amended complaint, Class I GQSs applied at the Waukegan station and applied at the other three stations until the Agency approved groundwater management zones there.²⁴ But nearly every other fact is disputed, and many of these disputes concern material facts.

Midwest Gen disputes that the evidence shows coal ash exists in the Historic Ash Areas.²⁵ (This opinion uses the term Historic Ash Areas for simplicity, without addressing this factual dispute.) Midwest Gen also disputes that coal ash constituents exist in groundwater at all facilities.²⁶ Furthermore, Midwest Gen disputes that Historic Ash Areas are a source of groundwater contamination. These disputed facts are material to the open dumping claims because they pertain to whether “waste” exists in the Historic Ash Areas. They are also material to the water pollution claims because they pertain to whether Midwest Gen discharged “contaminants.” The Board finds that these disputes constitute genuine issues of material fact, precluding summary judgment. Therefore the Board will not rule on whether other disputes are also genuine issues of material fact.

The Citizen Groups argue that there is no genuine dispute whether Historic Ash Areas are sources of groundwater contamination, even though Midwest Gen’s expert report concludes that it is not.²⁷ The Citizen Groups argue that a close inspection of the expert report’s analysis and the expert’s deposition testimony contradict the report’s conclusion. Instead, the conclusion is a “sham” that the underlying evidence does not support.²⁸

To show inconsistencies between the report’s conclusions and analysis, the Citizen Groups argue that the expert, at deposition, “acknowledges that ground water contains

¹⁹ Mot., *supra* n. 2.

²⁰ Mot. at 2

²¹ Midwest Gen’s Response Opposing Motion for Summary Judgment (July 19, 2016) (Resp.).

²² Citizen Groups’ Reply Supporting Motion for Summary Judgment (Sept. 2, 2016) (Reply).

²³ Midwest Gen’s Sur-Reply Opposing Motion for Summary Judgment (Oct. 3, 2016) (Sur-Reply).

²⁴ Resp. Appendix A at 21-22.

²⁵ Sur-Reply at 20.

²⁶ *Id.* at 24.

²⁷ Exh. G to Mot. at 52 (Expert Report of John Seymour, Nov. 2, 2015).

²⁸ Reply at 21-22.

constituents of coal ash” and that the source of those constituents must be a Historic Ash Area.²⁹ However, the expert did not recant the written report’s conclusions. Furthermore, Midwest Gen argues that the expert’s written analysis and deposition testimony are completely consistent with his conclusions.³⁰

When ruling on a motion for summary judgment, the Board must only find whether a question of fact exists and should not resolve genuine factual issues. Construing the evidence in favor of Midwest Gen, the Board finds that whether the Historic Ash Areas are sources of contamination is a genuine issue of material fact. This does not imply that the Board makes findings on other disputed facts, including whether coal ash exists in the Historic Ash Areas.

The evidence does not unambiguously show that the expert’s conclusion contradicts his underlying analysis. In case law that the Citizen Groups cite, a court found that when an expert explicitly contradicted his prior stance on a factual issue without any supporting evidence, this created a “sham” issue.³¹ Here, the expert maintained his report’s conclusions when testifying at deposition. When deciding a motion for summary judgment, the Board cannot weigh competing evidence to resolve a dispute over material facts. That exercise is appropriate only after a hearing.

CONCLUSION

Construing the evidence in favor of the party opposing summary judgment, the Board finds that whether the Historic Ash Areas are causes of contamination is a genuine issue of material fact. Therefore, the Board denies the Citizen Groups’ motion for summary judgment. The hearing officer is directed to expeditiously proceed to hearing.

ORDER

The Citizen Groups’ motion for summary judgment is denied.

IT IS SO ORDERED.

I, Don A. Brown, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on January 19, 2017, by a vote of 5-0.



Don A. Brown, Assistant Clerk
Illinois Pollution Control Board

²⁹ Reply at 20, citing Exh. E5 to Mot. at 46:17-18 (Deposition of John Seymour, Mar. 1, 2016).

³⁰ Sur-Reply at 12.

³¹ Adelman-Tremblay v. Jewel Companies, Inc., 859 F.2d 517, 521 (7th Cir. 1988).