BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
SIERRA CLUB, ENVIRONMENTAL LAW AND POLICY CENTER, PRAIRIE RIVERS NETWORK, and CITIZENS AGAINST RUINING THE ENVIRONMENT	)	
	)	**PCB 2013-015**
Complainants,	)	**(Enforcement – Water)**
	)	
v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondents.	)	

NOTICE OF FILING

TO: John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board Respondent's Motion for Leave to File, Instanter, Its Reply to Complainants' Response to Motion to Stay Proceedings and Respondent's Reply in Support of Its Motion to Stay Proceedings, copies of which are herewith served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: March 19, 2014

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, Respondent's Motion for Leave to File, Instanter, Its Reply to Complainants' Response to Motion to Stay Proceedings and Respondent's Reply in Support of Its Motion to Stay Proceedings which were filed electronically on March 19, 2014 with the following:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

and that true copies were mailed by First Class Mail, postage prepaid, on March 19, 2014 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

RESPONDENT'S MOTION FOR LEAVE TO FILE, INSTANTER, ITS REPLY TO COMPLAINANTS' RESPONSE TO MOTION TO STAY PROCEEDINGS

Respondent, Midwest Generation, LLC ("MWG"), by its undersigned counsel, submits this Motion for Leave to File, Instanter, its Reply to Complainants' Response to MWG's Motion to Stay Proceedings pursuant to Sections 101.500(e) and 101.514 of the Illinois Pollution Control Board's ("Board") Procedural Rules. 35 Ill. Adm. Code 101.500(e), 101.514. In support of this motion, MWG submits its Reply and states:

1. On February 19, 2014, MWG filed its Motion to Stay Proceedings due to the pending Federal and State rulemakings, the pending transition of MWG to NRG Energy, Inc., the corrective actions undertaken by MWG, and the lack of prejudice to Complainants or environmental harm.

2. On March 5, 2014, Complainants filed their Response to MWG's motion, and served their response on MWG on March 6, 2014. Complainants' Response presents new arguments unrelated to MWG's Motion, including that Complainants demand injunctive relief and unsupported claims of Board requirements for a stay.

3. MWG has prepared its Reply in support of its Motion to Stay Proceeding, which is attached hereto.

4. MWG respectfully submits that the filing of the attached Reply will prevent material prejudice and injustice by clarifying the scope of the relief requested from the Board, and updating the Board on the NRG Energy, Inc. acquisition of MWG.

5. This Motion is being filed on March 19, 2014, within fourteen (14) days after service of Complainants' Response on MWG, in accordance with 35 Ill. Admin. Code §101.500(e).

WHEREFORE, MWG respectfully requests that the Board grant Respondent's Motion for Leave to File Instanter, its Reply to Complainants' Response to Motion to Stay Proceedings, and accept the attached Reply as filed on this date.

Respectfully submitted,

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman
One of Its Attorneys

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RESPONDENT'S REPLY IN SUPPORT OF ITS MOTION TO STAY PROCEEDINGS

Respondent, Midwest Generation, LLC ("MWG"), by its undersigned counsel, submits this Reply in Support of MWG's Motion to Stay the Proceedings, pursuant to Sections 101.500(e) and 101.514 of the Illinois Pollution Control Board's ("Board") Procedural Rules. 35 Ill. Adm. Code 101.500(e), 101.514.

I. INTRODUCTION

Every argument in Complainants' response fails because it is based on a significant misunderstanding of the Board's authority in this matter. Complainants repeatedly argue that a stay should be denied because Complainants ask the Board to order specific injunctive relief for remedies that are different from the corrective measures already undertaken by MWG. Complainants fail to recognize that the Board does not have the authority to order specific remedial measures or to grant Complainants the injunctive relief they seek. It is well-settled that the Board does not have the power to order injunctive relief. The Board may order a party to "cease and desist" and pay penalties. 415 ILCS 5/33(b). Because the alleged violations have

ceased, as recently testified to by the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), and because any assessed penalty may not be collected by order of the Bankruptcy Court, Complainants cannot gain any additional remedy. As a result, a stay will not cause any risk of environmental harm nor prejudice Complainants. In addition, Complainants misstate the Board's standards for granting a stay. There is no requirement that the basis for the stay arise prior to the Board action. The Board has repeatedly granted stays in matters due to a new development that arose following the original filing of the claim. Moreover, there is no support for Complainants' claim that enforcement actions supersede rulemaking, or that an indefinite duration is a basis for an automatic denial of a stay. A simple search of Board orders reveals that the Board has stayed matters to await decisions on regulatory rulemakings, and despite the unknown timeframe for a stay. Because the bases for MWG's motion remain unrefuted, the Board should grant MWG's motion and stay this proceeding for a year.

II. ARGUMENT

The undisputed reasons for a stay in this proceeding are: (1) to await finalization of the Federal and State rules on managing coal ash; (2) to allow NRG Energy, Inc.'s ("NRG") to assume control of MWG, including operational control of the Stations; [1] (3) to avoid costly and inefficient allocation of resources as the alleged violations have ceased; and (4) because there is no ongoing environmental harm or prejudice to the Complainants. The Board has frequently granted stays to avoid uncertainty and multiplicity, *U.S. Steel v. Illinois EPA*, PCB 10-23, Feb. 2, 2012, slip op. at 12, to allow business decisions to conclude, *Herrin Security Bank v. Shell Oil Company*, PCB 94-178, May 18, 1995, to allow sufficient time to proceed with technical work

[1] On March 11, 2014, the Bankruptcy Court approved NRG Energy, Inc.'s purchase of certain assets and operating companies of Edison Mission Energy, including MWG. On March 18, 2014, the Federal Energy Regulatory Commission approved the transfer of Edison Mission Energy's assets, including MWG, to NRG Energy, Inc.

underway at the site, *People of the State of Illinois v. White & Brewer Trucking*, PCB 97-11, January 18, 2001, and because there is no risk of environmental harm nor prejudice to the non-movants. *Interstate Pollution Control, Inc. v. Illinois Environmental Protection Agency*, PCB 86-19, March 27, 1986.

A stay in this proceeding is appropriate given the fluid nature of the regulatory landscape surrounding the ash ponds and the shifting corporate structure for MWG. Granting a stay will allow for greater clarity to all of the parties involved, including the Board, on the regulatory scheme that the ash ponds will be subject to under the forthcoming Federal and State coal ash rules. Moreover, a stay will give NRG an opportunity to take operational control of the Stations and determine the direction and decision-making for this matter. A stay will also allow sufficient time to proceed with continued groundwater monitoring at the Stations, although as stated *infra*, the alleged violations have ceased. Because the alleged violations have ceased, there is no risk of environmental harm nor any potential prejudice to the Complainants by granting the stay.

A. A Stay Is Appropriate Because The Board Cannot Grant the Relief Complainants Demand

Complainants cannot get the injunctive relief they claim is required at the Stations. "The Board has no enforcement powers," and cannot order MWG to conduct any of the actions Complainants describe. *People of the State of Illinois v. NL Industries, et al*, 152 Ill.2d 82, 99, 604 N.E.2d 349, 356 (1992). In their Response, Complainants specify that they seek an injunctive order from the Board that would require MWG to act by "removing all coal ash ponds at all four plants from service, the installation of systems to pump and treat contaminated groundwater at all four plants, and permanent removal of the coal ash and other contaminated

materials from the ponds at Waukegan and Will County" (Response, pp. 16-17).[2] The Board cannot grant this injunctive relief. The Board is a creature of statute and can only operate within the bounds of its powers set out by the statute by which it was created. *County of Knox ex rel. Masterson v. Highlands, L.L.C.*, 188 Ill.2d 546, 554, 723 N.E.2d 256, 262 (1999), *Granite City Div. of Nat. Steel Co. v. Illinois Pollution Control Board*, 155 Ill.2d 149, 171, 613 N.E.2d 719 (1993), *Rolf Schilling, et al. v. Gary D. Hill, et al.* PCB 10-100, August 4, 2011, slip op at 8. The Board was created by the Illinois Environmental Protection Act ("Act"), and one of its powers is to issue final orders and make final determinations. 415 ILCS 5/5 & 33(a). However, the type of relief the Board may grant in its orders is limited by Section 33(b) of the Act, which states that a Board order:

> may include a direction to cease and desist from violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order, and/or the imposition by the Board of civil penalties in accord with Section 42 of this Act." 415 ILCS 5/33(b)

The Board has no authority to grant any other relief, including the authority to issue or enforce injunctive relief. *Janson v. Illinois Pollution Control Bd.*, 69 Ill.App.3d 324, 328, 387 N.E.2d 404, 408 (3rd Dist., 1979). The Board has repeatedly acknowledged its limited authority. In particular, the Board stated in *Dayton Hudson Corporation v. Cardinal Industries, Inc.*, 97-134, August 21, 1997, "we note that, contrary to Dayton's allegations, the Board does not have the authority to award injunctive relief." *Id* slip op. at 7. The Board repeated this in *Michael Pawlowski and Diane K. Pawlowski v. David Johansen et al*, PCB 00-157, May 4, 2000, by

[2] In their Motion for Relief from Automatic Stay filed before the Bankruptcy Court, Complainants specified that they were requesting "injunctive relief." The Bankruptcy Court, in turn, appears to have misunderstood the authority of the Board when it granted Complainants' relief from the stay, stating that the Court expected the Board proceeding to "require MWG to take immediate action to address alleged environmental violations." The Board cannot require such injunctive relief. See Renewed Motion of ELPC for Relief from the Automatic Stay (10/22/13), pp. 10, 12, 13, *In re: Edison Mission Energy, et al*, Case No. 12-49219.

stating that, "[r]espondents are correct that the Board cannot issue an injunction." *Id* slip op. at 2. In fact, the Board has struck the request for specific relief from a complaint because it is not authorized to grant such relief. *Clean the Uniform Company-Highland v. Aramark Uniform & Career Apparel, Inc.*, PCB 03-21, Nov. 7, 2002 slip op. at 1 & 3.

Complainants assert, in every one of their arguments, that a stay should be denied because they believe, contrary to Illinois EPA's findings, that additional remedial work and analysis of the impoundments at the MWG Stations is needed (See, e.g. Response, pp. 7, 13, 15, 16). As stated above, the Board is limited to granting Complainants an order to cease and desist and the imposition of civil penalties, if appropriate. A stay is appropriate because MWG has taken necessary actions to cease the alleged violations and the Board should allow the opportunity for to assess the impact of those actions. Since MWG filed its Motion to Stay, the Illinois EPA testified, under oath, that the remedies executed pursuant to the Compliance Commitment Agreements (CCAs) are working as intended. *In the Matter of: Coal Combustion Waste (CCW) Surface Impoundments at Power Generating Facilities: Proposed New 35 Ill. Adm. Code 841*, PCB No. R14-10. The Agency testified that a synthetic liner beneath an ash impoundment with a permeability of $1x10^{-7}$ centimeters, the type of liner underneath the MWG ash ponds, prevents contaminates from leaching into the groundwater. *In the Matter of: Coal Combustion Waste (CCW) Surface Impoundments at Power Generating Facilities,* PCB R14-10, 2/26/14 Tr. at 228 (emphasis added). In fact, the Agency testified that the synthetic liners under the ash impoundments at the MWG Stations protect contaminants from leaching into the environment. *Id.* at 229-230 and Ex. N of Ex. 5. In other words, the Agency has concluded that any future potential for contaminants leaching into the environment has ceased. Although Complainants point to their open dumping claims in an effort to distinguish their case,

Complainants concede that MWG will cease open dumping when they "prevent further groundwater contamination from occurring" (Response, FN 15, p 16). Illinois EPA has testified that the liners will do just that – prevent further groundwater contamination.

The remaining authority of the Board is to issue penalties. Here, however, the Bankruptcy Court has ordered that penalties may not be collected at this time. *In re: Edison Mission Energy, et al*, Case No. 12-49219, dkt. No. 1394, Dec. 11, 2013, p. 14. Thus, even if Complainants were able to prove the allegations in their complaint, no penalties can be collected against MWG until the end of the bankruptcy, if at all. *See In re Wisconsin Barge Lines, Inc.*, 91 B.R. 65, (Bankr.E.D.Mo., 1988) (Held that penalties assessed against corporate debtor for pre-petition conduct were discharged).

If the Board were to deny MWG's motion and continue these proceedings, there would be a significant waste of resources expended by both parties for very little gain. The most Complainants could receive is an order to cease violations that the Agency has already determined to have ceased, and a penalty they could not collect. Alternatively, by granting the stay, all of the parties, including the Board, will have a better understanding of the regulatory landscape surrounding the impoundments. Moreover, a stay will give the new owner, NRG, time to determine the direction and decision-making for this matter and set the policy decisions for the future of the Stations at issue.

B. A Stay Would Not Cause any Environmental Harm Nor Prejudice To Complainants

Illinois EPA's testimony clearly shows that these proceedings do not involve a risk of environmental harm. To the extent any harms existed, they have been addressed by MWG in instituting the compliance actions that have resolved the allegations in the Complaint. There is

also no threat to public harm, because all pathways for use of the groundwater in the vicinity of MWG's Stations have been barred.

Further, Complainants cannot be prejudiced by a stay. Illinois EPA has determined that the alleged violations have ceased and Complainants cannot obtain any additional injunctive relief from the Board. Because of the Bankruptcy Court order, if Complainants were to even succeed on the merits of their complaint, Complainants could not collect on any assessed penalty. Thus, maintaining the status quo by granting a stay will not cause any prejudice to Complainants.

C. The Board Does Not Require Primacy of Filing for a Stay

In consideration of a stay, the Board does not have a "first come - first serve" requirement. Complainants incorrectly assert that MWG cannot claim comity because the Board only considers it when the matter in the other jurisdiction was filed first. The Board has repeatedly stayed a proceeding due to a new development following the initial filing.

In *Midwest Generation EME, LLC v. Illinois Environmental Protection Agency*, PCB 04-185, April 6, 2006, the Board stayed a trade secret determination following notice that the U.S. EPA had recently begun a trade secret determination over the same documents. The Illinois EPA objected to the motion for the stay because the U.S. EPA was in the "preliminary stages" and there was no reason to give comity to the U.S. EPA's evaluation. *Id* at 5. The Board disagreed, and held that the matter should be stayed to respect U.S. EPA's decision and avoid conflicting determinations even though the Board's evaluation had begun first. *Id* at 6-7. Further, in an enforcement case, *People of the State of Illinois v. Inverse Investments, LLC,* PCB 11-79, October 17, 2013, the Board granted a stay two years after the State filed its complaint, upon subsequent notice of U.S. EPA's evaluation of the site that was the subject of the complaint. *See also U.S. Steel v. Illinois Environmental Protection Agency*, PCB 10-23, Feb. 2, 2012 (Board

stayed a permit appeal two years after initial filing even though the basis for the stay arose after the original appeal was filed).

There is clearly no test or requirement that a stay may only be granted when the basis for the stay arose first. In consideration of comity, the Board considers the decisions of another jurisdiction, not as a matter of obligation, but as a matter of deference and respect. *Midwest Generation*, PCB 04-185 at 6. Here, MWG is requesting that the Board give deference to Illinois EPA's decision to enter into the CCAs and its conclusion that the corrective actions undertaken by MWG have caused the alleged violations to cease. The Board should also give consideration to the evolving regulatory environment surrounding the MWG Stations due to the new Federal and State regulations presently contemplated by the respective agencies. Moreover, the Board should give deference to the pending transition to NRG. Contrary to Complainants uninformed assertions, MWG must be circumspect in what information it may share with its potential new owners until the purchase is approved and finalized. Thus, until NRG has taken full control of MWG and may be fully informed, MWG cannot and should not make any binding decisions that may be altered or rejected by NRG at a later date. By respecting the shifting landscape that directly affects the ash ponds at the MWG Stations, the Board will reduce the uncertainty created by the evolving regulations and avoid a wasteful multiplicity of litigation.

D. The Board May Grant A Stay Due to A Rulemaking and Despite an Indefinite End

The Board may stay this enforcement action due to the pending Federal and State rulemakings. The Board has never stated that enforcement actions supersede rulemakings, and in fact has stayed other Board proceedings pending the outcome of a rulemaking. In *Matter of: Petition of Sundstrand Corp.*, PCB AS98-3, Dec. 18, 1997, the Board stayed an adjusted standard determination until a rulemaking was final because the rulemaking would obviate the

need for the adjusted standard. *See also: In the Matter of: Petition of Midwest Generation L.L.C., Will County Generating Station for an adjusted Standard from 35 Ill. Adm. Code 225.230,* AS 07-04, March 15, 2007 (Board stayed an adjusted standard pending its decision in a rulemaking), *In the Matter of: Petition of Illinois Dept. of Transportation, Distract 8, Bowman Avenue Pump Station and Deep Well System for an Adjusted Standard From 35 Ill. Adm. Code 302.208(G*), AS 08-1, Dec. 20, 2007 (Board granted stay in the adjusted standard proceeding until resolution of the rulemaking pending before the Board). Clearly the Board can consider pending rulemakings when considering a stay. Here, there are two separate rulemakings that will directly affect how MWG operates the ash ponds. Granting a stay would avoid vexation and harassment to MWG in coordinating its responsibilities under the new Federal and State regulations.

Moreover, the uncertainty of the timing of the rulemakings is not an automatic denial of stay. Contrary to Complainants' claims, the Board has stayed cases even though there was not a date certain by which the stay should end. In the *U.S. Steel* matter cited above, the Board granted the stay, but merely denied the request to stay the matter indefinitely. *U.S. Steel*, PCB 10-23, slip op. at 12. Instead, the Board stayed the proceeding for a year and ordered U.S. Steel to update the Board six months from the date of the order. *Id* slip op. at 13. *See also People of the State of Illinois v. Inverse Investments, LLC*, PCB 11-79 (Board granted stay even though the duration of U.S. EPA's evaluation was unknown). The terms ordered in the *U.S. Steel* matter are the same terms that MWG is requesting here. MWG is requesting that the Board stay this matter for a year with quarterly updates. A stay of this duration would allow the corporate transition and the Federal and State regulatory rulemakings to finalize, thus preventing the uncertainty created by the evolving events and avoid wasting significant resources.

III. CONCLUSION

For the reasons stated herein, in Respondent's Motion to Stay Proceedings and the supporting Memorandum of Law in Support of the Motion to Stay Proceedings, Respondent, Midwest Generation, LLC, respectfully requests that the Board stay this matter for one year with quarterly updates.

Respectfully submitted,

MIDWEST GENERATION, LLC

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One of Its Attorneys

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