BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Midwest Generation EME, LLC,	)	
Petitioner	)	**PCB 04-216**
	)	**Trade Secret Appeal**
v.	)	
	)	
Illinois Environmental Protection Agency,	)	
Respondent	)	

NOTICE OF FILING

To: Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

Sheldon A. Zabel
Mary A. Mullin
Andrew N. Sawula
Schiff Hardin LLP
6600 Sears Tower
Chicago, Illinois 60606

Brad Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

Please take notice that today we have filed with the Office of the Clerk of the Pollution Control Board an original (1) and nine (9) copies of Respondent's Memorandum in Opposition to Midwest Generation's Motion to Stay Proceedings. A copy is herewith served upon the assigned Hearing Officer and the attorneys for the Petitioner, Midwest Generation EME, LLC.

Dated: Chicago, Illinois
October 6, 2005

LISA MADIGAN, Attorney General of the
State of Illinois

MATTHEW DUNN, Chief, Environmental Enforcement/
Asbestos Litigation Division

BY: _____

Ann Alexander, Assistant Attorney General and
Environmental Counsel
Paula Becker Wheeler, Assistant Attorney General
188 West Randolph Street, Suite 2000
Chicago, Illinois 60601
312-814-3772
312-814-2347 (fax)

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Midwest Generation EME, LLC	)	
Petitioner	)	**PCB 04-216**
	)	**Trade Secret Appeal**
v.	)	
	)	
Illinois Environmental Protection Agency,	)	
Respondent	)	

MEMORANDUM IN OPPOSITION TO MIDWEST GENERATION'S MOTION TO STAY PROCEEDINGS

Preliminary Statement

Respondent Illinois Environmental Protection Agency ("IEPA") submits this memorandum in opposition to the motion by Petitioner Midwest Generation EME, LLC ("Midwest Generation") to stay PCB 04-216. The entire basis for the request is a purported "proceeding" underway before the United States Environmental Protection Agency (USEPA) concerning the documents at issue here. But in fact, there is no such proceeding. USEPA is in the preliminary stages of making its initial administrative decision whether to release the documents at issue in the PCB proceeding pursuant to a federal Freedom of Information Act (FOIA) request by the Sierra Club. Once that decision is finalized, there may be a basis for Midwest Generation or the Sierra Club to commence a federal court challenge to that decision. Right now, however, a stay would be woefully premature. It would, moreover, be extremely prejudicial to respondent IEPA, which has a strong interest in the timely release of information concerning Clean Air Act compliance to the public.

Facts

Respondent accepts Midwest Generation's statement of facts solely with respect to the chronology of events set forth in it, and not with respect to any qualitative descriptions of those events.

Argument

Point I

THERE EXISTS NO LEGAL OR EQUITABLE BASIS FOR GRANTING THE STAY REQUESTED BY MIDWEST GENERATION

The provision in the Board's rules governing motions to stay, 35 Ill. Adm. Code 101.514, does not specify grounds for granting such motions. Accordingly, as Midwest Generation acknowledges, the Board looks to the Illinois Supreme Court standard for determining whether to stay a "later-filed action." Mather Investment Properties, L.L.C. v. Ill. State Trapshooters, PCB No. 04-29, 2005 WL 1943585 (2005) (Midwest Generation brief at 7), citing A.E. Staley Manufacturing Company v. Swift & Company, 84 Ill. 2d 245, 245, 419 N.E.2d 23, 27-28 (1980). This standard is a four-factor test: "comity; prevention of multiplicity, vexation, and harassment; likelihood of obtaining complete relief in the foreign jurisdiction; and the res judicata effect of a foreign judgment." Mather Investment Properties, 2005 WL 1943585 at *10. In evaluating the "multiplicity" prong, the primary ground relied upon by Midwest Generation in its motion, the Board in turn looks to the definition in its regulations of a "duplicative" matter, which is one "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202; Village of Forest Park v. Sears, Roebuck & Co., PCB 01-77, 2001 WL 179913 at *3-4 (2001).

This standard precludes the relief that Midwest Generation seeks here, for one simple reason: there is no proceeding pending before USEPA to trigger its applicability. USEPA is

merely in the process of evaluating a FOIA request prior to making an initial determination. This activity does not constitute an ongoing, duplicative proceeding that could serve as the basis for staying a case before the Board.

The Board has held that a case before it is "duplicative" under § 101.202 only if the second matter is a pending adjudicatory proceeding. An agency's internal decisionmaking process, or even preliminary enforcement steps short of filing an action, simply do not constitute a sufficiently developed "matter" to warrant staying all related Board proceedings. In Finley v. IFCO ICS-Chicago, Inc., PCB 02-208 (2002), the Board expressly declined to find a complaint before it "duplicative" on the ground that USEPA was investigating the same matter and had issued a notice of violation:

> Perhaps most importantly, however, USEPA's issuance of the NOV is only a preliminary enforcement step following a plant inspection. It does not mean that the matter is before "another forum" within the meaning of "duplicative." The NOV does not purport to commence, or to be the product of, an adjudicatory proceeding by a tribunal, either administrative or judicial. Investigation by the government of potential violations does not render duplicative a citizen complaint, formally filed with the Board under Section 31(d) of the Act. See UAW v. Caterpillar, Inc., PCB 94-240, slip op. at 5 (Nov. 3, 1994) (Illinois Environmental Protection Agency's (IEPA) voluntary cleanup program is not another "forum"); White v. Van Tine, PCB 94-150, slip op. at 2 (June 23, 1994) ("investigation by [IEPA] or a municipality does not preclude the matter from being brought before the Board"); Gardner v. Twp. High School District 211, PCB 01-86, slip op. at 3 (Jan. 4, 2001) (Cook County Department of Environmental Control's investigation of county code compliance not duplicative). The Board is not precluded from accepting complaints merely because it is possible that another matter may, at some later date, end up in court or before a USEPA administrative law judge or review panel.

Id., slip op. at 9. See also Mate Technologies v. F.I.C. America Corp., PCB 04-75, 2004 WL 604916 at * 6 (2004) ("The Board has clearly stated that preliminary enforcement steps do not mean the matter is before another forum for the purposes of dismissal, and that investigation by the government of potential violations does not render duplicative a citizen complaint, formally

filed with the Board").

Similarly, the Supreme Court in articulating the test for granting a stay in A.E. Staley Manufacturing Company, and other courts and the Board in applying that test, have repeatedly made clear that its purpose is avoiding multiplicity of *litigation*. Id., 84 Ill.2d at 252; Village of Mapleton v. Cathy's Tap, 313 Ill.App.3d 264, 266 (3rd Dist. 2000); Mather Investment Properties, LLC at *12. As with the "duplicative" action criterion, it is plainly not intended to apply where no second adjudicatory proceeding is pending.

Here, the actions taken to date by USEPA are, if anything, even more preliminary than those taken in Finley and the other matters cited. Neither is there any basis to conclude that an adjudicatory proceeding will necessarily arise in the future concerning the FOIA request. It is impossible to know in advance what grounds USEPA will rely on, and whether those grounds will provide the basis for a credible federal court challenge. In any event, the mere possibility that a challenge to USEPA's decision may be filed at a later date cannot provide a basis for staying PCB 04-216 under the Illinois Supreme Court test. The Board has expressly held that this test is only applicable as grounds for stay of a "later-filed action," i.e., an action filed with the Board *subsequent* to the action it is said to duplicate. Village of Forest Park, 2001 WL 179913 at 6.

Even if one were to apply the Supreme Court's four-factor Supreme Court test here, the three factors in addition to duplicativeness all militate against granting a stay. See A.E. Staley Manufacturing Company, 84 Ill. 2d at 245. With respect to comity, USEPA might choose not to decide at all the question of whether the documents constitute "emission data" under federal Clean Air Act § 114, and may instead decide the matter based solely on general rules governing confidentiality. No principle of comity renders USEPA a more appropriate forum for

interpreting those rules than the Board. It is also entirely possible that USEPA would not afford complete relief to either party in the Board proceeding, as it may choose to release some documents and not others. And USEPA's decision, although it would be persuasive authority, would have no res judicata effect on the Board.[1]

Finally, in applying the Supreme Court test, the Board must not only consider the four prongs of the test itself, but prejudice that a stay would cause the non-moving party. Village of Mapleton, 313 Ill.App.3d at 267. Here, that prejudice would be substantial. USEPA's track record in this matter thus far does not suggest an inclination to decide it expeditiously. IEPA has a strong interest in ensuring that the public receives promptly the information regarding environmental compliance to which it is entitled – particularly where, as here, the information concerns compliance with Clean Air Act provisions essential to protecting public health.[2] Putting off the Board's decision on that question until USEPA gets around to making a decision, and possibly until a federal court rules on a challenge to that decision, would grossly and unjustifiably interfere with that interest.

Point II

MIDWEST GENERATION HAS FAILED TO PROVIDE THE REQUIRED WAIVER OF THE DECISION DEADLINE

The Board rule authorizing stay motions, 35 Ill. Adm. Code 101.514, expressly requires

[1] Respondent's suggestion that allowing the Board proceeding to continue would provide FOIA requestors with incentive to "circumvent" an agency's confidentiality determination is baseless. A party seeking documents in the hands of the government will, as did Sierra Club, as a matter of course request them from all agencies known to have them. The fact that those agencies may use separate processes and timetables to decide the requests does not constitute "circumvention" of any of them. Here, moreover, as respondent observes, the criteria to be applied by the Board and USEPA are roughly similar, so there is no question of Sierra Club having shopped for a forum with more favorable criteria.

[2] The USEPA information requests, the responses to which were requested by Sierra Club, were all directed specifically toward determining whether its facilities were emitting pollutants in violation of the Clean Air Act New Source Review standards, which require older coal-fired plants that perform major modifications resulting in increased emissions to upgrade their pollution control equipment. See Clean Air Act § 111(a)(4), 42 U.S.C. 7411(a)(4).

that any such motion "be accompanied by . . . a waiver of any decision deadline." No such waiver was included with Midwest Generation's motion. Accordingly, the motion should be denied.

Conclusion

For the foregoing reasons, IEPA respectfully requests that Midwest Generation's motion for a stay be denied.

Dated: Chicago, Illinois
October 6, 2005

Respectfully submitted,

LISA MADIGAN, Attorney General of the State of Illinois

MATTHEW DUNN, Chief, Environmental Enforcement/
Asbestos Litigation Division

BY: _____

Ann Alexander, Assistant Attorney General and Environmental Counsel
Paula Becker Wheeler, Assistant Attorney General
188 West Randolph Street, Suite 2001
Chicago, Illinois 60601
312-814-3772
312-814-2347 (fax)

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Midwest Generation EME, LLC	)	
Petitioner	)	**PCB 04-216**
	)	**Trade Secret Appeal**
v.	)	
	)	
Illinois Environmental Protection Agency,	)	
Respondent	)	

CERTIFICATE OF SERVICE

I hereby certify that I did on the 6th day of October, 2005 send by First Class Mail, with postage thereon fully paid and deposited into the possession of the United States Postal Service, one (1) original and nine (9) copies of the following instruments entitled Notice of Filing and Memorandum in Opposition to Midwest Generation's Motion to Stay Proceedings, to

To: Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, Illinois 60601

and a true and correct copy of the same foregoing instruments, by First Class Mail with postage thereon fully paid and deposited into the possession of the United States Postal Service, to:

Sheldon A. Zabel
Mary A. Mullin
Andrew N. Sawula
Schiff Hardin LLP
6600 Sears Tower
Chicago, Illinois 60606

Dated: Chicago, Illinois
October 6, 2005

LISA MADIGAN, Attorney General of the
State of Illinois

MATTHEW DUNN, Chief, Environmental Enforcement/
Asbestos Litigation Division

BY: _____

Ann Alexander, Assistant Attorney General and
Environmental Counsel
188 West Randolph Street, Suite 2000
Paula Becker Wheeler, Assistant Attorney General
Chicago, Illinois 60601
312-814-3772
312-814-2347 (fax)