

ILLINOIS POLLUTION CONTROL BOARD
February 28, 2019

SIERRA CLUB,)
)
Complainant,)
)
v.)
) PCB 19-78
ILLINOIS POWER GENERATING) (Citizen’s Enforcement – Water)
COMPANY, ILLINOIS POWER)
RESOURCES GENERATING, LLC,)
ELECTRIC ENERGY, INC., and VISTRA)
ENERGY CORPORATION,)
)
Respondents.)

ORDER OF THE BOARD (by U. Choe):

Today the Board accepts for hearing an enforcement complaint filed on December 18, 2018, by Sierra Club against Illinois Power Generating Company (Genco), Illinois Power Resources Generating, LLC (IPRG), Electric Energy, Inc. (EEI), and Vistra Energy Corporation (Vistra) (collectively respondents).

Sierra Club’s three-count complaint alleges that respondents’ disposal of coal ash in ash ponds at three electric generating stations violated open dumping and water pollution provisions of the Environmental Protection Act (Act) (415 ILCS 5/12(a), 12(d), 21(a) (2016)), and the Board’s groundwater quality standards (35 Ill. Adm. Code 620.115, 620.301(a), 620.405). The three plants are Genco’s Coffeen Power Station, in Montgomery County; IPRG’s E.D. Edwards Generation Plant, in Peoria County; and EEI’s Joppa Steam Plant, in Massac County.

Section 31(d)(1) of the Act provides that “[u]nless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing.” 415 ILCS 5/31(d)(1) (2016); *see also* 35 Ill. Adm. Code 103.212(a). A complaint is duplicative if it is “identical or substantially similar to one brought before the Board or another forum.” 35 Ill. Adm. Code 101.202. A complaint is frivolous if it requests “relief that the Board does not have the authority to grant” or “fails to state a cause of action upon which the Board can grant relief.” *Id.* Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is frivolous or duplicative. 35 Ill. Adm. Code 103.212(b). No respondent filed such a motion. Based on the information now before it, the Board finds that the complaint is neither frivolous nor duplicative.

The Board accepts the complaint for hearing. *See* 415 ILCS 5/31(d)(1) (2016); 35 Ill. Adm. Code 103.212(a). On February 14, 2019, respondents filed an unopposed motion for an extension to April 15, 2019. The Board grants the motion, and any answer to the complaint must be filed by April 15, 2019. A respondent’s failure to file an answer to a complaint within 60

days after receiving the complaint may have severe consequences. Generally, if respondents fail within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider respondents to have admitted the allegations. *See* 35 Ill. Adm. Code 103.204(d).

The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

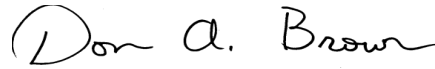
If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2016). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount. These factors include the following: the duration and gravity of the violation; whether the respondent showed due diligence in attempting to comply; any economic benefits that the respondent accrued from delaying compliance based upon the "lowest cost alternative for achieving compliance"; the need to deter further violations by the respondent and others similarly situated; and whether the respondent "voluntarily self-disclosed" the violation. 415 ILCS 5/42(h) (2016). Section 42(h) requires the Board to ensure that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship." *Id.* Such penalty, however, "may be off-set in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent." *Id.*

Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any (including whether to impose a civil penalty), and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

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 February 28, 2019, by a vote of 5-0.

A handwritten signature in black ink that reads "Don A. Brown". The signature is written in a cursive style with a large, circular initial "D".

Don A. Brown, Clerk
Illinois Pollution Control Board