WHAT DO RECENT ENVIRONMENTAL ENFORCEMENT DECISIONS MEAN FOR YOUR COMPANY?

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The precedents established by recent enforcement-related actions and decisions involving the Illinois Environmental Protection Act ("Act") are eroding traditional protections regulated entities have relied upon in Illinois, and are a significant cause for concern. The rulings of the Illinois Pollution Control Board ("Board") in *Sierra Club, et al. v Midwest Generation, LLC*, PCB No. 13-15, raise serious questions regarding the scope of liability protection afforded by Compliance Commitment Agreements and groundwater management zones ("GMZs") negotiated between regulated entities and the Illinois Environmental Protection Agency ("Agency"). Meanwhile, the *Midwest Generation* rulings and the Agency's 2018 enforcement action against the Sterigenics facility in Willowbrook significantly expand the scope of potential liability for open dumping and air pollution violations under the Act. Illinois companies cannot afford to ignore the alarming precedent set by Midwest Generation and the Sterigenics proceeding, and an understanding of these actions and decisions is essential for companies seeking to navigate the environmental regulatory system in Illinois and safeguard their bottom line.

Environmental Enforcement in Illinois

The Midwest Generation case and the Sterigenics complaint were enforcement proceedings brought under the authority of Section 31 of the Act (415 ILCS 5/31). Section 31(a) of the Act establishes a "pre-referral" process that the Agency is required to follow for alleged violations of the Act or Board regulations prior to referral to the Illinois Attorney General's Office ("IAGO"). Within 180 days of becoming aware of an alleged violation of the Act or Board regulations, Section 31(a) requires the Agency to notify the alleged violator in writing. The written Violation Notice must include a detailed explanation of the alleged violation(s) and provide the violator with an opportunity to meet with Agency personnel. Section 31(a) also allows an alleged violator to propose terms for a Compliance Commitment Agreement ("CCA") to resolve the alleged violations prior to formal enforcement by the Agency. Upon receiving proposed terms for a CCA, the Agency can either issue a proposed CCA or notify the alleged violator that the violations cannot be resolved without the involvement of the Attorney General or the local State's Attorney.

> A COMPANY'S COMPLIANCE WITH AGENCY-ISSUED AIR AND WATER PERMITS OR AGENCY-APPROVED GMZs OR CCAs IS NOT ENOUGH.

If the Agency elects to enter into a CCA, Section 31(a)(10) of the Act provides that "[i]f the person complained against complies with the terms of the Compliance Commitment Agreement …, the Agency shall not refer the alleged violations that are the subject of the Compliance Commitment Agreement to the IAGO or the State's Attorney of the county in which the alleged violation occurred." As amended in 2011, Section 31 provides that any violation of a CCA is an enforceable violation of the Act, subject to civil penalties. Under the 2018 amendments to Section 31, the Agency is required to publish all final executed CCAs on its website and maintain a searchable database for CCAs.

If, in the exercise of its discretion, the Agency elects not to enter into a CCA, it can refer the alleged violations to the IAGO or State's Attorney. The IAGO or State's Attorney can then file a formal complaint, either before the Board or the circuit court of the county where the alleged violation occurred. Section 31(d)(1) of the Act also allows "any person" to file a complaint before the Board against an alleged violator of the Act or the Board's regulations. This type of complaint is known as a citizen's enforcement action and is not subject to the pre-referral notice and meeting requirements applicable to the Agency. (Additionally, in prior decisions, the Board has consistently held that the IAGO can file a complaint under its own independent legal authority and is not required to comply with the Section 31(a) pre-referral requirements.)

The *Midwest Generation* case was a citizen's enforcement action and the Sterigenics Complaint was filed jointly by the IAGO and DuPage County State's Attorney, but these matters utilize three of the most important enforcement tools available to the Agency and private citizens/environmental groups: Sections 9(a), 12(a), and 21(a) of the Act which prohibit air and water pollution and open dumping, respectively. The applicable statutory language is as follows:

Section 9(a): No person shall "[c]ause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, …"

Section 12(a): No person shall "(a) Cause 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 other sources, …"

Section 21(a): No person shall "(a) Cause or allow the open dumping of any waste."

The definitions of "air pollution" and "water pollution" in the Act are both anchored by the term "contaminant" which is broadly defined as "any sol-

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id, liquid, or gaseous matter, any odor, or any form of energy, from whatever source." "Open dumping" is defined as "the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill."

The *Midwest Generation* Case

In 2010, Midwest Generation ("MWG") voluntarily performed hydrogeological assessments of coal ash disposal ponds at its four Illinois power stations: Joliet #29, Powerton, Will County, and Waukegan ("the Stations"). MWG has owned and operated the Stations since 1999, and the coal ash disposal ponds at all four MWG power stations were lined and permitted under National Pollutant Discharge Elimination System ("NPDES") permits issued by the Agency to MWG. MWG submitted the groundwater monitoring results from the hydrogeological assessments to the Agency and, in June 2012, the Agency issued Violation Notices ("VNs") to MWG alleging violations of Section 12(a) and the Illinois groundwater quality standards and regulations at all four Stations.

Following Section 31 pre-referral meetings for the VNs, MWG and the Agency entered into CCAs for each of the Stations on October 24, 2012. The CCAs required MWG to cease using the ash ponds as permanent disposal sites, continue periodic removal of ash from the ponds, and continue groundwater monitoring at all four Stations. Additional site-specific compliance measures were mandated by the CCAs, including relining certain ash ponds and removing some ponds from service, establishing GMZs at Joliet #29, Powerton and Will County, and installing additional monitoring wells. In 2013, MWG certified to the Agency that it had met the requirements of all four CCAs.

On October 4, 2012, four environmental groups (Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment) filed a complaint against MWG before the Board for violations of Section 12(a) and (d) and 21(a) of the Act at all four of the Stations. Over the course of the ensuing litigation, the Board issued Orders on October 3, 2013 (addressing MWG's dismissal motion) and June 20, 2019 (addressing MWG's liability). The Board's Orders contained the following significant rulings.

First, the Board unequivocally rejected MWG's argument that the complaint filed by the environmental groups was precluded by the CCAs negotiated between MWG and the Agency. The Board noted in its October 3, 2013 Order that the "existence of a CCA does not preclude the filing by the People or any citizen of an enforcement action against the person subject to the CCA," and further noted that "the Agency's role in pursuing enforcement against alleged violations of the Act or Board regulations plainly is not exclusive." The Board also rejected MWG's claim that the issuance of the CCAs rendered the claims of the environmental groups moot, and held that the only claims eliminated by the CCAs were those claims the Agency could have pursued through a referral. Dismissing MWG's contention that the General Assembly's 2011 amendments to Section 31 were intended to make CCAs legally binding and independently enforceable, the Board opined that the Section 31 pre-referral process "is not capable of producing anything comparable to a consent decree or settlement agreement."

Under the Board's ruling, CCAs provide very limited protection to alleged violators. While the Agency cannot refer violations that are addressed in a CCA, the Board's ruling is clear that these same violations can be the subject of a citizen's enforcement action or a complaint filed by the IAGO or State's Attorney. As a result, a company that enters into a CCA with the Agency may later find itself the subject of a Board proceeding that seeks penalties or other relief for violations previously addressed in a CCA negotiated with the Agency. The new requirement for publication of CCAs on the Agency's website means that the IAGO and private citizens will have a roadmap for alleging violations of the Act and/or Board regulations against a company that has entered into a CCA.

Second, the Board's interpretation of the regulation governing the establishment of GMZs calls into question the validity of GMZs established at sites throughout the State of Illinois to address impacted groundwater. As explained in 35 ILL. ADM. CODE 620.250(a), a GMZ is a "three-dimensional region containing groundwater being managed to mitigate impairment caused by the release of contaminants from a site." Prior to the completion of corrective action, the Class I and Class II groundwater quality standards are not applicable to groundwater within the GMZ, provided that corrective action proceeds in a "timely and appropriate manner." 35 ILL. ADM. CODE 620.450(a)(3).

In an issue of first impression, the Board ruled that "timely and appropriate" corrective action did not include groundwater monitoring conducted by MWG or ongoing natural attenuation of groundwater contamination at the Stations. Instead, the Board held that "corrective action" must be accomplished through remediation of contamination or removal of the contamination source. Even though the Agency had taken no action to modify or remove the GMZs at the Stations, the Board ruled that MWG could not claim the exemption from Class I groundwater quality standards afforded by the GMZ regulations after it certified completion under the CCAs. Based on this ruling, the Board found that MWG was in violation of Section 12(a) for the period of time prior to the establishment of the GMZs and after certification of the CCAs.

For those remediation sites in Illinois where a GMZ has been established, the Board's ruling strongly suggests that GMZs may be invalid unless active remediation or contamination removal is underway at those sites. Under the Board's ruling, the exemption from the groundwater quality standards only applies during a period of active remediation or contamination removal in the area covered by the GMZ. Thus, if a GMZ is no longer in effect after Midwest Generation, the Class I or Class II groundwater quality standards apply to groundwater within the area covered by the GMZ, and exceedances of the groundwater quality standards could be the subject of enforcement actions by the State and/or private citizens.

Finally, the Board found that MWG was liable under Section 21(a) of the Act for open dumping at the Powerton, Waukegan and Will County Stations even though MWG was not the entity that placed the coal ash on the land.

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The Complaint filed by the environmental groups alleged that MWG violated the Section 21(a) prohibition against open dumping, by its "knowledge of and acquiescence to" coal ash having been deposited in the coal ash ponds prior to MWG's ownership of the power stations.

In its motion to dismiss the environmental groups' complaint, MWG countered that the ash ponds were not "disposal sites" because they were specifically referenced in and covered by the NPDES permits issued by the Agency for each of the Stations. MWG further argued that it had not "allowed" open dumping and listed the extensive efforts it had undertaken to prevent open dumping, remove ash from the ponds on a periodic basis, and upgrade the existing ash ponds.

The Board rejected MWG's arguments, holding that "a properly permitted facility may become a 'disposal site' subject to the open-dumping proscription." According to the Board, because the ash ponds at the four Stations were not permitted "for the disposal of waste," they did not fulfill the requirements of a sanitary landfill and were in violation of Section 21(a) of the Act. The Board also held that MWG had control over the areas containing coal ash since 1999 when it began operating the Stations, and violated Section 21(a) by failing to remove coal ash from the Station properties and also by allowing the release of coal ash contamination to groundwater.

The Board's ruling indicates that any surface impoundment or similar containment structure that is part of a wastewater treatment system covered by a NPDES permit is, by definition, in violation of Section 21(a). Under the Board's reasoning, Section 21(a) violations are also a means by which the State or a private citizen can impose strict liability on owners of impacted properties that are not covered by a landfill permit, and thereby circumvent the proportionate share liability standard set forth in Section 58.9 of the Act ("in no event may the Agency, the State of Illinois, or any person bring an action pursuant to this Act or the Groundwater Protection Act to require any person to conduct remedial action or to seek recovery of costs for remedial action conducted by the State of Illinois or any person beyond the remediation of releases of regulated substances that may be attributable to being proximately caused by such person's act or omission or beyond such person's proportionate degree of responsibility …").

The *Midwest Generation* decision is an interim order of the Board and is still subject to reconsideration by the Board and, eventually, an appeal to the Illinois Appellate Court. The Board's docket indicates that Midwest Generation will seek reconsideration or modification of the Board's rulings. Further developments in the case will be closely watched by both environmental groups and the regulated community.

The Sterigenics Complaint

On October 30, 2018, the IAGO and DuPage County State's Attorney filed a Complaint for Injunctive and Other Relief against Sterigenics U.S., LLC, in the Circuit Court of DuPage County, Illinois. Per the allegations of the complaint, Sterigenics operated sterilization equipment at its Willowbrook, Illinois facility within the limits established by an Agency-issued air permit. Notwithstanding Sterigenics' compliance with its Agency-issued air permit and underlying regulations, the complaint filed by the State and County alleged that permitted ethylene oxide emissions from the Willowbrook facility were "contaminants" and "air pollution," in violation of Section 9(a) of the Act. The Section 9(a) violations were brought at the request of the Agency. According to the complaint, Sterigenics' "allowable emissions" violated Section 9(a) by threatening the health of people living and working near the facility, causing fear in the community, and interfering with the use and enjoyment of people's homes and work places. (The complaint against Sterigenics also included a separate public nuisance count.) There were no allegations in the complaint that Sterigenics failed to comply with the terms and conditions of its air permit. On February 15, 2019, the Sterigenics' Willowbrook facility was closed pursuant to a Seal Order issued by the Agency, and Sterigenics challenged the Seal Order through lawsuits filed in both federal and state court. On July 17, 2019, the IAGO and DuPage County State's Attorney filed a motion seeking approval of a proposed Consent Order, and this motion was granted on September 6, 2019.

The alleged Section 9(a) violations in the Sterigenics Complaint were not predicated on air permit violations or violations of applicable regulatory standards or emission limits. Instead, the Agency and IAGO based the alleged Section 9(a) violations on nuisance-related concerns. The use of Section 9(a) by the Agency and IAGO to assert what are essentially nuisance claims against a facility operating in compliance with an Agency-issued permit is a disquieting precedent for the regulated community in Illinois.

The Agency's use of the drastic measure of a Seal Order in the Sterigenics matter is also alarming. Although rarely used, Section 34 of the Act allows the Agency, if it "finds that an imminent and substantial endangerment to the public health or welfare or the environment exists" at any facility, to "seal any equipment, vehicle, vessel, aircraft, or other facility contributing to the imminent and substantial endangerment." The owner or operator of the site is then entitled to a hearing "to determine whether the seal should be removed," but there is no time frame for the hearing specified in the statute. In other words, the Agency can decide on its own that a facility presents an imminent danger and can shut it down indefinitely.

Granted, the IAGO has similar authority under Section 43(a) of the Act, which allows the IAGO to file a civil action in circuit court to seek immediate injunctive relief "to halt any discharge or other activity" where there is a "substantial danger to the environment or to the public health." The IAGO can obtain this injunction ex parte – meaning without prior notice to the facility and without an opportunity for the facility to oppose the injunction prior to its entry – but at least the IAGO must present evidence to a judge and convince him or her that drastic relief is needed. Fur-

ther, the court is required to "schedule a hearing on the matter not later than three working days from the date of the injunction," so the facility has an almost immediate opportunity to oppose the shutdown or work out an agreement with the IAGO. By contrast, the Seal Order by the Agency does not require any court or Board approval prior to its issuance and, as seen with Sterigenics, can remain in place for a lengthy period. Accordingly, the Agency's use of the extreme measure of issuing a Seal Order, particularly where the facility is operating in complete compliance with its permits, should be quite concerning to the regulated community.

What Are the Takeaways from *Midwest Generation* and Sterigenics?

The most significant takeaway from Midwest Generation and Sterigenics is that a company's compliance with Agency-issued air and water permits or Agency-approved GMZs or CCAs is not enough, because Sections 9(a), 12(a) and 21(a) may be employed by the State and environmental groups to impose liability on companies anyway. Likewise, a central premise to the Sterigenics enforcement action is that a company's activities can be in compliance with an Agency-issued permit and nonetheless constitute a common law nuisance, capable of adjudication in state court. This should concern any company relying on compliance with air or water permits or a GMZ to avoid liability. Midwest Generation also signifies that the legal protections afforded by CCAs are limited in scope and will not preclude a future enforcement action by the IAGO or an environmental group for the same violations.

Companies with GMZs should take special note of the Board's rulings in *Midwest Generation* which appear to significantly limit the effective period of GMZs. Indeed, any company with a GMZ on its property should assess whether it would be considered by the Agency, Board, or environmental groups to be engaged in active remediation or source removal. If not, in light of the Board's position in *Midwest Generation*, there is a risk of an enforcement action based on alleged violations of the groundwater quality standards. As noted above, the Midwest Generation decision is not yet final, but the interpretations of the Act set forth by the Board remain troublesome and, if not modified or reversed on appeal, will be applied in other cases, and will not be limited to cases involving coal ash ponds.

From a broader perspective, the *Midwest Generation* and Sterigenics matters highlight the need to stay educated regarding regulatory developments and enforcement trends in Illinois. Whereas entering into a CCA or obtaining a permit, and complying with the terms of the CCA or permit, once precluded the possibility that the State would pursue enforcement, this is seemingly no longer the case. In this new environment, maintaining open lines of communication with regulatory agencies can be an effective way to identify possible issues before they become the subject of an enforcement action, and can create an opportunity to work collaboratively with the Agency and minimize a regulated entity's exposure to liability. Similarly, monitoring local concerns and building relationships within county and municipal governments and local citizens' and environmental groups are critical steps to building support for a company's operations within its community, and can be invaluable in limiting the likelihood of nuisance-style actions. ◆