

Midwest Generation Seeks Reconsideration of Pollution Control Board Ruling Constricting Effective Period of Groundwater Management Zones to Duration of Active Remedial Work

By Michael Murphy on October 15, 2019
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On September 9, 2019, Midwest Generation, LLC (“MWG”) asked the Illinois Pollution Control Board (“Board”) to reconsider its interim order of June 20, 2019, in the enforcement case of *Sierra Club v. Midwest Generation, LLC* (docketed as PCB 13-15). That decision may have far-reaching implications for any party that has entered into an environmental compliance or remediation agreement with regulators incorporating Groundwater Management Zones (“GMZs”). According to MWG, the Board misconstrued the Illinois Environmental Protection Act and operative regulations when it found the company liable for continued violations and, in the process, drastically lowered the value of GMZs.

Midwest Generation’s Coal Ash Sites, and CCAs with the Agency

First, some background. Since 1999, MWG has owned four coal-fired power plants in Illinois: Joliet #29, Powerton, Will County, and Waukegan (“the Stations”), all utilizing coal ash disposal ponds. The ponds were lined with high-density membranes to prevent seepage into the groundwater as part of the National Pollutant Discharge Elimination System (“NPDES”) permits. Those permits were issued by the Agency, and MWG sent the regulator groundwater monitoring results stemming from a 2012 hydrogeological study.

Shortly thereafter, the Agency issued violation notices under Section 31(a) of the Illinois Environmental Protection Act (“Act”) (415 ILCS 5/31(a)), and MWG entered into discussions with the Agency regarding possible resolution outlined in that part of the Act. On October 24, 2012, MWG and the Agency resolved the dispute without litigation by entering into Compliance Commitment Agreements (“CCAs”) for each of the four Stations. The CCAs mandated relining some of the ash ponds and removing some ponds from active service. In addition, three of the stations—all except Waukegan—had GMZs incorporated into their respective agreements.

Part 620 of the Board’s rules (35 Ill. Adm. Code Part 620, *et seq.*) establishes groundwater quality standards for various scenarios. Part 620.250 created the GMZ as a corrective action mechanism, and subsection (a) provides:

“Within any class of groundwater, a groundwater management zone may be established as a three dimensional region containing groundwater being managed to mitigate impairment caused by the release of contaminants from a site:

1) That is subject to a corrective action process approved by the Agency; *or*

2) For which the owner or operator undertakes an adequate corrective action in a timely and appropriate manner and provides a written confirmation to the Agency. Such confirmation must be provided in a form as prescribed by the Agency.”

(Emphasis added.) Subsection (c) sets the expiration terms for a GMZ and states, in relevant part: “[a] groundwater management zone expires upon the Agency’s receipt of appropriate documentation which confirms the completion of the action taken pursuant to subsection (a) *and which confirms the attainment of applicable standards*” as specified in the portion of Part 620 setting groundwater quality standards for specific categories. (Emphasis added.) After explicitly defining the expiration of GMZs, that provision requires the Agency to “review the on-going adequacy of controls and continued management at the site if [stipulated] concentrations of chemical constituents ... remain in groundwater at the site following completion of such action.”

The Agency approved the CCAs for MWG’s sites, including the three incorporating GMZs, and MWG went forward with the remedial work. The company submitted certifications that the measures contained in the CCAs were completed. However, the applicable standards had not yet been attained, and MWG went forward with the belief that the GMZs were still in effect.

Environmental Groups File Suit

While this CCA negotiation process was ongoing, four environmental groups—Sierra Club, Environmental Law & Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (collectively “Environmental Groups”)—filed a complaint against MWG before the Board. They later amended the complaint and alleged violations of the Act stemming from the four coal ash ponds and ranging from 2010 through 2017. As summarized by the Board in its interim order, the Environmental Groups claimed MWG violated Sections 12(a), 12(d), and 21(a) of the Act, in that “through coal ash disposal ponds at its four stations, MWG has caused or contributed to contamination of groundwater, discarded contaminants into the environment and caused water pollution and exceedances of Illinois’ Class I and II Groundwater Quality Standards (GQS).” The proceeding was stayed for a period, but ultimately the parties put evidence before the Board in two sets of hearings, one in October 2017 and another in January-February 2018.

On June 20, 2019, the Board issued its interim order as to liability, finding MWG liable for violating Sections 12(a), 12(d), and 21(a) of the Act, along with Parts 620.115, 620, 301(a), and 620.405 of the Board regulations. Among its rulings, the Board referenced its October 3, 2013, order denying dismissal of the Environmental Groups’ complaint, where it earlier ruled 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.”

Having reaffirmed that the CCAs entered into by MWG did not protect the company from subsequent enforcement, the Board then found that groundwater monitoring revealed contamination at three stations after MWG had finished active corrective actions. As a partial basis for this finding, the Board *sua sponte* addressed the issue of the GMZ expiration at the three stations in which they had been established, holding that the “continuous monitoring required by CCAs at Joliet 29, Powerton, and Will

County does not show how that monitoring may be construed as ‘timely’ or ‘appropriate’ to remedy ground water quality...” It determined that “[c]ontinuing the GMZ in the absence of pending corrective action appears to be contrary to the purpose of Part 620 and, in particular, Section 620.250(a).” The Board found that, since MWG was not performing “pending corrective action,” those GMZs must have expired, and exceedances above the Class I Groundwater Quality Standards found in Part 620.410 (which a GMZ provides protection from) left MWG liable.

Midwest Generation Seeks Reconsideration

MWG moved for reconsideration and clarification on September 9, 2019. It argued, in part, that the Board misconstrued the Act and regulations regarding GMZ expiration, an issue that was never before the Board and which received no briefing or argument. The company contested the Board’s conclusion “that GMZs expire as soon as a specific corrective action such as relining of an ash pond is completed,” arguing this “misapplies the plain language of the regulations, is against the purpose of GMZs, and ignores Board and Illinois EPA precedent.”

Under the clear language of Part 620.250(c), MWG argues, “a GMZ continues for a period of time and only expires when *both* a corrective action is completed *and* applicable groundwater standards are attained.” (Emphasis in original.) Furthermore, the Board improperly read-in timeliness language to a portion of the GMZ rules which does not stipulate a remediation timeframe, but only requires the GMZ contain water impairing a site “[t]hat is subject to a corrective action process approved by the Agency,” which includes GMZs for these three stations.

In short, the Board had before it a complaint premised on violations at sites where the owner was using GMZs as part of its negotiated compliance agreements to avoid litigation. The Board ruled that the agreements afforded a much shorter period of protection to the party that negotiated and signed them. Then, notwithstanding that those GMZs have prescribed expirations under Board regulations, the Board turned the expiration clock forward by reading the “timely” and “appropriate” requirements found in Section 620.250(a)(2) into Section 620.250(a)(1). It construed Section 620.250 this way, in part, by ignoring the requirement that water quality standards be attained before a GMZ expires.

MWG’s Motion for Reconsideration remains pending. Given the potential implications of the Board’s rulings regarding GMZs if those rulings are not modified upon reconsideration, entities currently with GMZs or entities that may establish a GMZ in the future should pay close attention to this proceeding.

For an update on this issue, please see the post of Feb. 20, 2020. (That blog post can be read [here](#).)

Tags: Coal Ash, Groundwater Management Zones, Illinois Pollution Control Board