ILLINOIS POLLUTION CONTROL BOARD
May 6, 2021

PRAIRIE RIVERS NETWORK,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 19-93
	)	(Citizens Enforcement - Water)
DYNEGY MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by C.M. Santos):

On April 1, 2019, Prairie Rivers Network (PRN) filed a five-count complaint (Comp.) alleging water violations by Dynegy Midwest Generation, LLC (Dynegy). The complaint concerns Dynegy's Vermilion Power Station (Station), a retired coal-fired power plant located on the west bank of the Middle Fork of the Vermilion River (Middle Fork) approximately five miles north of Oakwood, Vermilion County.

On May 1, 2019, Dynegy filed a motion to stay the complaint pending final resolution of a federal court action filed by PRN. Alternatively, Dynegy seeks to dismiss counts 4 and 5 as duplicative and to dismiss count 4 as frivolous.

For the reasons below, the Board concludes to 1) deny Dynegy's motion to stay, 2) deny Dynegy's motion to dismiss Counts 4 and 5 as duplicative, and 3) deny Dynegy's motion to dismiss Count 4 as frivolous.

Below, the Board first summarizes the procedural history and PRN's complaint. The Board then provides the legal background, including citizens' enforcement complaints and the provisions allegedly violated. The Board next discusses Dynegy's motion to stay the complaint before addressing its motion to dismiss counts 4 and 5 as duplicative and to dismiss count 4 as frivolous. Finally, the Board reaches its conclusions and issues its order.

PROCEDURAL HISTORY

On April 1, 2019, PRN filed its complaint, attached to which were nine exhibits (Comp. Exh. 1-9).

On May 1, 2019, Dynegy filed its motion to stay this action or, in the alternative, to dismiss Counts 4 and 5 as duplicative and to dismiss Count 4 as frivolous (Mot. Stay). Dynegy also submitted a memorandum in support of its motion (Memo.), attached to which were two exhibits (Memo. Exh. A, B).

After the Board's hearing officer granted a motion to extend the response deadline, PRN on June 5, 2019, timely filed its response (Resp.), attached to which were four exhibits (Resp. Exh. A-D).

On June 19, 2019, Dynegy filed a motion for leave to file a reply, Attachment A to which is the Reply in support of the motion to stay or dismiss (Reply). Also attached to the motion for leave were two exhibits (Reply Exh. A, B). The Board grants Dynegy's unopposed motion for leave to file (35 Ill. Adm. Code 101.500(d)) and accepts the Reply and two exhibits.

PRN's COMPLAINT

Violations Alleged

Count 1

PRN alleges that, by storing and disposing of coal ash at the Station, Dynegy discharged contaminants into the environment and the Middle Fork, which caused and continues to cause water pollution in violation of Section 12(a) of the Environmental Protection Act (Act) (415 ILCS 5/12(a) (2018)). Comp. at 12.

Specifically, PRN alleges that, "between 1992 and 2018, contamination from Dynegy's disposal and storage of coal ash at the Vermilion Power Station caused at least 540 exceedances of Illinois Class I Groundwater Quality Standards for arsenic, beryllium, boron, iron, manganese, pH, sulfate and TDS [total dissolved solids]." Comp. at 12, citing 35 Ill. Adm. Code 620.410 (groundwater quality standards); Exh. 3 (Violations of Illinois Class I Groundwater Quality Standards).

Alternatively, PRN alleges that "between 1992, and 2018, contamination from Dynegy's disposal and storage of coal ash at the Vermilion Power Station caused at least 476 exceedances of Illinois Class II Groundwater Quality Standards for boron, iron, pH, sulfate, and TDS." Comp. at 12, citing 35 Ill. Adm. Code 620.420 (groundwater quality standards); Exh. 4 (Violations of Illinois Class II Groundwater Quality Standards).

Count 2

PRN alleges that, by storing and disposing of coal ash at the Station, Dynegy discharged contaminants into the environment and the Middle Fork, which created and continues to create a water pollution hazard in violation in Section 12(d) of the Act (415 ILCS 5/12(d) (2018). Comp. at 13, citing 35 Ill. Adm. Code 620.410, 620.420; Exhs. 3, 4.

Count 3

PRN alleges that exceedances of the Board's groundwater quality standards caused by contamination from coal ash impoundments at the Station have violated and continue to violate Sections 620.115, 620.301(a), and 620.405 of the Board's groundwater quality standards. Comp. at 13, citing 35 Ill. Adm. Code 620.115 (Prohibition), 620.301(a) (General Prohibition Against

Use Impairment of Resource Groundwater), 620.405 (General Prohibitions Against Violations of Groundwater Quality Standards).

Count 4

PRN alleges that discharges from Dynegy's coal ash impoundments have included and continue to include pollutant concentrations exceeding the Board's effluent limits. Comp. at 13, citing 35 Ill. Adm. Code 304.124 (Additional Contaminants).

Specifically, PRN alleges that, "in May 2016 and September 2017, Dynegy's discharges caused at least four exceedances of Illinois effluent standards for iron and manganese." Comp. at 14.

PRN also alleges that "Dynegy's discharges of pollutants have been, and continue to be, a a bright orange-red color that stands out distinctly and not 'below obvious levels'" in violation the Board's general effluent standards for offensive discharges. Comp. at 14, citing 35 Ill. Adm. Code 304.106. PRN further alleges that these discharges "have occurred on at least five occasions and, upon information and belief, are ongoing." Comp. at 14, citing Exh. 9 (photos).

Count 5

PRN alleges that "Dynegy's discharges of pollutants have discolored, and are continuing to discolor, the Middle Fork a bright orange-red color not of natural origin" in violation of the Board's water quality standards for offensive discharges. Comp. at 14, citing 35 Ill. Adm. Code 302.203. PRN further alleges that these "brightly-colored discharges have discolored the Middle Fork in colors not of natural origin on at least five occasions and, upon information and belief, are ongoing." Comp. at 14-15.

Relief Requested

PRN first requests that the Board issue an order finding that Dynegy has violated and continues to violate the Act and regulations by causing pollution of groundwater and surface water at the Station. Comp. at 15.

PRN also requests that the Board impose a civil penalty. Comp. at 15, citing 415 ILCS 5/42 (2018).

PRN next requests that the Board order Dynegy to "[c]ease and desist from causing or threatening to cause water pollution, [m]odify its coal ash and coal combustion residual waste disposal and storage practices so as to avoid future water contamination, and "[r]emediate the contaminated groundwater and surface water so that it meets applicable Illinois Groundwater Quality Standard and Illinois Water Quality Standards." Comp. at 15, citing 415 ILCS 5/33 (2018).

Finally, PRN requests a grant of "such other relief as the Board deems just and proper." Comp. at 15.

LEGAL BACKGROUND

In the following subsections, the Board first describes citizens enforcement complaints under the Act. The Board then sets forth the provisions of the Act and Board regulations allegedly violated.

Citizens Enforcement Actions

Any person may file with the Board a complaint meeting the requirements of Section 31(c) of the Act (415 ILCS 5/31(c) (2018)) against any person allegedly violating the Act, any rule or regulation adopted under the Act, any permit or term or condition of a permit, or any Board order. 415 ILCS 5/31(d)(1) (2018). The Board must schedule a hearing on the complaint "unless the Board determines that such complaint is duplicative or frivolous." 415 ILCS 5/31(d)(1) (2018); 35 Ill. Adm. Code 103.212(a).

Provisions Allegedly Violated

PRN alleges that Dynegy violated Sections 12(a) and 12(d) of the Act, which provide that no person shall:

> (a) [c]ause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.
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> * * *
>
> (d) [d]eposit any contaminants upon the land in such place and manner so as to create a water pollution hazard. 415 ILCS 5/12(a), (d) (2018).

PRN also alleges that Dynegy violated Sections 302.203 of the Board's general use water quality standards and Section 304.106 of the Board's general effluent standards.

Section 302.203 provides in its entirety that "[w]aters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin. The allowed mixing provisions of Section 302.102 shall not be used to comply with the provisions of this Section." 35 Ill. Adm. Code 302.203 (Offensive Conditions).

Section 304.106 provides in its entirety that, "[i]n addition to the other requirements of this Part, no effluent shall contain settleable solids, floating debris, visible oil, grease, scum or sludge solids. Color, odor and turbidity must be reduced to below obvious levels." 35 Ill. Adm. Code 304.106 (Offensive Discharges).

In addition, Section 304.124 provides that no person shall cause or allow the concentration of specified constituents in any effluent to exceed levels including 2.0 mg/L for iron (total) and 1.0 mg/L for manganese. 35 Ill. Adm. Code 304.124.

PRN also alleges that Dynegy violated Sections 620.115, 620.301(a), and 620.405 of the Board's groundwater quality regulations. Section 620.115 provides in its entirety that "[n]o person shall cause, threaten or allow a violation of the Act, the IGPA [Illinois Groundwater Protection Act] or regulations adopted by the Board thereunder, including but not limited to this Part." 35 Ill. Adm. Code 620.115.

Section 620.301(a) provides that:

> [n]o person shall cause, threaten or allow the release of any contaminant to a resource groundwater such that:
>
> 1) Treatment or additional treatment is necessary to continue an existing use or to assure a potential use of such groundwater; or
>
> 2) An existing or potential use of such groundwater is precluded. 35 Ill. Adm. Code 620.301(a).

Section 620.405 provides in its entirety that "[n]o person shall cause, threaten or allow the release of any contaminant to groundwater so as to cause a groundwater quality standard set forth in this Subpart [D] to be exceeded." 35 Ill. Adm. Code 620.405. Subpart D of Part 620 contains the groundwater quality standards for potable resource groundwater (Class I) and general resource groundwater (Class II). *See* 35 Ill. Adm. Code 620.410 (Class I), 620.420 (Class II); *see also* 35 Ill. Adm. Code 620.210 (potable resource groundwater classification), 620.220 (general resource groundwater classification).

MOTION TO STAY

A motion to stay "must be accompanied by sufficient information detailing why a stay is needed." 35 Ill. Adm. Code 101.514(a). 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, slip op. at 2 (May 15, 2003), *aff'd. sub nom*. State Oil Co. v. PCB, 822 N.E.2d 876, 291 Ill. Dec. 1 (2nd Dist. 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. *See* A. E. Staley Mfg. Co. v. Swift & Co., 84 Ill. 2d 245, 254, 419 N.E.2d 23, 27-28 (1980).

The Board may also weigh the prejudice to the non-moving party from staying the proceeding against the policy of avoiding duplicative litigation. *See* Village of Mapleton v. Cathy's Tap, Inc., 313 Ill. App. 3d 264, 267, 729 N.E.2d 854, 857 (3d Dist. 2000); *see also* Sierra Club v. Midwest Generation, LLC, PCB 13-15, slip op. at 16-17 (Apr. 17, 2014). The

Board also considers the environmental harm that would result from staying the proceeding. Sierra Club v. Midwest Generation, LLC, PCB 13-15, slip op. at 16 (Apr. 17, 2014).

Dynegy argues that the existence of a federal complaint provides grounds to stay this proceeding, as the Board complaint concerns the same central issues. PRN disagrees, arguing that the Board should proceed while the dismissal of the federal complaint is appealed. That appeal is stayed pending a decision by the U.S. Supreme Court. For the following reasons, the Board denies the motion for stay. The Board addresses each factor it considers in deciding whether to grant a stay as well as any prejudice to PRN.

Stay Factors

Comity

"Comity is the principle under which courts will give effect to the decisions of a court of another jurisdiction as a matter of deference and respect." Environmental Site Developers, Inc. v. White & Brewer Trucking, Inc.; People v. White & Brewer Trucking, Inc., PCB 96-180, PCB 97-11, slip op. at 4 (July 10, 1997), citing Black's Law Dictionary, 6th Ed. (1990). "Where another court has taken jurisdiction over a controversy, a court with jurisdiction over the same controversy as a result of a later-filed suit will generally, as a matter of comity, defer to the first court in ruling on the matter before both courts." ESDI, slip op. at 4.

The Board disagrees with Dynegy's assertion that "comity weighs in favor of a stay." Memo. at 6. The federal court dismissed the complaint, and the record before the Board does not indicate that the case has been reinstated. *See* Memo. at 12, citing 350 F. Supp. 697 (C.D. Ill. 2018). The Board understands that, while PRN's appeal to the U.S. Court of Appeal for the Seventh Circuit remains pending, the Seventh Circuit granted PRN's request to stay the appeal pending resolution of a matter before the U.S. Supreme Court. *See* Memo. at 6, 12-13, citing Prairie Rivers Network v. Dynegy Midwest Generation, LLC, Order, No. 18-3644 (7th Cir., Mar. 7, 2019). However, that matter is not now proceeding. Therefore, the current state of the federal case is that the complaint has been dismissed.

While both cases allege discharges from impoundments at the Station and are based on the same "central factual allegations" (Memo. at 2), PRN bases the Board complaint on different legal theories and is seeking different relief. The Board also finds persuasive the arguments by PRN that the federal court could not rule on its alleged violations of the Illinois Environmental Protections Act "even if it wanted to" since the Board has exclusive jurisdiction over citizen complaints. Resp. at 13, citing Mather Investment Properties, LLC v. Illinois State Trapshooters Association, Inc., PCB 05-29, slip op. at 12 (July 21, 2005); People v. State Oil Co., PCB 97-103, slip op. at 5-7 (Aug. 19, 1999).

The Board finds that comity does not favor a stay. The record does not show that another case is pending, and no other court has asserted jurisdiction over the matter before the Board.

Prevention of Multiplicity, Vexation, and Harassment.

Dynegy relies on the Board's decision in Environmental Site Developers, Inc. v. White & Brewer Trucking, PCB 97-11, (Sept. 18, 1997), to argue that this factor supports a stay. In ESDI, the Board found that the complainant requested "some different relief from the Board than the federal court (*i.e.*, statutory penalties)." Memo. at 4. Dynegy states that, because the two cases involved the same "central" issues, the Board found that allowing both to continue simultaneously would result in a multiplicity of litigation. Memo. at 5, citing ESDI, PCB 97-11, slip op. at 2. Dynegy argues that the Board stayed the case although "the claims in the two cases did not completely overlap and a decision in the other forum may not have fully resolved the Board case." Memo. at 5.

The Board is not convinced that its decision in ESDI supports Dynegy's arguments that allowing both cases to proceed would result in a multiplicity of litigation and waste the Board's and parties' resources. As discussed above, the current status of the federal case is that the case is dismissed. While that dismissal is stayed, ultimately the federal complaint may not proceed at all. Therefore, the Board does not weigh this factor in favor of a stay.

Likelihood of Obtaining Complete Relief in Foreign Jurisdiction.

Dynegy's motion did not address this factor. *See* Memo. at 3-6. However, a review of the relief requested by PRN establishes that the federal complaint will not address the relief PRN seeks in this complaint, and the Board weighs this factor against a stay.

Res Judicata

"The doctrine of *res judicata* states that once a cause of action has been adjudicated by a court of competent jurisdiction, it cannot be retried again between the same parties or their privies in new proceedings." Burke v. Village of Glenview, 257 Ill. App. 3d 63, 69 (1st Dist. 1993). The elements of *res judicata* are: "(1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of cause of action; and (3) an identity of parties or their privies." People *ex rel.* Burris v. Progressive Land Developers, Inc., 151 Ill. 2d 285, 294 (1992). "Where these elements are present, a judgment in a suit between the parties will be conclusive of all questions decided as well as questions which could have been litigated and decided and will bar relitigation of any such issues in a subsequent action." ESDI, PCB 96-180, PCB 97-11, slip op. at 6 (July 10, 1997), citing Progressive Land Developers, 151 Ill. 2d at 294. The doctrine is based on the principle of fairness and requires that litigation must end when a matter is decided on its merits. Burke, 257 Ill. App. 3d at 294.

The Board agrees with Dynegy's assertion that the federal complaint and Board complaint involve the same parties and share "an identity of cause of action." Memo. at 4-5, citing ESG Watts v. IEPA, PCB 96-181, slip op. at 2 (July 23, 1998). However, the Board disagrees with Dynegy that the federal court "may resolve many or all of the legal and factual issues in the Complaint." Memo. at 5, citing Midwest Generation EME v. IEPA, PCB 04-216, slip op. at 8 (Apr. 6, 2006). As PRN points out, its federal complaint alleged discharging without a federally-required permit and violating conditions of a federal permit. It did not allege state law violations. *See* Resp. at 8, citing Mot. Exh. A at 13-16 (¶¶58-78). The Board complaint alleges that Dynegy violated the Act and state regulations. Resp. at 8, citing Comp. at 12-15 (¶¶

45-60). Therefore, a decision on the federal complaint would not resolve all the issues alleged in this complaint. The Board is not convinced that the doctrine of *res judicata* supports a stay.

Prejudice to Non-Moving Party and Environmental Harm

When the Board considers whether to grant a stay, PRN argues that it may weigh "the prejudice a stay would cause the nonmovant." Resp. at 16, citing Sierra Club v. Midwest Generation, PCB 13-15, slip op. at 16-17 (Apr. 17, 2014). Likewise, PRN argues that the Board may weigh "environmental harm that would result from staying the proceeding." Resp. at 3, citing Sierra Club v. Midwest Generation, PCB 13-15, slip op. at 16-17 (Apr. 17, 2014). The Board agrees that it may consider prejudice to the nonmovant and environmental harm when ruling on a stay. However, as the Board has not found that the factors above weigh in favor of granting a stay, and the Board is not persuaded that these factors warrant a stay.

Conclusion on Motion to Stay

The existence of a case in another forum is not automatically a reason to stay a cause of action. In this instance it is significant that the case in the federal court has been dismissed, even though that decision is stayed. After reviewing the factors to be considered when deciding to stay, the Board concludes that they do not support a stay of this action. Therefore, the Board denies the motion to stay.

MOTION TO DISMISS

Dynegy moves that the Board dismiss Counts 4 and 5 as duplicative of Count 2 of the federal complaint. Dynegy also moves that the Board dismiss Count 4 as frivolous. Memo. at 1; Mot. Stay at 1, 3, citing 415 ILCS 5/31(d)(1) (2018); 35 Ill. Adm. Code 103.212(a).

In the following subsections, the Board first addresses Dynegy's motion to dismiss Counts 4 and 5 as duplicative before addressing its motion to dismiss Count 4 as frivolous.

Standard for Deciding Motions to Strike or Dismiss

When deciding a motion to strike or dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See, e.g.*, Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004); *see also* *In re* Chicago Flood Litigation, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997); Board of Education v. A, C & S, Inc., 131 Ill. 2d 428, 438, 546 N.E.2d 580, 584 (1989). A complainant need not set out its evidence, but only the ultimate facts to be proved. *See* Schilling v. Hill, PCB 10-100, slip op. at 7 (Mar. 15, 2012). "[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85 (2003); *see also* People v. Sheridan Sand & Gravel Co., PCB 06-177, slip op. at 4 (Sept. 7, 2006).

The Board is not convinced by the record before it that the complaint is either frivolous or duplicative. The Board first discusses allegations that the complaint is duplicate and then the argument that it is frivolous.

Duplicative. 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. Dynegy argues that Counts 4 and 5 of the Board Complaint allege legal claims and theories of law identical to Count 2 of the Federal Complaint. Memo. at 9. Dynegy cites Yorkville v. Hamman Farms, in which the Board weighed four factors to determine whether a case was duplicative: 1) whether the parties are the same in both matters, 2) whether the claims are based on the same legal theories, 3) whether the actions involve the same time frame, and 4) whether the requested relief differs. Memo. at 13, *citing* Yorkville v. Hamman Farms, PCB 08-96, slip op. at 6 (Apr. 2, 2009). Dynegy argues that each factor weighs in favor of dismissal. Memo. at 13-15.

Specifically, Dynegy maintains that Count 4 and Count 5 alleged violations that are substantively identical to Count 2 of the Federal Complaint and are therefore duplicative. *Id*. PRN argues that Dynegy's motion fails because there is no pending Federal lawsuit. Resp. at 17. Alternatively, PRN argues that the motion fails because the claims in the Board complaint are based on different legal theories and seek different relief. *Id*.

The Board is persuaded that the counts are not duplicative, as there is no federal complaint currently pending. However, even if the federal complaint is reinstated, the Board is not convinced that the counts would be duplicative. The federal complaint alleged that Dynegy violated the Clean Water Act by 1) discharging to the Middle Fork without authorization in an NPDES permit and 2) violating permit conditions. Resp. at 17, citing Federal Compl. at ¶¶ 58-78. The complaint before the Board alleges violations of the Act and Board rules. Taking all well pled facts in favor of PRN, the Board is not convinced that the complaint is duplicative, and the Board denies the motion.

Frivolous. 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." 35 Ill. Adm. Code 101.202. Dynegy argues that the discharge alleged in Count 4 of the Board Complaint is described as "groundwater flow[ing] laterally through the ash" and "groundwater seeps discharging to the river." Dynegy asserts that these are subsurface non-point discharges and not "effluent.". Memo at 15-16, *citing* Compl. at ¶¶ 21 & 24. Dynegy argues that, because the alleged discharges are nonpoint discharges from impoundment, they are not subject to 35 Ill. Adm. Code 304.106 or 304.124 and that Count 4 should therefore be dismissed as frivolous. Memo at 16.

Dynegy states that "effluent" is defined by Board rules as "any wastewater discharged, directly or indirectly, to the waters of the state or to any sewer . . . **but does not otherwise include nonpoint source discharges**. . . ." Memo at 15, *citing* 35 Ill. Adm. Code § 301.275 (emphasis in original). Dynegy argues the Board applied this definition to subsurface leachate from an unlined pond at a different Illinois coal-fired generating station. Memo at 15-16, *citing* Central Ill. Pub. Serv. Co. v. IEPA, PCB 84-105, slip op. at 3 (Nov. 8, 1984).

PRN argues that Count 4 of the Board complaint is not frivolous because the plain language of the Board's regulations qualify the discharges from the coal ash ponds as effluent. Resp. at 24-25. PRN argues that the unlined coal ash ponds contain wastewater from coal-fired power production, and the wastewater then discharges into the Middle Fork through seeps. *Id*. at 25.

In reviewing all well pled facts in favor of PRN, the Board is not persuaded that Count 4 is frivolous. The complaint sets forth a series of facts that could result in a finding of violation. Whether or not the discharge is an effluent or a nonpoint discharge is a question of both law and fact that the record now before the Board does not resolve. While Dynegy's arguments may be considered when determining if a violation exists, they are not sufficient to support a motion to dismiss this allegation as frivolous.

Conclusion on Motion to Dismiss

When deciding a motion to dismiss, the Board must take the well-pled allegations as true, and it draws all reasonable inferences from the allegations in favor of the non-moving party. While Dynegy raises issues that may be relevant in determining whether it has committed a violation, the Board finds that the complaint pleads sufficient facts to establish that PRN may be entitled to relief. Therefore, the Board denies the motions to dismiss as frivolous or duplicative.

ACCEPT FOR HEARING

The Board accepts the complaint for hearing. *See* 415 ILCS 5/31(d)(1) (2018); 35 Ill. Adm. Code 103.212(a). A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if respondent fails 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 respondent to have admitted the allegation. *See* 35 Ill. Adm. Code 103.204(d).

The Board directs the hearing officer to proceed expeditiously to hearing. Upon its own motion or the motion of any party, the Board or the hearing officer may order that the hearing be held by videoconference. In deciding whether to hold the hearing by videoconference, factors that the Board or the hearing officer will consider include cost-effectiveness, efficiency, facility accommodations, witness availability, public interest, the parties' preferences, and the proceeding's complexity and contentiousness. *See* 35 Ill. Adm. Code 101.600(b), 103.108.

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) (2018). 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) (2018). 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.

CONCLUSION

For the reasons above, the Board denies Dynegy's motions. The Board concludes that 1) a stay is not warranted, 2) Counts 4 and 5 should not be dismissed as duplicative, and 3) Count 4 should not be dismissed as frivolous. Having denied the motions, the Board accepts the complaint for hearing. Dynegy has 60 days from the date if this order - until Tuesday, July 6. 2021 - to file an answer to the complaint. *See* 35 Ill. Adm. Code 101.300(a) (State legal holiday).

ORDER

The Board denies Dynegy's motions for a stay and to dismiss and accepts the citizens complaint for hearing. The Board directs its assigned hearing officer to proceed to hearing.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 6, 2021, by a vote of 4-0.

Don A. Brown, Clerk
Illinois Pollution Control Board