E-FILED
Wednesday, 03 April, 2019 06:34:46 PM
Clerk, U.S. District Court, ILCD

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

NATURAL RESOURCES DEFENSE COUNCIL, INC.; RESPIRATORY HEALTH ASSOCIATION; and SIERRA CLUB, INC., Plaintiffs, v. ILLINOIS POWER RESOURCES GENERATING, LLC, Defendant.	Case No. 13-cv-01181 United States District Judge Joe Billy McDade Magistrate Judge Thomas P. Schanzle-Haskins III

PLAINTIFFS' PRETRIAL REPLY BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

The parties' initial pretrial briefs show that they agree on many of the principles that should guide this Court's remedy decision. This reply addresses the areas where IPRG's proposed approaches to setting its penalty and determining injunctive relief would undermine the goals Congress expressed in the Clean Air Act.

ARGUMENT

I. Civil Penalties

A. IPRG's penalty should exceed the economic benefit of noncompliance

The Court's discretion in setting a civil penalty under the Clean Air Act, while "broad," IPRG's Trial Br. Under Doc. #236 (IPRG Br.) 3, ECF No. 243, is cabined by the penalty factors, 42 U.S.C. § 7413(e), and Congress's purposes of deterrence, restitution, and retribution. *See* Pls.' Initial Pretrial Br. (Pls. Br.) 1-4, ECF No. 240. IPRG violated the emission standards that apply at Edwards thousands of times during the liability period, *compare id*. at 7-8 (6,612 violations), *with* IPRG Br. 8 (4,874 violations), and has continued to violate those standards, *see* Pls. Br. 9. Any penalty that does not exceed the economic benefit of noncompliance, plus an adjustment to account for the likelihood that not all violations are caught and penalized, would undermine enforcement by signaling to others in IPRG's industry that they have "nothing to lose" from gambling on noncompliance. *See United States v. Mun. Auth. of Union Twp. (Union Township)*, 929 F. Supp. 800, 806 (M.D. Pa. 1996), *aff'd*, 150 F.3d 259 (3d Cir. 1998); Pls. Br. 20-22.

The cases IPRG cites simply underscore why it would be so inappropriate for its penalty not to exceed economic benefit.[1] *See* IPRG Br. 9-10. Those cases involved municipal

[1] It would be an abuse of discretion for the Court to refuse to impose any penalty at all for IPRG's years of violations. *Contra* IPRG Br. 3. In *Sierra Club v. Energy Future Holdings Corporation*, cited by IPRG, the court found the defendant was not liable for any violations and

defendants, and concerns that the penalties would ultimately be borne by the general public and fail to punish or deter illegal pollution for private gain. *See Kleinman v. City of Austin*, 310 F. Supp. 3d 770, 783 (W.D. Tex. 2018) (reasoning that "any civil penalty levied on the City will be paid by the local taxpayers rather than by the people responsible," and "does not serve to disincentivize illegal but profitable pollution" by private parties); *United States v. City of San Diego*, No. 88-1101-B(IEG), 1991 WL 163747, at *5 (S.D. Cal. Apr. 18, 1991) ("[I]nsofar as plaintiffs' request[ed penalty] would represent a transfer of wealth from the residents of San Diego to the federal treasury, the court is concerned that the only victims in this case will be those residents."). No comparable concerns exist here.

B. The top-down method is the most appropriate one

IPRG acknowledges that penalty determinations are inherently case-specific. *See* IPRG Br. 6. The prevailing top-down method, *see* Pls. Br. 5, preserves the Court's discretion to set a penalty that reflects the facts of this case. It tethers the determination to the maximum penalty Congress envisioned, *id.*, while preserving the Court's flexibility to deviate downward as appropriate, after considering all relevant evidence on each of the penalty factors.

C. The Court should use a standard six-minute interval to tally and calculate the maximum penalty for IPRG's liability-period violations

IPRG never disputes that lumping consecutive periods during which it violated its opacity or particulate matter limits into single "violations" for purposes of determining the statutory maximum penalty would underweight exceedances that lasted longer and discourage polluters from bringing themselves back into compliance as quickly as possible. *See* Pls. Br. 7-8; IPRG

refused a penalty on that ground. No. W-12-CV-108, 2014 WL 2153913, at *19 (W.D. Tex. Mar. 28, 2014). The later discussion of penalty factors is dicta. *See id.* at *22-24.

Br. 8. The Court should accordingly use a standard interval of time—six minutes—to tally and calculate the maximum penalty for IPRG's violations during the liability period.[2]

D. The seriousness factor embraces risk of harm

IPRG's claim that the risks of harm posed by its violations should be "irrelevan[t]" to the seriousness of those violations, *see* IPRG Br. 12-13, does not square with the Clean Air Act's precautionary purposes. *See infra* at 7-8. Risk of harm is relevant to the seriousness inquiry because Congress understood that each unlawful release of air pollution poses risks to public health and well-being, even if those risks may be hard to quantify. Pls. Br. 1-2, 18-19. Requiring plaintiffs to show actual harm before violations may be deemed serious would convert the Act into a quasi-tort statute and encourage regulated polluters to gamble with public health.

IPRG is also wrong to assert that risk of harm is immaterial in cases about permit violations.[3] *See* IPRG Br. 13. The relevance of risk of harm does not turn on whether a pollutant is "banned." *Contra id.* When setting permit limits, regulators effectively "ban" the emission of pollutants above certain levels, based on their assessment of acceptable risks to public health and the environment. *See* Ban, *Black's Law Dictionary* (10th ed. 2014) (defining "ban" as "[a] legal or otherwise official prohibition against something"). Nor does regulators' consideration of a

[2] The Court should adopt this approach notwithstanding Plaintiffs' imprecise reference to "2,949 violations" in their opening liability-phase summary judgment brief. *See* Mem. of Law Supp. Pls.' Mot. for Partial Summ. J. 1, ECF No. 104-1. Plaintiffs made clear elsewhere in that brief that they were moving for summary judgment on their incorporated list of "2,949 exceedances" of Edwards's opacity limits and associated particulate matter exceedances. *See id.* at 28. The Court granted Plaintiffs' motion in part as to those *exceedances. See* Aug. 23, 2016 Op. & Order 4 & n.8, 49, ECF No. 124.

[3] Here again, *Kleinman* does not help IPRG. *Contra* IPRG Br. 12. The plaintiff in *Kleinman* presented no evidence as to risk or actual harm to public health or the environment. 310 F. Supp. 3d at 781. Plaintiffs will show at trial that IPRG's violations have increased the risks of premature death and other health problems for people living in and around Peoria.

"margin for safety" render risk immaterial.[4] *Contra* IPRG Br. 13. IPRG's position—if adopted—would perversely make it *harder* to ensure compliance with the very laws that Congress intended to be the most protective.

E. Only economic impact that would be ruinous can justify a penalty reduction

That the "ruinous or disabling" test for reducing penalties based on economic impact originated with the decision in *United States v. Gulf Park Water Company*, 14 F. Supp. 2d 854 (S.D. Miss. 1998), is not a reason to reject it. *But see* IPRG Br. 13-15. As IPRG's citations help illustrate, many other courts have applied *Gulf Park*.[5] Those courts were enforcing the Clean Water Act, but as this Court has recognized, Clean Water Act cases are "instructive" to Clean Air Act penalty determinations. Jan 15, 2019 Op. & Order 14 n.8, ECF No. 235 (citing *Pound v.*

[4] Margin-of-safety requirements are common in environmental law. *See, e.g.*, 33 U.S.C. § 1311(m)(2) (requiring that effluent limits in certain Clean Water Act permits allow for "an adequate margin of safety"); 42 U.S.C. § 300j-3b(1) (requiring that certain contaminant standards and treatment requirements under the Safe Drinking Water Act allow for "an adequate margin of safety"). Indeed, some of the permit limits at issue in *Powell* (those for toxic substances) were set at a "level which . . . provides an ample margin of safety." 33 U.S.C. § 1317(a)(4); *see PIRG v. Powell Duffryn Terminals, Inc.*, 720 F. Supp. 1158, 1161 (D.N.J. 1989), *aff'd in part, rev'd in part*, 913 F.2d 64 (3d Cir. 1990).

[5] *See* IPRG Br. 14-15 (citing *Idaho Conservation League v. Atlanta Gold Corp.*, No. 1:11-cv-00161-REB, 2017 WL 4099815 (D. Idaho Sept. 15, 2017), and other cases that apply *Gulf Park*); *United States v. Smith*, No. 12-00498-KD-C, 2014 WL 3687223, at *15 (S.D. Ala. July 24, 2014) (cited by IPRG and applying *Gulf Park*); *Sierra Club v. El Paso Gold Mines, Inc.*, No. CIV.A.01 PC 2163 OES, 2003 WL 25265873, at *11 (D. Colo. Feb. 10, 2003) (same), *rev'd on other grounds*, 421 F.3d 1133 (10th Cir. 2005); *see also* Pls. Br. 6 (citing *In re Oil Spill*, 148 F. Supp. 3d 563, 575 (E.D. La. 2015).

To the extent that the Court is inclined to state the test as whether a penalty would "jeopardize [IPRG's] continued operation," as IPRG suggests, *see* IPRG Br. 15, Plaintiffs note that some courts have treated that language as functionally equivalent to "ruinous or disabling," *see United States v. Mountain State Carbon, LLC*, No. 5:12-CV-19, 2014 WL 3548662, at *35 (N.D.W. Va. July 17, 2014) (quoting both "ruinous" and "jeopardize" language), and that the Court would still need to account for IPRG's relationship with its parents and the parents' resources, *see* Pls. Br. 13-15; *cf. Mun. Auth. of Union Twp.*, 929 F. Supp. at 805-06, 808-09 (including parent's resources and control over defendant's compliance in its economic-impact assessment and concluding that "[t]he magnitude of fine which the court believes to be warranted . . . can be easily absorbed by [the parent] without threatening its solvency").

Airosol Co., 498 F.3d 1089, 1094 n.2 (10th Cir. 2007)). IPRG (which relies on Clean Water Act cases in other parts of its brief) never explains why the Court should deviate from that rule when considering economic impact, and Plaintiffs are unaware of any basis for doing so.

F. The Court can and should consider the resources of IPRG's parents

IPRG cites no authority for the proposition that "courts consider facts related to the size of the named defendant, and [sic] against whom there is a liability finding" when considering business size, IPRG Br. 18, and relies on inapposite cases when it asserts that its parents' finances are "not relevant" to economic impact, *id*. 15-16. Plaintiffs are not seeking to pierce the corporate veil, so *United States v. Bestfoods*, 524 U.S. 51 (1998), and its progeny are beside the point.[6] *See Union Township*, 150 F.3d at 268 ("consideration of a parent's financial condition . . . is a far cry from piercing the corporate veil and holding the parent liable").

At trial, Plaintiffs will show that IPRG's corporate parents—like the parent whose finances were considered in *Union Township*—have played a role in IPRG's illegal pollution and exercised control over "actions that could have resolved it." 150 F.3d at 268-69. IPRG concedes that courts can consider parent resources when "the parent was 'siphoning off profits' from the subsidiary or had 'complete control' over the subsidiary's compliance with environmental statutes," IPRG Br. 16, and fails to refute Plaintiffs' broader points about how considering parents' resources in assessing economic impact and business size comports with the penalty

[6] None of the opinions cited by IPRG holds that a parent's finances are relevant to economic impact only if the parent could be held liable. *United States v. Dico, Inc.*, discusses the issue in a footnote that acknowledges other courts have included parents' finances in penalty assessments without veil piercing. 4 F. Supp. 3d 1047, 1065 n.43 (S.D. Iowa 2014), *aff'd in part, rev'd in part*, 808 F.3d 342 (8th Cir. 2015). The other opinions, from district courts in the Third Circuit, concern punitive damages for common-law violations and (to the extent they have any bearing at all on civil penalties under the Clean Air Act) do not square with the Third Circuit's *Union Township* decision. *See St. Croix Renaissance Grp. v. St. Croix Alumina, LLC*, No. 04-67, 2010 WL 4723897, at *1-2 (D.V.I. Nov. 18, 2010); *Herman v. Hess Oil Virgin Islands Corp.*, 379 F. Supp. 1268, 1270, 1276 (D.V.I. 1974).

provision's text and furthers its purposes. *See* Pls. Br. 13-15; *see also PIRG v. Powell Duffryn Terminals, Inc.*, 720 F. Supp. 1158, 1166 (D.N.J. 1989), *aff'd in part, rev'd in part*, 913 F.2d 64 (3d Cir. 1990) (rejecting defendant's claim that it was in a "relatively poor economic position," in part, because the defendant's ultimate parent was a publicly traded corporation).

G. Thousands of violations over a decade weigh in favor of a higher penalty

Plaintiffs will address IPRG's factual arguments about the duration of Edwards's violations at trial. *See* IPRG Br. 17. For the reasons Plaintiffs explained in their initial brief, repeated violations over many years weigh in favor of a higher penalty. Pls. Br. 15-16.

H. Only efforts that were reasonably calculated to achieve compliance should justify a penalty reduction

To the extent that a defendant's "inadequate efforts to comply" may support a penalty reduction under the "violator's full compliance history and good-faith efforts to comply" factor, *see* IPRG Br. 18, this should happen only where the evidence shows those efforts were reasonably calculated to bring the defendant into prompt and full compliance. *See* Pls. Br. 16-17 & n.6 (collecting cases); *cf. Union Township*, 150 F.3d at 266 ("A violator who chooses to continue to violate its permit while experimenting with less costly remedies necessarily subjects itself to the surrender via penalty of any economic benefit it acquired."). IPRG's citation to *Kleinman*, IPRG Br. 18, illustrates this point: defendant City of Austin took meaningful steps to cure its violations (caused by "extremely unusual," "off the charts" erosion) and had a plan in place to achieve compliance. 310 F. Supp. 3d at 775-76, 782-83.

I. Justice does not require consideration of any unenumerated penalty factors

The "other matters as justice may require" factor "should be applied sparingly" and only "when not considering a matter would result in a manifest injustice." *In re Oil Spill*, 148 F. Supp. 3d 563, 583 (E.D. La. 2015). To the extent that the "considerations" IPRG mentions in its brief

are germane to an enumerated penalty factor, such as seriousness, compliance history, or economic impact, they are—by definition—*not* factors justice requires the Court to consider separately. Consideration of unenumerated factors may help avert manifest injustice in special circumstances, such as when courts are called upon to penalize individuals' violations on personal or family property.[7] But those special circumstances do not apply here.

II. Injunctive Relief

A. Demonstrated risks of public-health harms constitute irreparable injury and deepen the public's interest in injunctive relief

IPRG's argument that a risk of harm should not be enough to justify injunctive relief, *see, e.g.*, IPRG Br. 23-24, 25, contravenes the Clean Air Act's precautionary purposes and ignores the precedents on courts' authority to issue prophylactic relief.

To be clear, Plaintiffs are not seeking injunctive relief based on a mere *presumption* that IPRG's violations harm human health. *Contra* IPRG Br. 25. At trial, Plaintiffs will show that IPRG's refusal to install adequate pollution controls for opacity and particulate matter and bring itself into compliance with the Act has exposed people who live in and around Peoria to increased health risks—including a quantifiable increase in the risk of premature death—for years. *Cf.* Pls.' Opp to Mot. to Exclude at 2-5, ECF No. 193, (describing Plaintiffs' public-health expert's anticipated testimony). Those increased risks constitute irreparable harm. *See United States v. Westvaco Corp.*, CV MJG-00-2602, 2015 WL 10323214, at *9 (D. Md. Feb. 26, 2015).

Congress passed the Clean Air Act to address the cumulative risks people face as a result

[7] *See Smith*, 2014 WL 3687223, at *16 (noting that "this is a case of a retired banker from a small town in South Alabama who decided to—albeit very unwisely—build roads/dams on family property for the family's forestry business"); *Quad Cities Waterkeeper Inc. v. Ballegeer*, 4:12-CV-4075-SLD-JEH, 2017 WL 2152366, at *1-3, *7 (C.D. Ill. Mar. 28, 2017) (discussing defendant father and son's construction and maintenance of a levee on the father's farmland, and noting that "a large penalty is not necessary to deter other nonindustrial rural landowners from building levees out of inappropriate material").

of their daily, unavoidable exposures to air pollution. Pls. Br. 4. It built "a precautionary element" into the Act by requiring that "once the decision [to set National Ambient Air Quality Standards (NAAQS)] is made the standards promulgated must be preventative in nature." *Ethyl Corp. v. EPA*, 541 F.2d 1, 15 (D.C. Cir. 1976) (en banc) (citing 42 U.S.C. § 7409(b)(1)). The Act's precautionary approach flows down from the NAAQS (set by the U.S. EPA for pollutants including particulate matter), through State Implementation Plans, 42 U.S.C. §§ 7407(a), 7410(a), and into the permits that set emission standards and limitations for specific industrial sources like Edwards, *id.* § 7661c(a); *see also* Pls. Opp. to IPRG Mot. for Partial Summ. J. on Remedy 54-55, ECF No. 198.

It would undermine Congress's precautionary goals to require Plaintiffs to show that IPRG's Clean Air Act violations have caused specific people to become ill or die before this Court may enjoin further violations. It would also contravene the Act's citizen suit provision, which does not condition this court's authority to "enforce" emission standards on *any* showing of harm, *see* 42 U.S.C. § 7604(a), and the settled principle that courts' equitable powers include preventing threatened harms. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) ("[O]ne does not have to await the consummation of threatened injury to obtain preventive relief." (internal quotation marks omitted)); *cf. Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 781 (7th Cir. 2011) ("A court may grant equitable relief to abate a public nuisance that is occurring *or to stop a threatened nuisance from arising*" (emphasis added) (citing *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238 (1907))); Restatement (Second) of Torts § 821B cmt. i (1979) (explaining that "for an injunction harm need only be threatened and need not actually have been sustained at all").

Sierra Club v. Franklin County Power of Illinois, 546 F.3d 918 (7th Cir. 2008), reflects

this principle. The Seventh Circuit did not affirm the grant of a permanent injunction solely because the defendant lacked a valid Clean Air Act permit for its proposed power plant. *Contra* IPRG Br. 27. Rather, the Seventh Circuit understood that the injunction would prevent harm because a new, valid permit would likely impose stricter emission standards. *See* 546 F.3d at 936. It concluded that the district court had properly used injunctive relief to eliminate the *potential* of future harm under the invalid permit. *See id*. at 936-37.

B. IPRG's opacity violations cause irreparable harm even when they do not coincide with particulate matter or NAAQS violations

IPRG's discussion of the NAAQS, IPRG Br. 29-30, is a red herring. As Plaintiffs will show at trial and other courts have recognized, exposure to below-NAAQS levels of fine particulate matter harms human health. *North Carolina ex rel. Cooper v. TVA*, 593 F. Supp. 2d 812, 821 (W.D.N.C. 2009) ("$PM_{2.5}$ exposure has significant negative impacts on human health, even when the exposure occurs at levels at or below the NAAQS."), *rev'd on other grounds*, 615 F.3d 291 (4th Cir. 2010). EPA—which sets the NAAQS—routinely quantifies health benefits from reductions in ambient concentrations of fine particulate matter well below the NAAQS, *see, e.g.*, ECF No. 193-4, at 4-25 to 4-27; ECF No. 193-3, at ES-11 to ES-12; ECF No. 193-13, at 4-70, and assumes that there is no concentration below which fine particles no longer pose a risk to human health, *see* ECF No. 193-12, at 2-25.

This case is also about enforcing State Implementation Plan and permit limits, not the NAAQS. As Plaintiffs will show, IPRG has exposed the people living in and around Peoria to additional particulate matter by failing to invest in the pollution controls it needs to comply with Edwards's opacity limits. *See also* IPRG Br. 30 (acknowledging the "heightened release of PM associated with non-exempt opacity exceedances"). To the extent that ordering installation of those controls will reduce future particulate pollution and the public's exposure to it, those

reductions are inherent consequences of injunctive relief.[8] IPRG never disputes this.

C. If the Court reduces or suspends IPRG's penalty based on the costs of injunctive relief, it should also set a contingent penalty

IPRG ignores most of Plaintiffs' points about how reducing or suspending its penalty to account for injunctive relief costs would undermine the Act's purposes and be unjust. *See* Pls. Br. 32-34. In response to IPRG's observation that they could seek further relief "if IPRG did not install pollution control equipment or did shut down," IPRG Br. 32, Plaintiffs suggest that if the Court does reduce or suspend IPRG's penalty to account for injunctive relief costs, it also set a contingent penalty, payable in the event that IPRG (or a parent) chooses to close Edwards before injunctive relief is fully implemented. To conserve its resources and avoid undue delay in remedying IPRG's violations, the Court should specify any contingent penalty amount and payment terms concurrently with injunctive relief and IPRG's normal penalty.

D. IPRG cannot evade injunctive relief by threatening closure

IPRG's refrain that Vistra may respond by closing Edwards, *see* IPRG Br. 34, should not dissuade the Court from ordering whatever injunctive relief is warranted to ensure that violations at the plant do not continue or recur. Securing defendants' future compliance is a core purpose of injunctive relief. Pls. Br. 23. IPRG cannot sidestep that relief by merely threatening to cease operations, after violating for ten years. *See Atl. States Leg. Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1134-36 (11th Cir. 1990) (citations omitted) (explaining that defendants who wish to moot claims for injunctive relief under the Clean Air and Water Acts bear the "heavy" burden to show there is "no reasonable likelihood that [their] wrongful behavior will recur").

Respectfully submitted April 3, 2019,

[8] *Sierra Club v. Tennessee Valley Authority*, 592 F. Supp. 2d 1357 (N.D. Ala. 2009), is not to the contrary. The main reason the court denied injunctive relief was because, following a change in law, the defendant was no longer violating the Clean Air Act. *Id.* at 1375-77.

s/ *Selena Kyle*
Selena Kyle (IL Bar No. 6311573)
Ian Fisher (CO Bar No. 47858)
Natural Resources Defense Council
20 North Wacker Drive, Suite 1600
Chicago, IL 60606
(312) 651-7906
skyle@nrdc.org
(312) 995-5903
ifisher@nrdc.org

Jared E. Knicley (DC Bar No. 1027257)
Jacqueline Iwata (DC Bar No. 1047984)
1152 15th Street NW, Suite 300
Washington, DC 20005
(202) 513-6242
jknicley@nrdc.org

Ann Alexander (IL Bar No. 6278919)
111 Sutter Street, 21st Floor
San Francisco, CA 94104
(415) 875-6190
aalexander@nrdc.org

Counsel for Plaintiff Natural Resources Defense Council

s/ *Gregory E. Wannier*
Gregory E. Wannier (CA Bar No. 275349)
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94110
(415) 977-5646
greg.wannier@sierraclub.org

Counsel for Plaintiff Sierra Club

s/ *Jeffrey Hammons*
Jeffrey Hammons (IL Bar No. 6324007)
Justin Vickers (IL Bar No. 6305129)
Scott Strand (MN Bar No. 147151)
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601
(312) 673-6500

jhammons@elpc.org
jvickers@elpc.org

Counsel for Plaintiffs Sierra Club and Respiratory Health Association

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2019, I caused the following to be served on all parties' counsel via the Court's CM/ECF system:

PLAINTIFFS' PRETRIAL REPLY BRIEF

s/ Selena Kyle
Selena Kyle