

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
) AS 2019-001
PETITION OF MIDWEST GENERATION,) (Adjusted Standard - Land)
LLC FOR AN ADJUSTED STANDARD)
FROM 35 ILL. ADM. CODE 811 AND 814)
)

NOTICE OF ELECTRONIC FILING

To: Attached Service List

PLEASE TAKE NOTICE that on June 11, 2019, I electronically filed with the Clerk of the Illinois Pollution Control Board (“Board”) the attached supplemental public comments and request for public hearing, copies of which are served on you along with this notice.

Dated: June 11, 2019

Respectfully Submitted,

/s/ Jennifer Cassel
Jennifer Cassel (IL Bar No. 6296047)
Earthjustice
311 S. Wacker Drive, Suite 1400
Chicago, IL, 60606
(312) 500-2198
jcassel@earthjustice.org

June 11, 2019

Bradley Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph Street
Suite 11-500
Chicago, Illinois 60601

RE: Supplemental Public Comments and Request for Public Hearing in IPCB AS 19-1, Petition of Midwest Generation for an Adjusted Standard from Portions of 35 Ill. Adm. Code Part 811

Dear Mr. Halloran,

Citizens Against Ruining the Environment, Earthjustice, Environmental Law & Policy Center, Prairie Rivers Network, and Sierra Club (collectively, “Commenters”) respectfully submit these supplemental public comments in response to Midwest Generation, LLC’s response to Commenters’ May 7, 2019 comment letter. We are writing to reiterate the importance of a public hearing on the closure of Lincoln Stone Quarry and to correct several legal errors made by Midwest Generation in its response.

I. A hearing would promote the public interest and not prejudice Midwest Generation.

A public hearing would promote the public interest through allowing residents affected by the groundwater contamination at Lincoln Stone Quarry to present their concerns directly to the Board. The Board recognizes the crucial role of robust public participation to protect public health and the environment. *See, e.g., In re: Review of Existing Regulations, Rule 602 of Chapter 3: Water Pollution Combined Sewer Overflow*, PCB R. No. 81-17, 1982 WL 28541 at *10 (Apr. 1, 1982) (recognizing public participation as “essential” and approving an exception procedure in part because it maintains public participation). In fact, the Board has found that, because of the importance of giving residents an opportunity to be heard, a hearing can serve the public interest even if the request comes after the normal deadline. *See City of Aurora v. Ill. EPA*, PCB 85-51, 1985 WL 21358 at *1 (May 30, 1985) (finding that “the Public interest is best served by ordering hearing in this matter” notwithstanding that “some objections were late filed”).

In this case, community members have not had an opportunity to express their concerns to the Board about a proposal that could affect their waters for centuries. Written comments do not and cannot stand in for the voices of community members and local residents, who are familiar with, and suffer the consequences of, both the coal ash pollution from the Lincoln Stone Quarry and pollution from other sources that contribute to the cumulative pollutant burden on their waters and well-being. The Board would benefit from hearing their perspective.

Midwest Generation’s hypothetical complaints about a possible delay in closure of the Quarry pale in comparison to this substantial public interest in a hearing. Midwest Generation argues that a public hearing “would unnecessarily delay this proceeding and MWGen’s efforts to commence closure of the Lincoln Stone Quarry.” Response at 2. Yet it is hard to imagine how extending this proceeding by

the amount of time required to hold a hearing would cause any delay to the ultimate closure of the Lincoln Stone Quarry. As of the filing of its petition in February, Lincoln Stone Quarry was still accepting coal ash from the ash ponds at Joliet 29. *See* Petition at 9. Midwest Generation has not indicated that it is preparing for immediate closure. *See* Petition at 1 (“MWGen is preparing for the *eventual* closure of the Main Quarry. . .”) (emphasis added). And while federal requirements currently mandate closure of unlined coal ash impoundments such as the Lincoln Stone Quarry in October 2020, the relevant provisions of the federal rule have been remanded to EPA for reconsideration,¹ and EPA has not yet proposed revisions. The deadline for closure of the Lincoln Stone Quarry under federal requirements remains, therefore, in flux. Midwest Generation’s complaint on this score is not credible.

II. The Board should consider the federal Closure Performance Standard in evaluating the closure of Lincoln Stone Quarry.

The federal coal ash regulations are a crucial consideration for the closure of Lincoln Stone Quarry notwithstanding the Board’s current lack of enforcement authority for those regulations. Midwest Generation makes much of the Board’s statement in 2013 that it is not empowered to enforce the Part 257 regulations. *See* Response at 4; *Sierra Club v. Midwest Generation, LLC*, PCB No. 13-15, 2013 WL 5524474 (Oct. 3, 2013). But this argument is a red herring. Commenters are not currently bringing a lawsuit to enforce the federal rule; rather, they are urging the Board to consider federal requirements as it evaluates Midwest Generation’s petition. There are clear reasons for the Board to be advised of the federal requirements even if they are not yet incorporated into Illinois law.

First, it would be impractical and inefficient to approve a closure plan at Lincoln Stone Quarry that will be invalid as a matter of federal law. That is particularly the case where Midwest Generation is also in the midst of a corrective action process under the federal rule that could require removal to control the source of coal ash contamination.² *See* 40 C.F.R. § 257.97(b)(3) (requiring that any corrective action remedy “control the source(s) of releases”). Thus, there are at least two provisions of the Part 257 regulations that may require removal of ash at Lincoln Stone Quarry. It would be a disservice to both the community, as well as to Midwest Generation, simply to ignore this reality. For instance, Midwest Generation could expend significant resources on a “final” cover, only to have to excavate the ash shortly thereafter.

Second, the Board will soon be empowered to enforce the federal coal ash rule under state law. Under Illinois Senate Bill 9, which passed the Illinois General Assembly and awaits only the Governor’s signature,³ the Board must “adopt rules establishing construction permit requirements, operating permit

¹ *See* Order, *Waterkeeper Alliance v. EPA* (D.C. Cir. Mar. 13, 2019) (No. 18-1289), ECF No. 1777351.

² *See* E-Mail from Sharene Shealey, NRG, to Rick Cobb et al., IEPA, RE: Federal CCR Notification - Initiation of Assessment of Corrective Measures 40 CFR 257.96 Joliet [sic] 9 Lincoln Stone Quarry (Mar. 4, 2019), http://3659839d00eefa48ab17-3929cea8f28e01ec3cb6bbf40cac69f0.r20.cf1.rackcdn.com/LSQ_LSQ1_GMXXVI.pdf.

³ *See* Bill Status of SB0009, 101st General Assembly, Coal Ash Pollution Prevention, <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=9&GAID=15&DocTypeID=SB&LegId=11358>

requirements, design standards, reporting, financial assurance, and closure and post-closure care requirements for CCR surface impoundments.” Sec. 22.59(g) (new). The legislation sets a deadline of twenty months after its enactment for the adoption of these rules. *Id.* The rules must, at a minimum, “be at least as protective and comprehensive as the federal regulations or amendments thereto.” *Id.* (g)(1). The Board will soon have the authority and duty to enforce the federal coal ash rule’s closure performance standard. It would be myopic to ignore federal requirements in considering Midwest Generation’s adjusted standard petition.

III. Midwest Generation is wrong that it may consider “economic reasonableness” in evaluating its options for closure of Lincoln Stone Quarry.

Midwest Generation’s argument for why closure in place is permissible at Lincoln Stone Quarry ignores controlling federal case law. Midwest Generation latches onto the phrase “to the maximum extent feasible,” 40 C.F.R. § 257.102(d)(1)(i), arguing that this standard allows Midwest Generation to consider “the economic reasonableness” of closure methods. Response at 7. Midwest Generation is simply wrong. The Court of Appeals for the D.C. Circuit has held that the Resource Conservation and Recovery Act bars cost considerations of this kind: “[u]nder any reasonable reading of RCRA, there is no textual commitment of authority to the EPA to consider costs in the open-dump standards.” *Util. Solid Waste Activities Grp. v. Env’tl. Prot. Agency*, 901 F.3d 414, 448 (D.C. Cir. 2018). This question arose in *USWAG v. EPA* after industry groups challenged a provision of the rule that ruled out “an increase in costs or the inconvenience of existing capacity” as legitimate justifications for a type of variance. *See id.*; 40 C.F.R. § 257.103(a)(1)(i). The D.C. Circuit rejected industry’s argument because “it is far from clear that the EPA could consider costs even if it wanted to.” 901 F.3d at 449.

In short, the D.C. Circuit decided in August 2018 that cost is not a legitimate consideration for regulations promulgated under RCRA, and in particular the coal ash rule. Midwest Generation fails even to mention this critical precedent, choosing instead to direct the Board’s attention to 2014 oral testimony offered before the federal coal ash rule had been promulgated, and a Connecticut trial court case interpreting a local zoning ordinance. *See* Response at 5-6. The D.C. Circuit’s interpretation of RCRA trumps stale testimony from 2014. Midwest Generation cannot consider cost in evaluating whether cap-in-place would “control, minimize or eliminate, to the maximum extent feasible” post-closure infiltration of and releases to groundwater. 40 C.F.R. § 257.102(d)(1)(i).

IV. Illinois EPA’s approval of a Groundwater Management Zone does not render the discharge of coal ash pollutants lawful.

Midwest Generation is also wrong that Illinois EPA’s history of regulatory oversight at Lincoln Stone Quarry immunizes Midwest Generation from liability under the Environmental Protection Act. The fundamental statutory command, which Midwest Generation fails to even cite, forbids any person to “[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.” 415 ILCS 5/12(a). Midwest Generation essentially argues that this provision requires nothing more than compliance with its landfill permit and the

1&SessionID=108&GA=101. The final text of the bill is available at <http://www.ilga.gov/legislation/101/SB/PDF/10100SB0009enr.pdf>.

Groundwater Monitoring Zone established under 35 Ill. Adm. Code 620.250. Response at 9-10. Yet, as Commenters noted in their initial letter, the Board has held that “compli[ance] with interim status and other groundwater regulatory requirements . . . is not an affirmative defense but rather a factor that may, if anything, mitigate any imposed penalty.” *People v. Texaco*, PCB 02-03, 2003 WL 22761195, at *9 (Nov. 6, 2003). Midwest Generation fails to address this crucial distinction.

Moreover, the Board does not grant any deference to Illinois EPA’s regulatory interpretations, as Midwest Generation incorrectly claims in its response. *See* Response at 10 (alleging that Illinois EPA “should be afforded deference to its interpretation of the Act”). The Board, not Illinois EPA, is the agency with primary interpretive authority over the requirements of the Act. *See* 415 ILCS 5/5(b) (“The Board shall determine, define and implement the environmental control standards applicable in the State of Illinois”); *Van Zelst Landscape Compost Facility v. Illinois EPA*, PCB No. 11-7, 2011 WL 3505250 at *10 (Aug. 4, 2011) (“[T]he Board has the final authority to interpret the Board’s rules and regulations. While the Agency makes initial determinations implementing Board rules, these interpretations are not binding on the Board.”); *see also Vill. of Fox River Grove v. Pollution Control Bd.*, 702 N.E.2d 656, 662 (Ill. App. Ct. 1998) (finding that the Board, but not EPA, is entitled to deference in interpretation of Illinois environmental regulations).

V. Conclusion

If left in place, the coal ash at Lincoln Stone Quarry will continue to contaminate nearby groundwater for centuries to come. Members of the public, including nearby residents, should have the opportunity to express their views directly to the Board on an issue of such importance. Given that the federal coal ash rule will soon be incorporated into Illinois law, its Closure Performance Standard must be a central consideration in evaluating Midwest Generation’s closure plans. Midwest Generation may not consider cost in measuring its compliance with that Standard. Finally, the Board need not blindly defer to Illinois EPA’s regulatory determinations at the Lincoln Stone Quarry, but must instead exercise independent judgment as to the requirements of the Environmental Protection Act.

Sincerely,

Ellen Rendulich
Citizens Against Ruining the Environment

Jennifer Cassel
Henry Weaver
Coal Program Attorneys
Earthjustice

Jeffrey Hammons
Staff Attorney
Environmental Law and Policy Center

Andrew Rehn

Water Resources Engineer
Prairie Rivers Network

Faith Bugel
Greg Wannier
Attorneys
Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of June, 2019, I electronically served the foregoing supplemental public comments and request for public hearing upon the parties of record at the email addresses indicated in the service list below.

I further certify that my email address is jcassel@earthjustice.org; the number of pages in the email transmission is 7; and the email transmission took place today before 5:00 p.m. CT.

Respectfully Submitted,

/s/ Jennifer Cassel
Jennifer Cassel (IL Bar No. 6296047)
Earthjustice
311 S. Wacker Drive, Suite 1400
Chicago, IL, 60606
(312) 500-2198
jcassel@earthjustice.org

SERVICE LIST

Michelle M. Ryan, Assistant Counsel
Illinois Environmental Protection Agency
1021 N. Grand Avenue East
P.O. Box 19276
Springfield, IL 62794
michelle.ryan@illinois.gov

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, IL 60601
brad.halloran@illinois.gov

Kristen L. Gale
Susan M. Franzetti
Nijman Franzetti LLP
10 S. LaSalle Street, Suite 3600
Chicago, IL 60603
kg@nijmanfranzetti.com
sf@nijmanfranzetti.com

Don Brown, Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601
don.brown@illinois.gov