BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SIERRA CLUB	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
ILLINOIS POWER GENERATING COMPANY, ILLINOIS POWER RESOURCES GENERATING, LLC, ELECTRIC ENERGY, INC. and VISTRA ENERGY CORP.	)	**PCB 19-078 (Enforcement – Water)**
	)	
Respondents.	)	

NOTICE OF FILING

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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board a **Motion to Bifurcate**, copies of which are hereby served upon you.

/s/ *Ryan C. Granholm*
Ryan C. Granholm

Dated: April 15, 2019

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SIERRA CLUB	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	**PCB No. 19-78**
ILLINOIS POWER GENERATING COMPANY, ILLINOIS POWER RESOURCES GENERATING, LLC, ELECTRIC ENERGY, INC., and VISTRA ENERGY CORP.	)	**(Enforcement – Water)**
	)	
Respondents.	)	

Motion to Bifurcate

NOW COME Respondents Electric Energy, Inc.; Illinois Power Generating Company; Illinois Power Resources Generating, LLC; and Vistra Energy Corp. (collectively, "Respondents") by their attorneys, Schiff Hardin LLP, and move the Illinois Pollution Control Board ("Board"), pursuant to 35 Ill. Admin. Code §§ 101.500 & 103.212(d), to hold separate hearings in this matter on the issues of liability and remedy. Should the Board agree that bifurcation is appropriate, Respondents also request that expert discovery on remedy issues be delayed until the liability phase is complete. In support of their motion Respondents state as follows:

1. On December 18, 2018, Sierra Club filed its Complaint against Respondents with the Illinois Pollution Control Board ("Board"). The Complaint names four separate respondents, regarding activities at three separate facilities. Compl. ¶ 1. Specifically, it implicates coal combustion residuals ("CCR") in eight separate "onsite repositories," which it alleges date back as far as the 1960s. Compl. ¶¶ 5, 11, 17. Sierra Club alleges hundreds of "exceedances" of

Illinois Groundwater Quality Standards, and violations of several statutory and regulatory provisions at each of the three named facilities. Compl. ¶¶ 63-64; 66-67; 69-71.

2. Sierra Club requests that the Board grant a variety of relief, including a declaratory judgment, civil penalties, and injunctive relief. Compl. at p. 17-18.

3. In light of the complicated factual allegations in Sierra Club's multi-party and multi-site Complaint, as well as the multi-faceted relief it demands, it is necessary to bifurcate the liability and remedy phases of this case. Separating the case into two phases will narrow the issues to be considered in each phase, focusing the parties' argument and streamlining the record for the Board's review. Further, bifurcation will conserve the parties' and the Board's resources by reserving consideration of remedy issues until violations are established. Bifurcation is consistent with the Board's rules and precedent, as well as federal case law in complicated environmental cases such as this one.

I. Sierra Club's Complaint Presents Complicated Allegations and Requests for Relief.

4. This case is highly complicated, both factually and legally. Factually, the Complaint implicates three separate facilities. Compl. ¶ 1. Each of these facilities has a separate owner, distinct operational history, and each site has a unique geology and hydrology. In total, the Complaint identifies eight separate "repositories" for CCR. Compl. ¶¶ 5, 11, 17. The history of the repositories at each facility dates back several decades. *Id.*

5. Additionally, Sierra Club's factual allegations regarding groundwater contamination and violations of Illinois groundwater standards are extensive. The Complaint cites up to eight years of monitoring data at each facility, and its exhibits identify more than 100 separately-named monitoring wells at the three facilities, cumulatively. Compl. ¶¶ 6, 12, 18, Exs. A-1 – C-3. In total, the Complaint alleges over 650 separate violations of state standards.

Id. ¶¶ 64, 67, 70-71. Sierra Club also cites a wide array of regulatory materials and scientific publications to support numerous allegations about nearly twenty separate chemicals which it alleges are "recognized constituents of coal ash." Compl. ¶¶ 22-45.

6. Once the facts of Sierra Club's allegations have been established, determining whether any violations have occurred will also require detailed inquiry. Sierra Club has alleged that Respondents EEI, IPGC, and IPRG have each violated two separate statutory provisions and three separate provisions of the Board's regulations, regarding sixteen different parameters. Compl. ¶¶ 63, 66, 69. Analyzing these alleged violations, including whether any were caused or allowed by Respondents, requires more than a simple comparison of groundwater samples to proscribed standards. *See, e.g.*, *Environmental Site Developers v. White & Brewer Trucking*, PCB 96-180, 1997 WL 735012, Order of the Board at *6 (Nov. 20, 1997) ("The mere presence of a contaminant is insufficient to establish that water pollution has occurred or is threatened; it must also be shown that the particular quantity and concentration of the contaminant in question is likely to create a nuisance or to render the waters harmful, detrimental, or injurious.").

7. Finally, Sierra Club has requested five different types of relief, which, if allowed, would require extensive discovery and argument from the parties and careful review by the Board: (1) "declare[] that Respondents have violated the Illinois Environmental Protection Act[]"; (2) "impose[] civil penalties"; (3) order Respondents to "[c]ease and desist from causing or threatening to cause water pollution"; (4) order Respondents to "[m]odify their . . . disposal and storage practices so as to avoid future contamination"; and (5) order Respondents to "[r]emediate the contaminated groundwater." Compl. at p. 17-18.

8. In the unlikely event that it becomes necessary for the Board to consider any of Sierra Club's requested remedies, the Board would need to conduct a fact-intensive inquiry

regarding the "unreasonableness" of any violations, applying the three-factor test provided by Section 33(c) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/33(c). *Village of Park Forest v. Sears, Roebuck & Co.*, PCB 01-77, Order of the Board, at 7 (June 6, 2002) ("Section 33(c) of the Act requires the Board to weigh mitigating factors which is a fact intensive inquiry.").

9. Further, Sierra Club's request for civil penalties would require the Board to consider seven or more factors "in mitigation or aggravation of penalty" under Section 42(h) of the Act. 415 ILCS 5/42(h). Several of these statutory factors, such as the "social and economic value of the pollution source," the character of the surrounding area, supplemental environmental projects, and the due diligence exercised by the violator, will likely necessitate additional fact and expert testimony, beyond what will be required to determine whether violations have occurred. *Id.*

10. Sierra Club's requests for mandatory injunctive relief—which demand that Respondents modify their CCR management practices and remediate groundwater—would also be legally and factually complicated. Respondents contend, as a matter of law, that Sierra Club may not obtain mandatory injunctive relief from the Board. *See* Answer to Complaint ¶¶ 73-78 (Apr. 15, 2019). This issue is likely to be the subject of motion practice between the parties. Even if Sierra Club may obtain such mandatory injunctive relief, the nature and scope of that relief will require extensive fact and expert discovery, hearing, and briefing by the parties.

II. Judicial and Board Precedent Recognize that Bifurcation of Liability and Remedy Issues is Often Appropriate.

11. The Board's procedural rules specifically grant it the authority to bifurcate a case: "The Board in its discretion may hold a hearing on the violation and a separate hearing on the remedy." 35 Ill. Admin. Code § 103.212(d). The Board's rules direct the hearing officer to

"ensure development of a clear, complete, and concise record for timely submission to the Board." 35 Ill. Admin. Code § 101.610.

12. Enforcement cases before the Board often involve separate hearings on remedy and liability. *See, e.g.*, *Johns Manville v. Illinois Dept. of Transp.*, PCB 14-3, Interim Opinion and Order of the Board, at 1-2, 22 (Dec. 15, 2016) (finding after "extensive discovery" and five days of hearing that an additional hearing was required to determine the appropriate relief); *Brill v. Latoria*, PCB 00-219, Interim Opinion and Order of the Board, at 45 (June 6, 2002) (finding violations of air pollution and noise standards and ordering respondent to present additional expert testimony on remedy issues); *Roti v. LTD* Commodities, PCB 99-19, Interim Opinion and Order of the Board, at 31, 33 (Feb. 15, 2001) (scheduling additional hearings on remedy after seven days of hearing on liability issues); *People v. Doren Polland*, PCB 98-148, Order of the Board, at 3-4 (Jan. 24, 2002) (ordering an additional hearing on remedies and penalties after two days of hearings on liability); *IEPA v. Chicago Housing Authority*, PCB 71-320, Preliminary Order (Dec. 9, 1971) (authorizing a "second hearing on the issue of remedy").

13. Importantly, the Board and the Hearing Officer agreed to bifurcate liability and remedy issues in a case involving similar claims regarding groundwater at multiple sites operated by a single common entity, *Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15. That case, like this one, involves claims of groundwater pollution allegedly caused by CCR facilities at several power plants in Illinois, with alleged violations spanning a number of years. PCB 13-15, Order of the Board, at 2-4 (Oct. 3, 2013). The Hearing Officer in that case agreed to bifurcate the hearing process, first to consider whether any violations had occurred, reserving the issue of remedy for later consideration. *See* PCB 13-15, Hearing Officer Order (Feb. 9, 2017) (reserving certain issues for consideration "when and if a hearing on remedy is held").

14. The extensive docket in *Midwest Generation* shows that bifurcation was appropriate in that case. Ten days of hearing were required for the liability phase alone, with more than 260 exhibits introduced. PCB 13-15, Respondent Midwest Generation, LLC's Post-Hearing Brief, at 1 (July 20, 2018). The parties' post-hearing briefing totaled more than 250 pages, not including attachments. Combining remedy with liability issues would have undoubtedly expanded the record dramatically, requiring multiple additional days of hearing and further briefing by the parties. Adding even more material to the docket would likely have created a volume of facts and argument that would have been unworkable for both the parties and the Board.

15. Where the Board bifurcates a case, it may be appropriate to bifurcate some elements of discovery as well. In *Johns Manville v. Illinois Dept. of Transp.* the Board held that, under its rules and Illinois law, discovery is limited to only that information which is relevant to the facts at issue. PCB 14-3, Opinion and Order of the Board, at 4-5 (Dec. 21, 2017). In that case, once the Board moved to hearing on remedy issues, it held that further discovery would be limited to information that was relevant to remedy issues. *Id.*

16. Unlike the Board, Illinois courts do not have a rule that authorizes bifurcating a case. But federal courts often bifurcate cases under Federal Rule of Civil Procedure 42(b). ("For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues."). Federal courts have explained that bifurcation is appropriate, in the interest of judicial economy, in complex cases where legal issues or affirmative defenses may eliminate the need for a hearing on remedy issues. *Greening v. B.F. Goodrich Co.*, No. 90 C 2891, 1993 WL 134781, at *3 (N.D. Ill. Apr. 23, 1993) (granting a motion to bifurcate where "preparation for trial on all of the issues will be extensive and involve

extraordinary expenses"). Bifurcation is particularly useful in cases where remedy decisions will require "significant amounts of complex additional evidence." *A.L. Hansen Mfg. Co. v. Bauer Prod. Inc.*, No. 03 C 3642, 2004 WL 1125911, at *5 (N.D. Ill. May 18, 2004) (noting that "patent cases are particularly well-suited to bifurcation of liability and damages in service of efficiency").

17. Federal courts frequently bifurcate complex environmental cases. For example, the Fifth Circuit has explained that bifurcation is particularly useful in cases under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667 (5th Cir. 1989). In such cases, "disputed factual and legal issues pertaining only to liability are resolved before deciding the more complicated and technical questions of appropriate cleanup measures and the proportionate fault of liable parties." *Id.*; *see Tex Tin Settling Defendants Steering Comm. v. Great Lakes Carbon Corp.*, No. CIV.A. G-96-0247, 2008 WL 4376363, at 12 (S.D. Tex. Sept. 22, 2008) ("Because CERCLA cases are complex, courts often bifurcate liability and damages phases."). In these cases, "isolating the issues to be resolved [may help] avoid lengthy and perhaps needless litigation." *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 720 (2d Cir. 1993).

III. Bifurcation is Appropriate Here.

18. Bifurcation of this highly-complex case will promote the efficient use of resources by both the parties and the Board. An initial hearing on liability—including the affirmative defenses presented in Respondents' Answer—may defeat Sierra Club's allegations in whole or in part, limiting the scope of remedy issues to be considered, or eliminating the need for a remedy hearing altogether. Bifurcation here would therefore be consistent with the rationale cited by federal courts in complex cases such as this one. *See, e.g.*, *Greening*, 1993 WL 134781,

at *3; *Amoco Oil Co.*, 889 F.2d at 667. As noted, bifurcation is also consistent with the Board's precedent in previous enforcement cases, including the analogous *Midwest Generation* case. *See supra* ¶¶ 12-14.

19. Setting aside the possibility that an initial hearing on liability may narrow the scope of the remedy considered in the second phase of the case, bifurcation will also assist the parties and the Board by "ensur[ing] development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Admin. Code § 101.610. Simply put, the volume of fact and expert evidence at issue in this case will be too much to consider at once. For example, in *Midwest Generation* ten days of hearing were required on liability issues alone. *See supra* ¶ 14. Here, remedy issues are likely to require the expert testimony of engineers, hydrologists, and toxicologists. Delaying consideration of these issues will allow the parties and the Board to more efficiently and more succinctly address liability issues during the first phase of the case.

20. As in *Johns Manville v. Illinois Dept. of Transp.*, if the Board bifurcates this case, it is appropriate to bifurcate some discovery issues as well, delaying expert discovery on remedy issues unless and until the Board determines that a hearing on remedies is appropriate. PCB 14-3, Opinion and Order of the Board, at 4-5 (Dec. 21, 2017). Limiting expert discovery during each phase to only the information that is relevant to the ultimate issues in that phase will prevent the parties from wasting significant amounts of resources on expert discovery until the Board determines that a remedy hearing will be required in this case.

WHERFORE, Respondents respectfully request that the Board bifurcate the hearing schedule and expert discovery in this case to separate consideration of liability and remedy in this case.

Dated: April 15, 2019

/s/ *Daniel J. Deeb*
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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 15th day of April, 2019, I have served electronically the attached **Motion to Bifurcate**, upon the following persons by e-mail at the email addresses indicated below:

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I further certify that my email address is rgranholm@schiffhardin.com; the number of pages in the email transmission is 12; and the email transmission took place today before 5:00 p.m.

/s/ *Ryan C. Granholm*
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