ILLINOIS POLLUTION CONTROL BOARD
April 16, 2020

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

ORDER OF THE BOARD (by B.F. Currie):

On October 3, 2012, Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (collectively, Environmental Groups) filed a seven-count complaint against Midwest Generation, LLC (MWG). The complaint was later amended and alleged groundwater contamination and open dumping in violation of the Environmental Protection Act (Act) and Board regulations. The Environmental Groups alleged that MWG discharged contaminants into the environment through coal ash disposal ponds and historical coal ash storage sites at four of MWG's electric generation stations (Stations) in Illinois. The matter has been bifurcated into a liability and remedy phase. The liability phase has concluded and the matter is currently beginning the remedy phase.

MWG moves to stay the proceedings for one year in light of pending state rulemaking regarding Coal Combustion Residual (CCR) Surface Impoundment Rules. The Environmental Groups oppose the motion. Today, the Board denies MWG's motion to stay the proceedings. The primary question that arises from these filing is whether the Board can simultaneously consider a rulemaking and an enforcement action dealing with overlapping issues. The Board finds that it may consider both jointly and the ongoing environmental harm at the Stations weighs heavily in denying the motion to stay.

In this order, the Board first provides a brief procedural history relevant to the motion to stay and rules on a procedural motion. Next, the Board summarizes the filings regarding motion to stay, after which the Board analyzes and provides the reasons for denying the motion.

PROCEDURAL BACKGROUND

Procedural History

The extensive procedural history in this case is described in detail in the June 20, 2019 Board order. *See* Sierra Club, et al. v. Midwest Generation, LLC, PCB 13-15, slip op. at 4 (June

20, 2019) (Interim Order). The Board had bifurcated the matter into a liability and remedy phase. To conclude the liability phase, the Board issued the Interim Order which held that MWG violated Sections 12(a), 12(d), and 21(a) of the Act (415 ILCS 5/12(a), 12(d), 21(a) (2016)), as well as Sections 620.115, 620.301(a), and 620.405 of the Board groundwater quality regulations (35 Ill. Adm. Code 620.115, 620.301(a), 620.405). Subsequently, MWG filed a motion to reconsider and clarify on September 9, 2019. An *amicus curiae* brief was filed in support of the motion by various industry groups. The motion and the brief were opposed by the Environmental Groups.

On February 6, 2020, the Board issued an order granting in part and denying in part MWG's motion to reconsider. The Board did not alter the substance of the previous Interim Order ruling which found MWG violated the above-mentioned sections of the Act and regulations. However, the Board found that groundwater management zones at three of the Stations are still in operation and therefore violations of 35 Ill. Adm. Code Sections 620.115, 620.301(a) and 620.405 have been stayed since the creation of the groundwater management zones in 2013. This February 6, 2020 Board order directed the parties to proceed expeditiously to discovery in the remedy phase of this matter. A hearing officer order issued on February 25, 2020 directed the parties to file a proposed discovery schedule by March 9, 2020.

Motion to Stay Proceedings

On February 21, 2020, MWG filed a motion to stay the proceedings (Mot. to Stay) as well as a memorandum in support of its motion (Memo to Stay). MWG argues that this proceeding should be stayed for one year to await the promulgation of final rules for CCR Surface Impoundments.

On July 30, 2019, Public Act 101-171 went into effect. Among its provisions, P.A. 101-171 adds to the Act a new section 22.59 addressing CCR (termed coal combustion waste in federal regulations). 415 ILCS 5/22.59 (2018). Subsection 22.59(g) requires the Illinois Environmental Protection Agency (Agency), within eight months of the effective date of P.A. 101-171, to propose rules addressing, at a minimum, 11 specific factors including construction and operating permits, financial assurance, public participation, environmental justice, closure, and removal. The Agency's proposed rules are due to be filed by March 30, 2020. Within one year of receiving the Agency's proposal, the Board must adopt rules. P.A. 101-171.

Draft rules have been circulated for public comments by the Agency via its website, and as required by Section 22.59(g), the rules were formally proposed to the Board on March 30, 2020. 415 ILCS 5/22.59(g) (2018), *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, R20-19. MWG argues that the new CCR rules will directly affect the remedy for the four Stations. Memo to Stay at 2. Further, MWG argues that the CCR surface impoundment rules "contain virtually the same corrective actions and remedies demanded by Complainants." *Id.* MWG states that in a year's time, when the rules are adopted by the Board, it plans to conduct the operations of its CCR surface impoundments at the four Stations that are the subject of this case in full compliance with the new rules. *Id.* at 1-2. By planning on complying fully with the future rules, MWG claims this would eliminate the bulk of the relief requested by the Environmental Groups.

Id. at 4. Additionally, MWG argues that staying this matter would eliminate any possible inconsistent remedy ordered by the Board that may differ from what the CCR rules eventually will demand. *Id.* at 5-6. Lastly, MWG claims there is "no risk of environmental harm and Complainants will not be prejudiced by a stay for one year." *Id.* at 10-11.

Response in Opposition to Motion to Stay

The Environmental Groups oppose the motion to stay, pointing to an earlier ruling in this case, issued in 2014 (2014 Mot. to Stay). Resp. Mot. to Stay at 1. On February 19, 2014, MWG filed a motion to stay "to avoid potential conflicts arising from U.S. EPA's and Illinois EPA's proposed rules for the handling of coal ash." 2014 Mot. to Stay at 1. At that time, the Board denied the motion to stay. The Environmental Groups argue that the current motion to stay is based on the same reasoning as the 2014 motion. As the Board denied the motion then, the Groups argue the Board should do so for the same reasons today. Resp. Mot. to Stay at 1-2.

The Environmental Groups argue that the four factors the Board is allowed to consider when deciding motions to stay, (1) comity; (2) prevention of multiplicity, vexation and harassment; (3) likelihood of obtaining complete relief in the foreign jurisdiction; and (4) the *res judicata* effect of a foreign judgment in the Board proceeding, do not support granting the motion to stay. Resp. Mot. to Stay at 2.

In looking to the prevention of multiplicity, vexation or harassment, the Environmental Groups argue that fundamentally, rulemaking and enforcement proceedings are entirely distinct proceedings before the Board. Resp. Mot. Stay at 3. Highlighting the discussion in the 2014 Board order regarding the motion to stay, the Groups claim the same reasoning should apply in this matter. *Id.* "The Board's reasoning from 2014 is equally applicable today. No administrative inefficiency will result if this case and the forthcoming state rulemaking continue in tandem because they are two distinct types of proceedings." *Id.*

As to the three other factors, comity, likelihood of obtaining relief in a foreign jurisdiction, and *res judicata*, the Environmental Groups argue that these are not applicable in this case. "The Board considers comity, which is the principle that courts give effect to the decision of a court of another jurisdiction, not as a matter of obligation but as a matter of deference and respect." Resp. Mot. to Stay at 7. Similarly, the Board's requirement to consider likelihood of obtaining complete relief in a foreign jurisdiction is not applicable, as argued by the Groups. *Id.* The Groups argue that the Board is the only jurisdiction at issue, which obviates the need to consider comity, relief in a foreign jurisdiction and this applies to the *res judicata* factor as well. *Id.*

Finally, as to the issue of environmental harm, the Groups have submitted four exhibits (Exh. B, C, D, and E) that show the results of the most recent quarterly monitoring reports at all four Stations. *Id*. at 6. The Groups highlight exceedences at all four Stations as evidence that environmental harm is continuing at each Station. *Id.* at 7. "A stay would both prejudice Complainants' ability to pursue remedies at the four coal plants and cause continuing environmental harms." *Id.* at 6.

DISCUSSION

Legal Background

The Board rules regarding a motion to stay are found at 35 Ill. Adm. Code Section 101.514(a).

Section 101.514 Motions to Stay Proceedings

> a) Motions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed, and in decision deadline proceedings, by a waiver of any decision deadline. A status report detailing the progress of the proceeding must be included in the motion.
>
> b) If the motion to stay is granted, at the close of the stay, the parties must file a status report in compliance with Subpart C. Additional requests for stay of the proceedings must be directed to the hearing officer.

The decision to grant or deny a motion for stay is "vested in the sound discretion of the Board." *See* People v. State Oil Co., PCB 97-103 (May 15, 2004). When exercising its discretion to determine whether an arguably related matter pending elsewhere warrants staying a Board proceeding, the Board may consider the following factors: (1) comity; (2) prevention of multiplicity, vexation, and harassment; (3) likelihood of obtaining complete relief in the foreign jurisdiction; and (4) the *res judicata* effect of a foreign judgment in the local forum, *i.e.*, in the Board proceeding. Sierra Club, et. al v. Midwest Generation, LLC, PCB 13-15, slip op at 11 (April 17, 2014). The Board may also weigh the prejudice a stay would cause the nonmovant against the policy of avoiding duplicative litigation. *Id.* at 11, *citing* Village of Mapleton v. Cathy's Tap, Inc., 313 Ill. App. 3d 264, 267, 729 N.E.2d 854, 857 (3d Dist. 2000). Additionally, the Board must consider any ongoing environmental harm should the stay be granted. *Id.* at 16.

Board Denies MWG's Motion to Stay

In weighing the above listed factors, the Board finds that the evidence supports denying the motion to stay in this matter. As noted above, MWG requests that the Board stay this matter until the Board adopts the final CCR rules in approximately one year's time. As both matters are properly before the Board, there is no issue of comity in this case. The nature of the Board allows for simultaneous decision-making on enforcement and rulemaking matters. The Board declines to weigh the factor of comity in favor of staying this matter.

The Board is not persuaded that granting a stay would prevent multiple actions, vexation, or harassment. The Board is able to continue adjudicating cases while it considers proposed revisions to the rules that are the subject of adjudication. As a quasi-adjudicatory and quasi-regulatory body, the Board, by its nature, must decide a variety of matters, many of which may interrelate. The Board concludes that the factor of potential multiplicity, vexation or harassment does not weigh in favor of granting a stay.

MWG makes no argument in its motion that there is another jurisdiction at issue in this matter. Both this matter and the CCR rulemaking are currently before the Board and not before a foreign jurisdiction. As such, the Board concludes this factor does not weigh in favor of granting a stay.

While the final adoption by the Board of the proposed rules for CCR surface impoundment and the future remedy ordered in this matter have overlapping issues, the two matters are distinct from each other. The Board concludes that there is no *res judicata* effect at issue in this matter and therefore finds that this factor does not support granting a stay.

Prejudice to the Nonmovant and Environmental Harm

The Board may also weigh the prejudice a stay would cause the non-moving parties in this matter, i.e., the Environmental Groups. In their response to MWG's motion to stay, the Environmental Groups cite two instances in which a stay would prejudice them. First, the Environmental Groups urge moving forward with discovery in this matter as the length of the case has itself caused prejudice. Resp. at 6. "Complainants filed this enforcement case in 2012 and it has taken over seven years to reach the question of remedy." *Id.*

The Environmental Groups' exhibits provide the most recent groundwater monitoring results at the four Stations. Exh. B, C, D, and E. The Groups argue that prejudice is caused by ongoing environmental harm at the four Stations. "Remedy in this case should not be delayed any further because, as the Board found, there is ongoing groundwater contamination occurring at all four of MWG's coal plants, and MWG's most recent quarterly groundwater monitoring reports show that contamination has continued unabated at MWG's four coal plants. Resp. at 6.

The Board finds that the recent groundwater monitoring results support the Environmental Groups' claim that groundwater contamination continues at all four stations. The Board last analyzed groundwater reports in its June 2019 Interim Order and in that order, the reports used were from early 2017. The four stations at issue in this matter are (1) Joliet #29 Station in Joliet, Will County (Joliet 29); (2) Powerton Station in Pekin, Tazewell County (Powerton); (3) Will County Station in Romeoville, Will County (Will County); and (4) Waukegan Station in Waukegan, Lake County (Waukegan).

At the Joliet 29 station, the Board identified monitoring well 09 (MW-09) as a downgradient well with the highest number of exceedences of Part 620 standards. Interim Order at 29-35, 35 Ill. Adm. Code 620. Further, the Board concluded "that it is more probable than not that the source of the exceedences of sulfate and total dissolved solids (TDS) in well MW-09 at Joliet 29 is either coal ash stored in Ash Pond 3 or any coal ash deposited in fill areas outside of but close to that pond." *Id.* at 33. As noted by the Environmental Groups, the recent groundwater reports indicate continued exceedences of Part 620 standards for sulfate and TDS in MW-09 from October 2017 to November 2019. Exh. B at 153.

At the Waukegan station the Board identified MW-05 as "upgradient" of the ash ponds, but downgradient of the former slag and fly ash storage area. Interim Order at 68. In this regard, the Board noted that "[e]ven though the 59 exceedences in wells MW-10 through 14 suggest that

contamination may be coming in from the former tannery and boiler sites, the 163 exceedences downgradient of the Former Slag and Fly Ash Storage area, along with higher concentrations of indicator constituents show that the Former Slag and Fly Ash Storage area is contributing to the exceedances in wells MW-1 through 7." *Id.* at 69.

Between 2010 and 2017, MW-05 had a total of 87 exceedences of Part 620 standards for arsenic, boron, sulfate and TDS. *Id.* at 71-72. In the Interim Order, the Board found that the Former Slag and Fly Ash Storage area was likely the source of boron exceedences in the wells downgradient of the area, one of which is MW-05. *Id.* at 75. The recent groundwater reports indicate continued exceedences of Part 620 standards of boron, sulfate and TDS in MW-05 from November 2017 to November 2019. Exh. C at 161.

In the Interim Order, the Board identified MW-13 at Powerton as a downgradient well. Interim Order at 43. This well had 101 exceedences of Part 620 standards of arsenic, boron, sulfate, and TDS between 2010 and 2017. *Id.* at 44-46. Further, the Board found that "the Environmental Groups have proven that it is more probable than not that coal ash stored onsite, either in the ash ponds or outside of the ponds, is causing or contributing to exceedances" of Part 620 standards in downgradient wells, including MW-13. *Id.* at 48-50. The recent ground water reports indicate continued exceedences of Part 620 standards of arsenic, boron, sulfate and TDS in MW-13 from October 2017 to November 2019[1]. Exh. D at 177.

At the Will County station, the Board identified MW-07 as a downgradient well. Interim Order at 57-58. This well had a total of 63 exceedences of Part 620 standards for boron, sulfate, and TDS between 2010 and 2017. *Id.* at 59-61. Further, the Board found that "the Environmental Groups have proven that it is more probable than not that coal ash stored onsite, either in the ash ponds or outside of the ponds, is causing or contributing to," exceedances of Part 620 standards in downgradient wells, including MW-07 at Will County. *Id.* at 62-63. The recent ground water reports indicate continued exceedences of Part 620 standards of boron, sulfate and TDS in MW-07 from January 2017 to August 2019[2]. Exh. E at 188.

The Board finds that prejudice to the nonmoving party, which includes ongoing environmental harm at the four Stations, weighs in favor of not granting a stay in this matter. Accordingly, the Board finds that a stay is not warranted and denies the motion for a stay.

ORDER

1. For the above reasons, the Board denies MWG's motion to stay this proceeding.

2. The Board directs the parties and the hearing officer to proceed expeditiously to hearing on remedy.

---

[1] There were exceptions - the sulfate and TDS levels in first quarter of 2018 were below Part 620 standards. Exh. D at 177.

[2] The only exceptions were the sulfate and TDS levels in the second (7/18) and third (10/18) quarter of 2018 that were below Part 620 standards. Exh. E at 188.

IT IS SO ORDERED.

Board Member Carter abstained.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 16, 2020 by a vote of 3-0.

Don A. Brown

Don A. Brown, Clerk
Illinois Pollution Control Board