ILLINOIS POLLUTION CONTROL BOARD
January 23, 2014

SIERRA CLUB, ENVIRONMENTAL LAW AND POLICY CENTER, PRAIRIE RIVERS NETWORK, and CITIZENS AGAINST RUINING THE ENVIRONMENT,	)	
Complainants,	)	
v.	)	PCB 13-15
	)	(Citizen's Enforcement – Water)
MIDWEST GENERATION, LLC,	)	
Respondent.	)	

ORDER OF THE BOARD (by J.D. O'Leary):

Today the Board accepts for hearing the enforcement complaint filed by Sierra Club, Environmental Law and Policy Center (ELPC), Prairie Rivers Network, and Citizens Against Ruining the Environment (collectively, complainants).[1] Respondent, Midwest Generation, LLC (MWG), has 60 days from the date of this order to file an answer to the complaint. Below, the Board describes the relevant procedural history of this case before accepting the complaint for hearing.

PROCEDURAL HISTORY

On October 3, 2012, complainants filed their complaint. The seven-count complaint alleges that MWG's disposal of coal ash in ash ponds at four electric generating stations resulted in violations of open dumping and water pollution provisions of the Environmental Protection Act (Act) (415 ILCS 5/12(a), 12(d), 21(a) (2012)), groundwater quality standards (35 Ill. Adm. Code 620.115, 620.301(a), 620.405), and various regulations promulgated under the federal Resource Conservation and Recovery Act. The four plants are MWG's Powerton Station, Tazewell County; the Joliet 29 Station, Will and Kendall Counties; the Will County Generating Station, Will County; and Waukegan Station, Lake County.

On November 5, 2012, MWG timely filed a motion to dismiss the complaint as frivolous and duplicative. Before the time for response to the motion had expired, complainants filed a letter noting that MWG had filed a bankruptcy petition, staying this action. On December 28, 2012, the Board received a notice of bankruptcy for Edison Mission Energy and certain of its subsidiaries and affiliates, including MWG. The notice stated that on December 17, 2012, Edison Mission Energy *et al.* had filed voluntary petitions for relief under the Bankruptcy Code (11 U.S.C. Ch. 11), being jointly administered under the lead case name In re Edison Mission

[1] Chad Kruse, who worked for the Illinois Environmental Protection Agency prior to joining the Board as an attorney assistant on March 19, 2013, took no part in the Board's drafting or deliberation of any order or issue in this matter.

Energy, Case No. 12-49219 (PJC), in the United States Bankruptcy Court for the Northern District of Illinois (Bankruptcy Court).

After one extension of time to respond to the motion to dismiss, on January 10, 2013, complainants filed a motion requesting an additional extension until the Bankruptcy Court either lifted the automatic stay or the stay otherwise expired. By order of February 7, 2013, the Board granted the motion for extension of time and directed the parties to make any appropriate filing to notify the Board within 30 days of the expiration of the automatic stay in this case.

On May 22, 2013, complainants filed a notice stating that on April 22, 2013, the Bankruptcy Court issued an order partially lifting the automatic stay as to this case "for the sole purpose of adjudicating MWG's motion to dismiss." In accordance with the schedule set by the hearing officer, complainants filed a response in opposition to MWG's motion to dismiss on June 21, 2013, and MWG filed its reply in support of the motion to dismiss on July 9, 2013.

By order of October 3, 2013, the Board denied MWG's motion to dismiss but granted its request to strike portions of the open dumping claims (counts 1-3) alleging that MWG violated federal regulations. The Board found that the complaint was neither frivolous nor duplicative based on the existence of compliance commitment agreements (CCAs) that MWG entered into with the Illinois Environmental Protection Agency (Agency) concerning the ash ponds at each of the four generating stations. As to counts 1-3, the Board found them adequately pled but frivolous to the extent they claimed MWG violated federal regulations that are not a part of Illinois law. Accordingly, the Board granted the motion to dismiss counts 1-3 only to the extent the complaint alleges MWG violated 40 C.F.R. §§ 257.1 and 257.3-4.

However, the Board did not proceed to determine, as required by Section 31(d)(1) of the Act (415 ILCS 5/31(d)(1) (2012)), whether the complaint is otherwise duplicative or frivolous. Rather, the Board reserved ruling on that question because the Bankruptcy Court had lifted the automatic stay in this case "for the sole purpose of adjudicating MWG's motion to dismiss." The Board directed the parties to notify the Board within 30 days after expiration of the automatic stay, either by action of the Bankruptcy Court or otherwise.

On January 10, 2014, complainants filed a Notice of Lift of Stay by Bankruptcy Court (Not.), which includes as exhibits the Bankruptcy Court's order of December 11, 2013 and accompanying memorandum opinion regarding ELPC's motion for relief from stay. The order states as follows:

> The Court finds that cause exists to lift the [automatic] stay as to the pending IPCB proceeding pursuant to section 362(d)(1).
>
> At this time, the ELPC is prohibited from seeking to enforce any monetary penalty that may be awarded pursuant to 415 ILCS 5/42 or otherwise. Not. Exh. A; *see also* Not. Exh. B at 14.

DISCUSSION

Because the Bankruptcy Court has lifted entirely the automatic stay in this case, the Board now turns to the question of whether the complaint, as modified by the Board's order of October 3, 2013, is otherwise frivolous or duplicative. Section 31(d)(1) of the Act provides that "[u]nless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2012); *see also* 35 Ill. Adm. Code 103.212(a). A complaint is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.* Based on the information in this record and taking into account the Board's prior ruling striking the claims in counts 1-3 for violation of federal regulations, the Board finds that complainants' complaint, so modified, is neither frivolous nor duplicative.

The Board accepts the complaint for hearing. *See* 415 ILCS 5/31(d)(1) (2012); 35 Ill. Adm. Code 103.212(a). A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if MWG fails within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider MWG to have admitted the allegation. *See* 35 Ill. Adm. Code 103.204(d). Any answer to the complaint, as amended, must be filed on or before March 24, 2014, which is the 60th day after the date of this order.

The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2012). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount. These factors include the following: the duration and gravity of the violation; whether the respondent showed due diligence in attempting to comply; any economic benefits that the respondent accrued from delaying compliance based upon the "lowest cost alternative for achieving compliance"; the need to deter further violations

by the respondent and others similarly situated; and whether the respondent "voluntarily self-disclosed" the violation. 415 ILCS 5/42(h) (2012). Section 42(h) requires the Board to ensure that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship." *Id*. Such penalty, however, "may be off-set in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent." *Id*.

Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any (including whether to impose a civil penalty), and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

IT IS SO ORDERED.

I, John Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on January 23, 2014, by a vote of 4-0.

John Therriault, Clerk
Illinois Pollution Control Board