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.	)	

NOTICE OF FILING

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PLEASE TAKE NOTICE that I have filed electronically with the Office of the Clerk of the Illinois Pollution Control Board the following Complainant's Response to Respondents' Affirmative Defenses in the above-captioned case today, copies of which are hereby served upon you.

Respectfully submitted,

/s/ Greg Wannier

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Counsel for Sierra Club

Dated: June 21, 2019

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ILLINOIS POLLUTION CONTROL BOARD

SIERRA CLUB	)	
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Complainant,	)	
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COMPLAINANT'S REPSPONSE TO RESPONDENTS' AFFIRMATIVE DEFENSES

Complainant Sierra Club hereby responds to the affirmative defenses pleaded by Respondents Illinois Power Generating Company ("IPGC"), Illinois Power Resources Generating, LLC ("IPRG"), Electric Energy, Inc. ("EEI"), and Vistra Energy Corporation ("Vistra") in their April 15, 2019 Answer to Complaint ("Answer").

I. Respondents' First Affirmative Defense (Answer ¶¶ 73–78)

Answer ¶ 73: "Illinois courts look to the substance, not the form, of an order to determine whether relief is injunctive. *In re A Minor*, 127 Ill. 2d 247, 260 (Ill. 1989). The Illinois Supreme Court has defined injunctive relief as a "judicial process operating in personam and requiring [a] person to whom it is directed to do or refrain from doing a particular thing." *Id.* at 261 (quoting Black's Law Dictionary 705 (5th ed. 1983)) (alteration in original); *Santella v. Kolton*, 393 Ill. App. 3d 889, 901-02 (Ill. App. Ct., 1st Dist., 2009). Black's Law Dictionary defines a number of types of injunctions, including "mandatory injunctions," which "orders an affirmative act or mandates a specified course of conduct." (10th ed. 2014)."

RESPONSE TO ¶ 73: Paragraph 73 contains one or more legal conclusions to which no response is required.

Answer ¶ 74: "Sierra Club requests that the Board issue a mandatory injunction ordering Respondents to take two specific affirmative actions: "[m]odify their . . . disposal and storage practices so as to avoid future groundwater contamination[;] and [r]emediate the contaminated groundwater so that it meets applicable Illinois Groundwater Quality Standards." Compl. at p. 18."

RESPONSE TO ¶ 74: Complainant states that the Complaint and the Relief Requested therein speak for themselves. Respondents' characterization of the requested relief as a "mandatory injunction" constitutes a legal conclusion to which no response is required.

Answer ¶ 75: "These elements of Sierra Club's requested relief exceed a mere "cease and desist" order (which Sierra Club requests in Relief Requested (c)(i), Compl. at p. 17). Instead, these elements of the requested relief ask the board to order a specific affirmative act, *i.e.* a mandatory injunction. *See* Black's Law Dictionary (10th ed. 2014)."

RESPONSE TO ¶ 75: Paragraph 75 contains one or more legal conclusions to which no response is required.

Answer ¶ 76: "While plaintiffs are authorized by the Illinois Environmental Protection Agency to seek mandatory injunctive relief from the Illinois courts, they may not obtain that relief from the Board. Instead, complainants before the Board are authorized to seek only three specific types of relief: orders to "cease and desist from violations," civil penalties, and revocation of permits. 415 ILCS 5/33(b)."

RESPONSE TO ¶ 76: Paragraph 76 contains one or more legal conclusions to which no response is required.

Answer ¶ 77: "The Board, and state and federal courts have held on numerous occasions that the Act does not authorize plaintiffs to seek mandatory injunctive relief before the Board. *See, e.g.*, *Clean the Uniform Co.-Highland vs. Aramark Uniform & Career Apparel, Inc.*, PCB 03-21, Order of the Board, at 2 (Nov. 7, 2002) ("The Board is not authorized to grant injunctive relief . . . and that portion of the complaint is stricken."); *Krempel v. Martin Oil Marketing, Inc.*, No. 95-c-1348, 1995 WL 733439, at *3 (N.D. Ill., Dec. 8, 1995) ("The plain language of the statute prohibits a suit for injunctive relief until a ruling from the PCB is obtained."); *People v. NL Indus.*, 152 Ill. 2d 82, 99–100 (Ill. 1992), *opinion modified on denial of reh'g* (Nov. 30, 1992) ("The Board has no enforcement powers. . . . Section 42 allows for the institution of a *civil* action to obtain an injunction." (emphasis in original))."

RESPONSE TO ¶ 77: Paragraph 77 contains one or more legal conclusions to which no response is required.

Answer ¶ 78: "Because Sierra Club has requested relief that the Act does not authorize it to seek from the Board, those elements of Sierra Club's requested relief cannot be granted."

RESPONSE TO ¶ 78: Paragraph 78 contains one or more legal conclusions to which no response is required.

II. Respondents' Second Affirmative Defense (Answer ¶¶ 80–82)

Answer ¶ 80: "Sierra Club's Complaint alleges that IPGC, IPRG, and EEI have violated 415 ILCS 5/12(d), which prohibits "*deposit[ing]* any contaminants upon the land in such place and manner so as to create a water pollution hazard." Compl. ¶¶ 63, 66, 69; 415 ILCS 5/12(d) (emphasis added)."

RESPONSE TO ¶ 80: Complainant states that the Complaint and the Illinois Environmental Protection Act speak for themselves.

Answer ¶ 81: "The Illinois Supreme Court has held that "the plain language of the Act prohibits depositing contaminants on the land so as to create a water pollution hazard; it does not prohibit the mere existence of a water pollution hazard." *People v. Agpro, Inc.*, 214 Ill. 2d 222, 233 (Ill. 2005) (internal quotation omitted)."

RESPONSE TO ¶ 81: Paragraph 81 contains one or more legal conclusions to which no response is required.

Answer ¶ 82: "Because Section 12(d) relates only to the depositing of contaminants on the land, not the maintenance of such contaminants on the land, injunctive relief is not available under Section 12(d) to correct any alleged violations of the Act or the Board's rules that relate to existing coal combustion residuals at Coffeen, Edwards, or Joppa."

RESPONSE TO ¶ 82: Paragraph 82 contains one or more legal conclusions to which no response is required.

III. Respondents' Third Affirmative Defense (Answer ¶¶ 84–88)

Answer ¶ 84: "The Board's rules require complainants to clearly identify the regulatory or statutory provisions that they allege a respondent has violated and the specific conduct that they allege constitute violations. 35 Ill. Admin. Code § 103.204(c)(1)&(2)."

RESPONSE TO ¶ 84: Complainant states that the Board's rules speak for themselves.

Answer ¶ 85: "Sierra Club names the three "Direct Owners" of the plants, which it alleges are "subsidiary companies of Vistra Energy Corporation," and Vistra itself as the respondents. Compl. ¶ 1. The Complaint alleges that the "Direct Owners" own and operate the plants at issue and admits that there are multiple corporate "intermediaries" between Vistra and each of the "Direct Owners." *Id.* ¶¶ 47-49."

RESPONSE TO ¶ 85: Complainant states that the Complaint and the Illinois Environmental Protection Act speak for themselves.

Answer ¶ 86: "Beyond alleging that Vistra is the ultimate corporate parent of the "Direct Owners," Sierra Club includes no specific factual or legal allegations against Vistra whatsoever. Instead, Counts I-III allege violations of the Act and the Board's rules by IPGC, IPRG, and EEI, respectively – the owners and operators of the plants at issue. Compl. ¶¶ 62-71. But no count alleges any violations of the Act or the Board's rules by Vistra itself."

RESPONSE TO ¶ 86: Complainant states that the Complaint speaks for itself.

Answer ¶ 87: "Nevertheless, the Complaint requests that the Board declare that all "Respondents," including Vistra, be found in violation of the Act and be subject to penalties, a cease and desist order, and injunctive relief. Compl. at p. 17-18."

RESPONSE TO ¶ 87: Complainant states that the Complaint speaks for itself.

Answer ¶ 88: "Because Sierra Club has failed to allege any violations of the Act or the Board's rules by Vistra, it has not satisfied the pleading requirements contained in the Board's rules. 35 Ill. Admin. Code § 103.204(c)(1)&(2); *Elmhurst Memorial Healthcare v. Chevron U.S.A.*, PCB 09-66, Order of the Board, at 14 (Dec. 16, 2010) ("[T]he pleader [must] set out the ultimate facts which support his cause of action.") (internal quotation omitted). For that reason, Sierra Club may not obtain relief against Vistra."

RESPONSE TO ¶ 88: Paragraph 88 contains one or more legal conclusions to which no response is required.

IV. Respondents' Fourth Affirmative Defense (Answer ¶¶ 90–93)

Answer ¶ 90: "Sierra Club alleges that groundwater conditions at Coffeen violate 35 Ill. Admin. Code § 620.410. Compl. ¶ 64."

RESPONSE TO ¶ 90: Complainant states that the Complaint speaks for itself.

Answer ¶ 91: "Pursuant to the Board's Rules, a Groundwater Management Zone ("GMZ") was established for groundwater underlying portions of Coffeen on January 30, 2018."

RESPONSE TO ¶ 91: Complainant admits that the Illinois Environmental Protection Agency approved a closure plan for the Coffeen Ash Pond No. 2 which included an application for a GMZ. Complainant lacks sufficient information to respond to the remaining allegations in paragraph 91 including those relating to the scope of the GMZ.

Answer ¶ 92: "Upon establishment of a GMZ, the standards specified in 35 Ill. Admin. Code §§ 620.410, 620.420, 620.430, and 620.440 are not applicable. 35 Ill. Adm. Code 620.450(a)(3)."

RESPONSE TO ¶ 92: Paragraph 92 contains one or more legal conclusions to which no response is required.

Answer ¶ 93: "IPGC is not in violation of 35 Ill. Admin. Code § 620.410 for any exceedances of groundwater standards measured within Coffeen's GMZ that occurred after the GMZ was established."

RESPONSE TO ¶ 93: Paragraph 93 contains one or more legal conclusions to which no response is required.

V. Respondents' Fifth Affirmative Defense (Answer ¶¶ 95–98)

Answer ¶ 95: "Sierra Club's Complaint alleges that CCR located at Coffeen, Edwards, and Joppa, which were first deposited as early as the 1960s, have contaminated groundwater. Compl. ¶¶ 5, 11, 17."

RESPONSE TO ¶ 95: Complainant states that the Complaint speaks for itself.

Answer ¶ 96: "Sierra Club alleges that data from groundwater monitoring at Coffeen, Edwards, and Joppa dating back as far as 2010 shows exceedances of applicable groundwater standards. Compl. ¶¶ 7, 13, 19."

RESPONSE TO ¶ 96: Complainant states that the Complaint speaks for itself.

Answer ¶ 97: "The Act does not contain a specific statute of limitations, but Illinois law provides a general, catch-all five-year statute of limitations applicable to "all civil actions not otherwise provided for." 735 ILCS 5/13-205."

RESPONSE TO ¶ 97: Paragraph 97 contains one or more legal conclusions to which no response is required.

Answer ¶ 98: "The statute of limitations bars Sierra Club's claims as to (1) any coal combustion residuals that were deposited; and (2) any groundwater contamination that was discovered, more than five years before the date of Sierra Club's Complaint."

RESPONSE TO ¶ 98: Paragraph 98 contains one or more legal conclusions to which no response is required.

Respectfully submitted the 21st of June, 2019,

/s/ Greg Wannier
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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 21st day of June, 2019, I have served electronically the attached Complainant's Response to Respondents' Affirmative Defenses, upon the following persons by e-mail at the email addresses indicated below. I further certify that my email address is greg.wannier@sierraclub.org; the number of pages in the email transmission is 9; and the email transmission took place today before 5:00pm Central Time:

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