

ILLINOIS POLLUTION CONTROL BOARD
February 19, 2015

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

ORDER OF THE BOARD (by J.D. O’Leary)¹:

Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (collectively, complainants) have filed a motion for leave to file an amended complaint against Midwest Generation, LLC (MWG). MWG responded, and complainants seek leave to file a reply. In the following sections of this order, the Board provides the abbreviated procedural history and addresses complainants’ motion for leave to file a reply. Next, the Board summarizes the parties’ filings on leave to file an amended complaint before it concludes to grant the motion.

ABBREVIATED PROCEDURAL HISTORY

On December 15, 2014, complainants filed a motion for leave to file amended complaint accompanied by an amended complaint and five exhibits. On December 29, 2014, MWG filed its response to the motion for leave.

On January 14, 2015, complainants filed a second motion for leave to file amended complaint (Mot.) accompanied by a document entitled “First Amended Complaint” and 14 exhibits. On January 27, 2015, MWG filed its response to complainants’ second motion for leave (Resp.).

On January 30, 2015, complainants filed a notice of withdrawal of the motion filed December 15, 2014, for leave to file amended complaint. Also on January 30, 2015, complainants filed a motion for leave to reply to MWG’s response to the second motion for leave to file an amended complaint (Mot. Reply). Attached to the motion was Exhibit 1, complainant’s reply (Reply). Attached to complainants’ reply were complainants’ Second Amended Complaint and 14 exhibits.

¹ Chad Kruse, who worked for the Illinois Environmental Protection Agency prior to joining the Board as an attorney assistant on March 19, 2013, took no part in the Board’s drafting or deliberation of any order or issue in this matter.

On February 4, 2015, complainants filed an agreed motion to extend the discovery schedule and modify the discovery order entered by the hearing officer on June 9, 2014.

MOTION FOR LEAVE TO FILE REPLY

While complainants express the view that their first amended complaint conforms to the Board's October 3, 2013 order, they request leave to file a reply in order to file a second amended complaint addressing MWG's position. Mot. Reply at 2. Complainants claim that "[a]llowing this Reply, to which is attached the modified amended complaint ready for this Board's consideration, will expedite this process and save all parties, as well as this Board, time and resources." *Id.* The Board notes that "[t]he moving party will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice." 35 Ill. Adm. Code 101.500(e).

On February 5, 2015, during a status conference with the hearing officer, counsel for MWG reported that MWG did not intend to file a response to complainants' motion for leave to reply. Sierra Club, et al. v. Midwest Generation, LLC, PCB 13-15, slip op. at 1 (Feb. 11, 2015).

The Board's procedural rules provide that, "[w]ithin 14 days after service of a motion, a party may file a response to the motion. . . . Unless undue delay or material prejudice would result, neither the Board nor the hearing officer will grant any motion before expiration of the 14 day response period. . . . 35 Ill. Adm. Code 101.500(d). The Board finds that undue delay would result from allowing the expiration of the response deadline when MWG indicates it will not respond to complainants' motion. Accordingly, the Board will proceed to decide the motion.

The Board's procedural rules provide that, if a party does not respond to a motion, "the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board or the hearing office in its disposition of the motion." 35 Ill. Adm. Code 101.500(d). Complainants claim that allowing a reply and attached amended complaint will expedite consideration of this case and save the resources of all parties and the Board. The Board construes this as a claim that filing the reply will prevent material prejudice. Having reviewed the motion for leave, and in the absence of a response from MWG, the Board grants complainants' motion for leave to file a reply. The Board summarizes the reply below.

SUMMARY OF SECOND MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Complainants re-state that, since filing the original complaint and through discovery, they "have become aware of additional coal ash storage, disposal, and/or fill areas at each site that may be contributing to coal ash-related contamination alleged in the Complaint." Mot. 2 at 2. Complainants again claim that they now have reason to believe MWG has committed violations at additional areas of the four sites named in the original complaint. *Id.* at 2-3.

Complainants state that the amended complaint filed on January 14, 2015, differs from the original complaint in four ways. Mot. 2 at 3. Complainants first claim that, "[w]here the original Complaint referred to 'coal ash disposal ponds' or 'coal ash ponds,' the Amended

Complaint refers to coal ash ‘repositories,’ including, but not limited to, the ash ponds named in the Complaint.” *Id.* Second, complainants claim that, “[w]here the original Complaint referred to ‘disposal,’ the Amended Complaint refers to ‘storage and disposal.’” *Id.* Third, complainants claim that, “[w]here the original Complaint referred to ‘coal ash,’ the Amended Complaint refers to ‘coal ash and other coal combustion waste.’” *Id.* Fourth, complainants claim that “[t]he list of violations included in the Amended Complaint have been updated to include more recent data.” *Id.*

Complainants argue that “[t]he fundamental contentions of the Complaint – that Midwest Generation waste disposal practices for its coal ash and other coal combustion wastes have contaminated groundwater - remains unchanged.” Mot. 2 at 3. Complainants further argue that the amended complaint neither removes nor adds any claim but seeks to conform pleadings to newly-discovered facts. *Id.*

Complainants state that MWG responded to the first motion for leave to file with three disagreements. Mot. 2 at 4. Complainants further state that they have communicated with MWG’s counsel and “have responded to all three points of disagreement.” *Id.*

Complainants attached to the motion a “First Amended Complaint” and requested that the Board grant leave to file it. Mot. 2 at 4.

SUMMARY OF MWG’S RESPONSE TO SECOND MOTION FOR LEAVE

MWG first notes that it filed a response to complainants’ first motion for leave to file and lodged objections to the proposed amended complaint. Resp. 2 at 2. MWG further notes that, before the Board acted on the first motion, complainants filed a second motion for leave to file, a new proposed amended complaint, and a separate set of exhibits. *Id.* at 1. MWG “does not conceptually oppose” complainants’ second motion for leave to file but states specific objections. *Id.* at 1.

In its response to complainants’ first motion for leave to file, MWG objected to use of the term “or other waste.” Resp. 1 at 2; *see* Resp. 1 at 1-2. MWG’s response to the second motion for leave to file acknowledges that “all references to ‘other waste’ have been removed” from the proposed amended complaint filed January 14, 2015. Resp. 2 at 2.

MWG’s response to the first motion for leave to file objected that the proposed amended complaint “included language that the Board had stricken in its October 3, 2013 Order.” Resp. 2 at 2; *see* Resp. 1 at 2. MWG notes complainants’ statement that the amended complaint filed January 14, 2015 has “removed the portions of Counts 1-3 that have been dismissed by the board.” Resp. 2 at 2, citing Mot. 2 at 4 (¶14); *see* Sierra Club, et al. v. Midwest Generation, LLC, PCB 13-15, slip op. at 27 (Oct. 3, 2013). MWG argues, however, that the proposed amended complaint “retains allegations of violations of the federal regulations.” Resp. 2 at 2. MWG elaborates that “[p]aragraphs 43, 46, and 49 of the proposed Amended Complaint allege that the groundwater samples violated the Appendix I MCLs.” *Id.* MWG requests that, if the Board grants the motion for leave to file, “the Board direct Complainants to re-file an Amended

Complaint in which the allegations of violations of the federal RCRA regulations are stricken.” Resp. 2 at 3.

MWG’s response to the first motion for leave to file “requested that the Board modify the discovery schedule for the sole purpose of allowing MWG to serve additional written discovery upon Complainants regarding the new allegations and to respond to the Amended Complaint. Resp. 2 at 2; *see* Resp. 1 at 2. MWG notes that complainants’ second motion for leave to file does “not object to MWG’s request for extension of the discovery schedule to file written requests, but asked that it be extended to all parties.” Resp. 2 at 2, citing Mot. 2 at 4 (¶13). MWG states that it “does not object to including the Complainants in an extension to the discovery schedule for written discovery, as requested by MWG, regarding the additional allegations in the Amended Complaint.” Resp. 2 at 3. MWG requests modification of the discovery schedule for service of additional written discovery and to allow MWG to respond to the amended complaint. *Id.*

SUMMARY OF COMPLAINANTS’ REPLY

Complainants state that the Board’s October 3, 2013 order denied MWG’s motion to dismiss but struck alleged violations of 40 C.F.R § 257. Reply at 2. Complainants note that the Board did not exclude the possibility that exceeding MCLs at Appendix I of Part 257 “may be evidence tending to show a violation of Section 21(a) of the Act.” *Id.*, citing Sierra Club, et al. v. Midwest Generation, LLC, PCB 13-15, slip op. at 25 (Oct. 3, 2013).

Complainants state that MWG’s first response included a request that the Board strike portions of the amended complaint that do not conform to the October 3, 2013 order. Reply at 2, citing Resp. at 3. Complainants argue that their amended complaint filed January 14, 2014, struck alleged violations of 40 C.F.R. § 257. Reply at 3. Complainants note MWG’s position that the amended complaint should strike alleged violations of the MCLs in paragraphs 44, 47, and 50 of the original complaint. *Id.*, citing Resp. at 2-3.

Complainants note MWG’s argument that they had failed to delete all allegations struck by the Board in its October 3, 2013 order. Reply at 3, citing Resp. at 3. Complainants state the belief that they “acted wholly consistently with the October 3, 2013 Board Order” by striking from the amended complaint violations of 40 C.F.R. § 257 that had originally been alleged in paragraphs 42, 45, and 48. Reply at 4. Complainants further state that, “[i]n order to expedite this process,” they are willing to revise paragraphs 43, 46, and 49 of the amended complaint, which correspond to paragraphs 44, 47, and 50 of the original complaint. *Id.* Specifically, complainants propose to replace the terms “violated” and “violations” with “exceeded” or “exceedances.” *Id.*

Complainants also object to MWG’s position that a 60-day extension of fact discovery should be limited to written discovery. Reply at 3, citing Resp. at 3. Complainants argue that the hearing officer should address discovery deadlines. Reply at 3. Complainants state that they will submit a revised discovery schedule to the hearing officer at the next scheduled status conference. *Id.*

Complainants conclude by requesting leave to file a second amended complaint, which was attached as Exhibit A and included Exhibits A-N.

DISCUSSION

As noted above under “Procedural History,” complainants on January 30, 2015, filed notice that they withdrew their motion filed on December 15, 2014, for leave to file an amended complaint. Complainants clarified that the withdrawn motion was supplanted by the subsequent motion for leave. Accordingly, the Board below reviews only complainants’ second motion filed on January 14, 2015.

In their second motion for leave to file an amended complaint, complainants state that documents produced in the course of discovery have caused them to “become aware of additional coal ash storage, disposal, and/or fill areas at each site that may be contributing to the coal ash-related contamination alleged in the Complaint.” Mot. 2 at 2. “Amendments to pleadings should be liberally allowed to permit parties to fully present their causes of action.” Simon v. Wilson, 291 Ill. App. 3d 495, 508, 684 N.E.2d 791, 800 (1st Dist. 1997) (citation omitted). Additionally, the Board's practice is to liberally allow amendments to complaints and petitions filed with the Board. *See generally* People v. The Highlands, L.L.C. and Murphy's Farm, Inc., PCB 00-104 (May 6, 2004) and People v. 4832 Vincennes, LP and Batteast Construction Co., PCB 04-7 (Nov. 6, 2003).

MWG disagrees with specific aspects of complainants’ filings. Resp. 2 at 3-4. However, MWG “does not conceptually oppose” the second motion for leave to file. *Id.* at 1. Having reviewed the motion and the amended complaint, and in the absence of a general objection by MWG, the Board grants the motion for leave to file an amended complaint as provided in its order below.

In its response to complainants’ second motion for leave to file, MWG requests that the Board “strike the portions of the Amended Complaint consistent with the Board’s prior Order of October 3, 2013,” which addressed MWG’s motion to dismiss the original complaint. Resp. 2 at 4. MWG elaborates that “the proposed Amended Complaint retains allegations of violations of the federal regulations. Paragraphs 43, 46, and 49 of the proposed Amended Complaint allege that the groundwater samples violated the Appendix I MCLs.” *Id.*; *see* 40 C.F.R. 257 Appendix I (Maximum Contaminant Levels (MCLs) Promulgated Under the Safe Drinking Water Act). The Board notes that these three paragraphs correspond to paragraphs 44, 47, and 50 in the original complaint, which referred to tables 1, 2, and 3, respectively.

In its October 3, 2013 order, the Board found that “it lacks authority to enforce 40 C.F.R part 257.” Sierra Club, et al. v. Midwest Generation, LLC, PCB 13-15, slip op. at 25 (Oct. 3, 2013). The Board added that it “does not, however, exclude the possibility that an exceedance of the MCLs at one or more power plants may be evidence tending to show a violation of Section 21(a) of the Act.” *Id.* Specifically referring to paragraphs 44, 47, and 50 and tables 1-3 of the original complaint, the Board stated that

[t]hese references are more in the nature of evidence than claims of violations of the MCLs. Of course, a complainant need not set out evidence to state a claim. . . . However,

that a complaint does so is not grounds for striking it, and the Board declines to strike portions of the complaint that reference the RCRA regulations as background or identify purported MCL exceedances under the various generating stations. *Id.*

Having so addressed this issue in its previous order, the Board cannot conclude that the proposed amended complaint is inconsistent with the Board's previous order, and the Board declines to strike language as requested by MWG.

In its response to complainants' second motion for leave to file, MWG also requests that the Board extend the discovery schedule. Resp. 2 at 3. The Board's procedural rules establish the hearing officer's authorities, including ordering discovery under Section 101.616 of those rules. 35 Ill. Adm. Code 101.610(m). Section 101.616 provides in pertinent part that the hearing officer will set all discovery deadlines and handle all discovery disputes. 35 Ill. Adm. Code 101.616. In light of those authorities, the Board will defer to its assigned hearing officer to entertain any requests to set or extend discovery deadlines.

Section 31(d)(1) of the Act allows any person to file a complaint with the Board, and the Board grants complainant's motion for leave to file an amended complaint as provided in this order. 415 ILCS 5/31(d)(1) (2012). Section 31(d)(1) further provides that, "[u]nless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing." *Id.*; see 35 Ill. Adm. Code 101.202, 103.212(a). Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicative or frivolous. 35 Ill. Adm. Code 103.212(b).

ORDER

1. The Board grants complainant's motion for leave to file a reply.
2. The Board grants complainant's motion for leave to file an amended complaint.
3. Within 30 days of service of this order, MWG may file a motion alleging that the amended complaint is duplicative or frivolous, to which complainants may file a response.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 19, 2015, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board