

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To:

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Chicago, Illinois 60601

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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 for Leave to Reply**, copies of which are hereby served upon you.

/s/ Ryan C. Granholm

Ryan C. Granholm

Dated: May 13, 2019

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SIERRA CLUB)	
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Complainant,)	
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v.)	
)	PCB No. 19-78
ILLINOIS POWER GENERATING)	(Enforcement – Water)
COMPANY; ILLINOIS POWER)	
RESOURCES GENERATING, LLC;)	
ELECTRIC ENERGY, INC.; and VISTRA)	
ENERGY CORP.)	
)	
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Motion for Leave to Reply

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 Hearing Officer, pursuant to 35 Ill. Admin. Code §§ 101.500(a)&(e), to grant them leave to file a Reply, attached as Attachment A, in support of their Motion to Bifurcate. In support of their Motion for Leave to Reply, Respondents state as follows:

1. On April 15, 2019, Respondents filed a Motion to Bifurcate (the “Motion”), requesting that the Board hold separate hearings in this matter on the issues of liability and remedy and that expert discovery on remedy issues be delayed until the liability phase is complete.

2. Sierra Club filed its “Opposition to Motion to Bifurcate” on April 29, 2019 (the “Response”). The Motion remains pending before the Board.

3. The Board's rules provide that the Board or the Hearing Officer may grant leave to reply in order "to prevent material prejudice." 35 Ill. Admin. Code § 101.500(e). A motion for leave to reply must be filed within 14 days after service of the response. *Id.*

4. Respondent's Motion for Leave to Reply is filed within 14 days of Sierra Club's Response, and is therefore timely under the Board's rules. *Id.*

5. The Board often grants leave to reply where a reply will correct the factual record or supply important facts omitted by a response to a motion. For example, in *City of Quincy v. IEPA*, the Board granted leave to reply in support of a motion to reconsider in order to correct alleged "mischaracterizations" in the response. PCB 08-86, Order of the Board, at 2-3 (June 17, 2010). Similarly, in *People v. Chiquita Processed Foods, LLC*, the Board found that the movant would be materially prejudiced if it were not granted leave to reply to "clarify misleading statements." PCB 02-56, Order of the Board, at 4-5 (Apr. 18, 2002).

6. Sierra Club's Response argues that bifurcation is not appropriate here because this case is more analogous to *Sierra Club, et al. v. City Water Light and Power*, PCB 18-11 ("CWLP"), which was not bifurcated, than it is to *Sierra Club, et al. v. Midwest Generation*, PCB 13-15 ("*Midwest Gen.*"), which was bifurcated. Response at ¶¶ 11-12; 20-22. But, as explained in Respondents' proposed Reply, this argument misstates, mischaracterizes, or omits several key facts. First, Sierra Club erroneously states that, unlike *Midwest Gen.*, this case involves no groundwater management zones and no "steps . . . to reduce contamination" on the part of Respondents or the Illinois Environmental Protection Agency. *Id.* at ¶ 11. Second, Sierra Club misstates the same and other facts (e.g. Sierra Club wrongly claims that none of the CCR repositories at issue in the Complaint are lined) in support of its argument that CWLP is more

analogous here, and ignores or mischaracterizes other obvious distinctions between its Complaint and *CWLP*. *Id.* at ¶¶ 12, 22.

7. Respondents' 5-page Reply is necessary to correct these "mischaracterizations" and "misleading statements" in PRN's Response and to "prevent material prejudice" to Respondents. 35 Ill. Admin. Code § 101.500(e); *City of Quincy*, at 2-3; *Chiquita Processed Foods, LLC*, at 4-5.

WHEREFORE, Respondents respectfully request that the Board grant it them leave to file the attached Reply in support of their Motion to Bifurcate.

Dated: May 13, 2019

/s/ Daniel J. Deeb
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Attachment A

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SIERRA CLUB)	
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)	PCB No. 19-78
ILLINOIS POWER GENERATING)	(Enforcement – Water)
COMPANY, ILLINOIS POWER)	
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ENERGY CORP.)	
)	
Respondents.)	

**Reply in Support of Respondents’
Motion to Bifurcate**

1. On April 15, 2019, Respondents¹ filed a Motion to Bifurcate this matter (the “Motion”), explaining that Sierra Club’s Complaint—which alleges hundreds of statutory and regulatory violations at three separate facilities, each of which has a separate owner—is highly complicated, both legally and factually. Mot. at ¶ 1. Bifurcation here would narrow the issues to be considered in each phase and conserve the parties’ and the Board’s resources by reserving testimony on remedy issues unless and until violations are established. Mot. at ¶ 3. In support of their Motion, Respondents cited several Board enforcement cases in which separate hearings on remedy issues were held after violations of the Act were established, including *Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15 (“*Midwest Gen.*”). Mot. ¶¶ 12-13.

2. On April 29, 2019, Sierra Club filed its “Opposition to Motion to Bifurcate” (the “Response”). Sierra Club’s Response ignores the Board precedent cited in the Motion other than *Midwest Gen.* and misstates many of the “crucial” facts of this case. Instead, Sierra Club

¹ This Reply incorporates defined terms from Respondents’ Motion to Bifurcate.

attempts to shift the Board's focus to one narrow argument: this case is somehow more analogous to *Sierra Club, et al. v. City Water Light and Power*, PCB 18-11 ("CWLP"), which was not bifurcated, than it is to *Midwest Gen.*, which was bifurcated. Response at ¶¶ 11-12; 20-22.

3. But, even assuming that Sierra Club's framing of this issue were correct (it is not), Sierra Club misstates key facts in support of its argument to distinguish *Midwest Gen.* and mischaracterizes or omits key facts about this case's parallels to *Midwest Gen.* and differences from *CWLP*. As a result, Sierra Club's attempt to distinguish this case from *Midwest Gen.*, and its analogy to *CWLP*, both fail. Viewing this case on its own merits, as explained in the Motion, the Board's review of the complicated facts, alleged violations, and requested relief in this case will be best served by separating this case into two narrowly-focused phases.

I. Sierra Club Misstates a Key Fact in an Attempt to Oversimplify this Case.

4. Sierra Club claims five separate times in its Response that this case is "simple." Response at ¶¶ 5, 8, 11, 18, 20. But at the same time, it claims that this case is analogous to *CWLP*, a case that involves only one respondent and one site, but which Sierra Club admits will take at least three years to resolve. *Id.* at ¶¶ 12, 22.

5. A "crucial" fact Sierra Club cites in support of its argument that this case is distinguishable from *Midwest Gen.*, is that in *Midwest Gen.*, "IEPA had established Groundwater Management Zones at most of the sites." Response at ¶ 11. Sierra Club goes on to argue that, efforts to remediate the sites at issue in *Midwest Gen.* "complicated [the case] both legally and factually," but "no such efforts have been made" here and, as a result, this case is "both legally and factually simpler" than *Midwest Gen.* *Id.*

6. But Sierra Club is incorrect. Groundwater under four of the eight CCR repositories implicated in the Complaint is fully or partially contained within an IEPA-approved groundwater management zone (“GMZ”). Respondents’ Answer at ¶ 91.² And IEPA has approved a closure plan for one of those repositories that will include “installation of a geomembrane cover system, groundwater monitoring, and maintenance.”³ Implementation of that closure plan is underway. Moreover, Respondents will demonstrate that sites have, in fact, taken others steps with respect to various CCR repositories, including, by way of example, dewatering and covering activities. These corrected facts eliminate the bases Sierra Club uses to attempt to distinguish this case from *Midwest Gen.* Indeed, by Sierra Club’s own implicit admission, these facts will “complicate” this case “both legally and factually,” and therefore, justify bifurcation. Response at ¶ 11.

7. Like *Midwest Gen.*, this case involves multiple CCR repositories, at multiple sites, where implementation of IEPA-approved remedial measures has already begun. But, unlike *Midwest Gen.*, this case involves the additional complicating factor that each facility is owned and operated by a separate legal entity. Mot. at ¶ 4. Therefore, Sierra Club’s primary attempt to distinguish this case as “simpler” than *Midwest Gen.* fails, by its own terms. Response at ¶ 11.

II. Sierra Club Mischaracterizes or Omits Crucial Facts about CWLP, in a Misleading Attempt to Draw Parallels to this Case.

8. Sierra Club contends that this case “can be better compared with” *CWLP*, a case which has not been bifurcated. Response at ¶ 12. Specifically, Sierra Club contends that this

² Respondent’s Answer was filed on the same date as its Motion to Bifurcate.

³ See IEPA Approval of Closure and Post-Closure Care Plan for the Coffeen Ash Pond No. 2 (Jan. 30, 2018), attached as Exhibit 1.

case is analogous to CWLP because (a) both cases involve unlined CCR impoundments; and (b) “as with the situation here, IEPA has failed to make any meaningful efforts to prevent this contamination . . . , either by establishing a Groundwater Management Zone or entering into a Compliance Commitment Agreement with CWLP.” *Id.* Those Sierra Club claims fail for at least four reasons.

9. First, Sierra Club fails to acknowledge several glaring differences between this case and *CWLP*. As noted above, *CWLP* involves a single company and single site, with common geology and hydrology. In contrast, Sierra Club’s Complaint here involves four separate respondents, eight different CCR repositories, spread over three distinct sites with different geology and hydrology, each of which will need to be considered separately in discovery, by experts, and by the Board. Mot. at ¶¶ 1, 4.

10. Second, Sierra Club alleges that its Complaint is analogous to *CWLP* because “[a]s with the situation here, CWLP did not line its ponds.” Response at ¶ 12. But, again, Sierra Club has its facts very wrong. In truth, evidence in this case will demonstrate that at least four of the CCR repositories implicated in its Complaint **are** lined and, further, IEPA-approved closure of one repository has begun.

11. Third, as noted above, contrary to Sierra Club’s allegations and unlike *CWLP*, IEPA has approved measures to address four of the eight CCR repositories noted in the Complaint by establishing a GMZ and has also approved a closure plan for a repository which is now being implemented. *See supra* ¶ 6. Even prior to approval of that GMZ and closure plan, de-watering wells were installed at one of the CCR repositories implicated in the Complaint and a cover was installed on another. *Id.*

12. Fourth, no party in *CWLP* has requested bifurcation. *See* PCB 18-11, Complainant's Motion to Set Discovery Deadlines (Mar. 19, 2018); PCB 18-11, Response to Motion to Set Deadlines (Mar. 23, 2018).

13. Sierra Club concedes that even the "simpler" *CWLP* case will likely take the Board more than three years to resolve. Response ¶ 22.⁴ Indeed, discovery was extended once and appears to have been effectively stayed for over three months while complainants prepared an amended complaint. *See generally* docket PCB 18-11. That case has not yet reached an amended answer, much less dispositive motions and a hearing, so it is too soon to say whether a single phase was the most efficient path.⁵

14. Taking this case as a whole, and setting aside Sierra Club's failed attempts to distinguish *Midwest Gen.* and analogize to *CWLP*, the parties' and the Board's resources, and the efficient administration of this case, will be best served by separating this case into two distinct phases, reserving consideration of remedy until Sierra Club establishes the existence and the scope of any violations of the Act and the Board's Rules.

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

⁴ Assuming, *arguendo*, that Sierra Club's projected three-year timeline for *CWLP* would apply here, this case would resolve well after the anticipated closure date for Coffeen Ash Pond 2, pursuant to the approved closure plan.

⁵ Given this status of *CWLP*, Sierra Club's claim that *CWLP* will conclude "by early 2020" appears questionable. Response at ¶ 12.

Dated: May 13, 2019

/s/ Daniel J. Deeb
Daniel J. Deeb

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Exhibit 1



Electronic Filing: Received, Clerk's Office 05/13/2019

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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BRUCE RAUNER, GOVERNOR

ALEC MESSINA, DIRECTOR

217/785-4787

January 30, 2018

Mr. Rick Diericx
Managing Director – Environmental Compliance Group
Illinois Power Generating Company
Coffeen Power Station
134 CIPS Lane
Coffeen, IL 62017

Re: Coffeen Power Station W1350150004 Montgomery County, Illinois

Dear Mr. Diericx,

The Agency has reviewed the January, 2017 Closure and Post-Closure Care Plan for the Coffeen Ash Pond No. 2 and the December 29, 2017 responses to comments received from the Agency dated October 27, 2017.

The closure plan activities include installation of a geomembrane cover system, groundwater monitoring, and maintenance of the cover system. The plan also includes an application for a groundwater management zone. After review of the plan, application, and later submitted revisions, the Agency approves the plan.

If you have any additional questions regarding this correspondence, please contact me at 217-785-4787.

Sincerely,

A handwritten signature in black ink, appearing to read "William E. Buscher".

William E. Buscher, P.G.
Manager, Hydrogeology and Compliance Unit
Division of Public Water Supplies
Bureau of Water

CC: Darin LeCrone
Central File 06L

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 13th day of May, 2019, I have served electronically the attached **Motion for Leave to Reply**, 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 16; and the email transmission took place today before 5:00 p.m.

/s/ Ryan C. Granholm

Ryan C. Granholm

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