Electronic Filing - Received, Clerk's Office : 03/05/2014

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 No-2013-015
Complainants,	)	(Enforcement – Water)
	)	
v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondents	)	

NOTICE OF ELECTRONIC FILING

To: Attached Service List

PLEASE TAKE NOTICE that on March 5, 2014, I electronically filed with the Clerk of the Illinois Pollution Control Board: **CITIZEN GROUPS' RESPONSE TO RESPONDENT'S MOTION TO STAY**, a copy of which is served on you along with this notice.

Respectfully submitted,

Jennifer L. Cassel
Staff Attorney
Environmental Law & Policy Center
35 E. Wacker Dr., Suite 1600
Chicago, IL 60601
jcassel@elpc.org
ph (312) 795-3726

Dated: March 5, 2014

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	)	
	)	
Complainants,	)	
	)	
v.	)	PCB No-2013-015
	)	(Enforcement – Water)
MIDWEST GENERATION, LLC,	)	
	)	
Respondents	)	

CITIZEN GROUPS' RESPONSE TO RESPONDENT'S MOTION TO STAY

I. INTRODUCTION

Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (collectively "Citizen Groups") file this response to Respondent Midwest Generation's ("MWG") Motion to Stay Proceedings and Memorandum in Support of Motion to Stay Proceedings ("Motion to Stay"). For the reasons discussed herein, MWG's allegations are meritless and its Motion to Stay should be denied.

II. STANDARD FOR A STAY

Section 101.514(a) of the Illinois Pollution Control Board ("the Board")'s rules provides the procedure on stays:

> Motions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed, and in decision deadline proceedings, by a waiver of any decision deadline. A status report detailing the progress of the proceeding must be included in the motion.

Electronic Filing - Received, Clerk's Office : 03/05/2014

35 Ill. Adm. Code 101.514(a). The decision whether to grant or deny a motion for a stay is "vested in the sound discretion of the Board." *Midwest Generation EME, LLC*, PCB 04-216 at 5 (Apr. 6, 2006) (citing *People v. State Oil Co.*, PCB 97-103 (May 15, 2003), *aff'd sub nom State Oil Co. v. PCB*, 822 N.E.2d 876 (2d Dist. 2004)).

MWG misstates the factors that the Board looks at in evaluating a stay request in a situation like the present case. In making select stay determinations, the Board does consider the factors noted by MWG: "(1) comity; (2) prevention of multiplicity, vexation, and harassment; (3) likelihood of obtaining complete relief in the foreign jurisdiction; and (4) the *res judicata* effect of a foreign judgment in the local forum, *i.e.*, in the Board proceeding," as well as (5) prejudice to the non-moving party, *Midwest Generation EME, LLC v. EPA*, PCB 04-216, at 7 (Apr. 6, 2006) (citing *A. E. Staley Mfg. Co. v. Swift & Co.*, 84 Ill. 2d 245, 254, 419 N.E.2d 23, 27-28 (1980), and (6) environmental harm that would result from staying the proceeding, *North Shore Sanitary District v. Illinois EPA*, PCB 03-146, at 3 (Mar. 20, 2003).)[1] The Board, however, has made clear that it does <u>not</u> apply this test when the complainant files its causes of action before the Board well before the Respondent files claims in another court. *Park Forest v. Sears, Roebuck & Co.*, PCB No. 01-77 at 4, 2001 Ill. Env. Lexis 101 at *12-17 (Feb. 15, 2001); *see also Environmental Site Developers v. White & Brewer Trucking, Inc.; People v. White & Brewer Trucking, Inc.*, PCB 96-180, PCB 97-11, 1997 Ill. Env. Lexis 409, at *7 (July 10, 1997) ("Where another court has taken jurisdiction over a controversy, a court with jurisdiction over the same

[1] Midwest Generation LLC, PCB 04-216 at 7 (Apr. 6, 2006), suggests, without support, that the applicable standard for a stay was whether the stay would:

> (1) avoid the costly and inefficient allocation of resources that is necessarily resulting from duplicative proceedings, (2) avoid practical difficulties that might arise from contrary determinations by state and federal agencies, and (3) allow the Board to be informed by a closely related federal determination.

Id. at 4.

controversy as a result of a later-filed suit will generally, as a matter of comity, defer to the first court in ruling on the matter before both courts"). In that situation, the Board simply looks at whether the second proceeding obviates the Board proceeding at issue. *Id*. ("The Board finds that the case before the Board . . . could not be obviated by the resolution of the contract dispute in the circuit court."). That test applies here, as Citizen Groups filed this enforcement action both before the Compliance Commitment Agreements ("CCAs") were entered into and before the Bankruptcy proceeding was filed. Because, as discussed further below, neither the CCAs, nor the Bankruptcy proceeding, nor the pending state or federal rulemakings obviate this enforcement action, a stay is not appropriate. Further, even if the factors MWG cites did apply here, a stay would not be appropriate. Accordingly, MWG's Motion to Stay should be denied.

III. ARGUMENT

MWG's Motion to Stay fails on numerous counts. First, the draft state and federal rulemakings neither obviate this enforcement action nor render it a "waste of resources." Second, "comity and consideration" for the Bankruptcy Court does not require a stay in this case. Third, as this Board has already held, the existence of CCAs may affect the fashioning of a remedy, but does not affect liability and is not a proper basis for dismissing or delaying this enforcement action. *See* Board Order, PCB 2013-015, at 20 (Oct. 3, 2013). Finally, a stay would prejudice Citizen Groups and would pose a risk to the public health and to the environment. For those reasons, addressed in further detail below, MWG's Motion to Stay should be denied.

A. The State and Federal Rulemakings Do Not Obviate This Action.

MWG points to a rule proposed by the IEPA and a federal consent decree in which U.S. EPA commits to a federal rulemaking on coal ash by December 19, 2014, and argues that the

Board should avoid a "waste of resources" that would be caused by this action going forward in the face of those rulemakings. Mtn. to Stay at 11-12. MWG's argument, which is merely a new spin on their old, rejected argument that this enforcement proceeding is duplicative of Illinois Environmental Protection Agency ("IEPA") actions on coal ash, does not hold up. The proposed rules do not obviate this enforcement action or render it a "waste of resources" because (a) rulemakings generally do not supersede enforcement actions already underway, but rather are inherently different processes with distinct aims; (b) there are numerous mechanisms to ensure that any relief granted in this case will not conflict with whatever the final rules may require; and (c) when the proposed rules will be finalized, and what they may require if and when they do proceed to a final stage, is highly uncertain. Thus, as explained further below, these pending rulemakings are no cause for a stay of this action.[2]

i. Rulemakings Do Not Obviate Enforcement Actions.

Rulemakings, in general, do not supersede enforcement actions. *See e.g., In the Matter of: Coal Combustion Waste (CCW) Ash Ponds and Surface Impoundments at Power Generating Facilities: Proposed New 35 Ill. Adm. Code 841*, PCB R2014-010, Attachment A, "Technical Support Document: Coal Combustion Waste Impoundments at Electrical Coal Fired Power Plants," ("IEPA Technical Support Document") at 35-36 (filed Oct. 28, 2013).[3] Rulemakings

[2] The case MWG cites is wholly distinguishable from this case and does not support a stay here. Citing *U.S. Steel v. IEPA and ABC*, PCB 10-23, at 12 (Feb 2, 2012), MWG argues that a stay would avoid multiplicity or uncertainty. Mtn. to Stay at 10. In *U.S. Steel*, the second proceeding at issue involved the complainant's petition to U.S. EPA regarding a subsequent version of the same permit at issue in the Board proceeding. *U.S. Steel v. IEPA and ABC*, PCB 10-23, at 12 (Feb 2, 2012). The second proceeding posed the risk of a legal impact on the status of the Board proceeding (i.e., a determination that the prior version of the permit was not legally valid, rendering moot any adjudication concerning the terms of that permit), thus justifying a stay of the Board case pending the outcome of the petition to the U.S. EPA. *Id.* at 12. "[R]esolution of the USEPA proceeding on ABC's petition should indicate definitively whether the instant appeal is moot." *Id*. Unlike that case, here, neither the state nor the federal rulemaking will have a legal effect on the Board proceeding via res judicata, mootness, or otherwise.

[3] *Available at* http://www.ipcb.state.il.us/documents/dsweb/Get/Document-82135

are forward-looking, and in the case of the federal and state coal ash rulemakings, regulate future use of surface impoundments. Enforcement actions, including this action before the Board, are backward-looking, addressing violations that have already occurred. The State's proposed rule is clear that it does not displace enforcement actions: even with the rule in place, exceedances of groundwater standards will continue to be grounds for an enforcement action. *See* IEPA Technical Support Document at 35-36 (under proposed rules, exceedances of groundwater quality standards could subject the owner or operator to "a notice of violation that could result in penalties and a corrective action process or closure of the unit.")

Moreover, the proposed rule does not treat violations of the existing state groundwater pollution laws the same way an enforcement action would. For example, the proposed rule does not impose penalties for current violations. The Board's ability to impose punitive measures is an important mechanism for stopping egregious violations and for deterring future violations. *In the Matter of: Coal Combustion Waste (CCW) Ash Ponds and Surface Impoundments at Power Generating Facilities: Proposed New 35 Ill. Adm. Code 841*, PCB R2014-010, IEPA Statement of Reasons ("Statement of Reasons") at 1 (filed Oct. 28, 2013).[4] In sum, nothing in the State's proposed rule supersedes enforcement actions before the Board or would render such actions legally moot; to the contrary, it includes a mechanism to incorporate the outcome of such action to meet the requirements of the rule. Statement of Reasons at 14.

Indeed, Judge Cox of the Bankruptcy Court has already held, in lifting the automatic stay in bankruptcy, that: "Contrary to MWG's assertion, nothing in the proposed rule suggests that its enactment would obviate the current IPCB Proceeding." *In re: Edison Mission Energy, et al.*, No. 12-49219, 2013 Bankr. Lexis 5230 at *25 (Bankr. ND. Ill., Dec. 11, 2013). When a later

[4] *Available at* http://www.ipcb.state.il.us/documents/dsweb/Get/Document-82136

proceeding does not obviate a Board proceeding filed earlier, the court will not stay the second proceeding. *Park Forest v. Sears, Roebuck & Co.*, PCB No. 01-77 at 4, 2001 Ill. Env. Lexis 101 at *12-17 (Feb. 15, 2001) ("The Board finds that the case before the Board . . . could not be obviated by the resolution of the contract dispute in the circuit court."). Accordingly, a stay is not appropriate here.

ii. Any Relief Granted In This Case Will Not Conflict With The Requirements of the Pending Rules.

The pending rulemakings likewise do not pose a risk of wasted resources or inconsistencies between any relief awarded here and the requirements of those rules. There are numerous mechanisms built into both the rules and the current board process to avoid such wasted resources, duplicative results, or inconsistencies among the various outcomes. First, the state rulemaking is simply a codification of a process to be used (similar to the current CCA process) and does not mandate any specific outcomes. *See, e.g.*, IEPA Statement of Reasons at 1 ("This proposed rule sets forth a process to monitor [coal combustion waste ("CCW")] surface impoundments and groundwater, as well as a process for preventive response, corrective action and closure). The documents supporting the proposed state rule emphasize repeatedly that the rule puts forward a process to address impoundments, not specific results for impoundments: "The proposed rules do not prescribe how all CCW surface impoundments must be closed, or how each site with groundwater contamination must be remediated. Instead, the rule provides a process." *Id*. at 9. This is repeated by IEPA testimony offered in support of the proposed rule:

> The proposed regulations establish a process for assessing groundwater quality at ash impoundments which includes verifying the sources of the groundwater impacts, addressing impacts to potable wells, initiating corrective actions and initiating impoundment closure. The actions required at each of the ash impoundments will be based upon the specific conditions encountered at each impoundment.

Buscher Testimony at 2. Since the rule does not prescribe specific outcomes for impoundments, the Agency can use the process provided to avoid duplicative or inconsistent results. In fact, the proposed rule would authorize the Agency to consider Board orders as sufficient compliance with the rule:

> The Agency may approve the use of any hydrogeologic site investigation or characterization, groundwater monitoring well or system, groundwater monitoring plan, groundwater management zone or preventive response plan, compliance commitment agreement, or court or Board order existing prior to the effective date of these rules to satisfy the requirements of this Part.

Proposed Section 841.145.

The proposed federal coal ash rules similarly do not mandate specific corrective action measures, and therefore pose no direct conflict with any relief the Board may order in this case. *See* Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities, 75 Fed. Reg. 35,128, 35, 248 (proposed June 21, 2010). Like the state rules, the proposed federal rules under Subtitle D of RCRA would require a plan for monitoring groundwater contamination at the sites (which MWG is already doing), as well as an "assessment of corrective measures" and a "selection of remedy" should groundwater contamination be found. *See id.* at 35,248 – 51; Proposed §§ 257.94(d)(2), 257.95(c)(2), 257.95(e), 257.95(f)(1)(iv), 257.96(a), and 257.97. There is nothing in the proposed rule that would preclude the Board from ordering specific measures to remediate pre-existing contamination, and nothing indicating that such corrective measures would not be entirely consistent with the broad, vague requirements of the federal rule, if and when it is adopted. Moreover, just as the Board can take efforts to avoid wasted resources and consider compliance with CCAs in prescribing the remedy in the present enforcement action, the Board can also take efforts to avoid wasted resources of and ensure consistency with any final State or

Electronic Filing - Received, Clerk's Office : 03/05/2014

federal rules. Board Order, PCB 2013-15 (Oct. 3, 2013) at 20. Therefore, even if "prevention of multiplicity, vexation, and harassment," *see Midwest Generation EME, LLC v. EPA*, PCB 04-216, at 7 (Apr. 6, 2006), were at issue in the Board's decision on MWG's motion to stay (as explained above, it is not), there is no threat of multiplicity or vexation here, and therefore a stay is not warranted.

iii. <u>The Timing and Content of the Pending Rules Is Uncertain And Therefore A Stay Is Not Appropriate.</u>

Finally, when the proposed rules will be finalized, and what they may require if and when they do proceed to a final stage, is highly uncertain. Moreover, even if they are finalized, it will probably be years before the new rules take effect. *See, e.g.,* IEPA Statement of Reasons at 11 ("the [groundwater quality standards] compliance period begins when the unit receives coal combustion waste, or leachate from coal combustion waste, or one year *after* the effective date of this rule, whichever is later") (emphasis added). Judge Cox of the Bankruptcy Court recognized that the results of the rulemaking process are speculative and likely won't be clear for a long time, which conclusions underpinned, in part, her decision to lift the stay in bankruptcy: "Even assuming arguendo that the terms of the proposed rule overlap with what is at issue in the IPCB Proceeding, this Court cannot speculate as to when the rule will be enacted. . . . [I]t could be years before the new rule takes effect." *In re: Edison Mission Energy, et al.*, No. 12-49219, 2013 Bankr. Lexis 5230 at *25 (Bankr. ND. Ill., Dec. 11, 2013).

The fact that a consent decree sets the timeline for the federal rule provides few assurances as to the actual timeline on which the rule will be finalized. There are many examples of EPA agreeing to a date certain to publish federal rules but then missing that deadline and needing more time. For instance, pursuant to a consent decree, EPA was under deadline to issue both proposed and final regulations setting effluent limitation guidelines on toxic metals for

electric generating units. Consent Decree, *Defenders of Wildlife v. EPA*, No. 10-cv-01915 (March 18, 2012, D.D.C.). Those deadlines were extended three separate times. Nevertheless, on Dec. 16, 2013, EPA filed a status report with the court stating that it requires still more time to issue the final rule, pushing the publication date further into 2014**.** *Defenders of Wildlife v. EPA*, No. 10-cv-01915 (D.D.C.) (status report filed Dec. 16, 2013). Likewise, in December 2010, EPA entered into a settlement agreement with numerous states and environmental groups to issue New Source Performance Standards for carbon pollution from refineries, providing that draft standards would be issued by December 2011 and final standards by November 2012. Settlement Agreement.[5] More than one year after those standards were to be finalized, EPA has yet to propose any such standards, and former EPA Administrator Lisa Jackson told Inside EPA in March 2012 that "there are no current rules under development on that issue." Inside EPA, "EPA Puts Greenhouse Gas Rules for Oil Refineries on Backburner," (Mar. 8, 2012).[6]

Significant uncertainty remains not just as to the date these proposed rules might be finalized, but also as to what they may require in their final iterations. Proposed rules are rarely issued in precisely the form they are initially drafted, and with the complexities of coal ash regulation and the high level of public attention focused on the issue, it is nearly certain that changes will be made to both the state and federal proposed rules. MWG itself acknowledges that the outcome of the both rulemaking is far from clear. With regard to the state rulemaking, it admits that "the Board may modify the proposed rules based upon the hearings scheduled through May 2014." Mtn. to Stay at 12. As to the federal rules, MWG concedes that "At this

[5] *Available at* http://www2.epa.gov/sites/production/files/2013-09/documents/refineryghgsettlement.pdf.

[6] *Available at* http://insideclimatenews.org/news/20120308/epa-greenhouse-gas-emissions-rules-oil-refineries-power-plants-tailoring-rule-2012-elections-obama-climate-change.

time, the U.S. EPA has not indicated whether it intends to regulate coal ash under either Subtitle C or D of RCRA." *Id.*

The impact of the rulemakings on this action is further uncertain due to their far-off compliance dates. Even if EPA met the consent decree deadline of December 19, 2014 for finalizing the 2010 coal ash RCRA rule proposal, [7] the earliest date by which MWG would have to perform corrective actions is June 13, 2016.[8] If we assume that groundwater data clearly show contamination attributable to the MWG coal plants, corrective action requirements might not be triggered until years later.[9]

Illinois courts, as well as this Board, have made clear that speculative future action is no basis for a stay of ongoing proceedings. *See Laff v. Butler Co.,* 64 Ill. App. 3d 603, 623; 381 N.E.2d 423, 438 (Ill. App. 1st Dist. 1978) (explaining that "we will not attempt to expand our power to stay judgments in order to allow speculation as to the development of the law…," court denies motion to stay based on pending Illinois Supreme Court decision in similar case); *In re:*

[7] Consent Decree, *Appalachian Voices et al. v. McCarthy*, Civ. No. 1:12-cv-00585-RBW (D.D.C., Jan. 29, 2014).

[8] The effective date of the Subtitle D rule would be June 19, 2015. Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities, 75 Fed. Reg. 35,128, 35,2210 (proposed June 21, 2010) (setting the effective date of the Subtitle D proposal at 180 days from the date of promulgation). Assuming that there is contamination from the coal ash disposal areas, Midwest Generation or its successor would have 90 days to establish an assessment monitoring program, 90 days to establish background concentrations and groundwater protection standards, 90 days to begin the assessment of corrective actions, and 90 days to complete the assessment of corrective actions. *Id.* at 75 Fed. Reg. 35,248-50 (to be codified at 40 C.F.R. § 257.94-257.96).

[9] If Midwest Generation were ultimately required to assess corrective actions according to the terms of the Subtitle D proposal, they would have an open-ended "reasonable period of time" to initiate remedial actions. *Id.* at 75 Fed. Reg. 35,251 (to be codified at 40 C.F.R. § 257.97). In addition, although Midwest Generation is currently monitoring the groundwater at all of the coal plants at issue here, they may attempt to take advantage of provisions for the set-up and initial analysis of the groundwater monitoring network required by the federal rule. Under the Subtitle D proposal, owners can take up to a year to set up groundwater monitoring systems and a "reasonable period of time" to determine whether monitoring data show increases over background. *Id.* at 75 Fed. Reg. 35,246-48 (to be codified at 40 C.F.R. § 257.93).

Petition of the Louis Berkman Co., d/b/a The Swenson Spreader Co., for an Adjusted Standard from 35 Ill. Adm. Code Part 215 Subpart F ("In re Berkman"), AS No. 97-5, 1997 Ill. Env. Lexis 188, *4 (Apr. 3, 1997). In *In re Berkman*, this Board denied a motion to stay the ongoing adjusted standard proceedings, holding that

> although the Agency speculates that the enforcement case will be resolved by a compliance plan, that outcome is not inevitable. The possibility that a compliance plan may be adopted is not a sufficient reason to stay the adjusted standard proceedings. This is especially true here given that the petition for the adjusted standard was filed before the enforcement action and that preparations for the hearing on the adjusted standard have been underway for some time.

Id. at *4. The Board has also indicated that when the timing of a decision in a proceeding is uncertain, a stay is not warranted. *Midwest Generation EME, LLC v. EPA*, PCB 04-216 at 6 (Feb. 15, 2007) (denying a stay when movant did not provide a timeline for federal decision).

Here, the present enforcement action was filed long before the state drafted its proposed rules, and well before either the state or federal rules will have been made final. Because the timing and outcomes of those rulemakings are wholly uncertain and speculative, *Laff* and the Board's decisions in *In re Berkman and Midwest Generation EME* make clear that the pending rules form no basis for a stay of this action. Just like the Board's decisions on the CCAs, the prospective State and federal rules should have no bearing on this Court's consideration as to whether the enforcement action should proceed.

B. Comity and Consideration for the Bankruptcy Court Do Not Require A Stay.

MWG next argues that comity and consideration for the Bankruptcy Court, the Federal Energy Regulatory Commission ("FERC"), and the NRG sale support a stay. Mtn. to Stay at 12-13. MWG is incorrect. To begin with, as explained above, this factor is not relevant here because the present case was commenced prior to other proceedings in other forums. *See Park*

Electronic Filing - Received, Clerk's Office : 03/05/2014

Forest v. Sears, Roebuck & Co., PCB No. 01-77 at 4, 2001 Ill. Env. Lexis 101 at *12-17 (Feb. 15, 2001). Consequently, because it looks to factors which the Board has made clear it does not consider in the present situation, the case that MWG primarily relies upon - *Midwest Generation EME, LLC v. EPA*, PCB 04-216 (Apr. 6, 2006) – is not relevant here.[10] The other case MWG relies upon, *Herrin Security Bank v. Shell Oil Co.*, PCB 94-178 (May 18, 1995), is similarly distinguishable from the present case.[11]

Even if comity were a relevant factor, however, MWG's argument wouldn't pass the red-face test because this is virtually the same argument that the Bankruptcy Court itself rejected in deciding to lift the automatic stay imposed on this proceeding. *In re: Edison Mission Energy, et al.*, No. 12-49219, 2013 Bankr. Lexis 5230 at *19-20 ("[T]he Court finds that the continuation of the IPCB Proceeding will not result in great prejudice to MWG or to the Debtors' estate"). The most appropriate court to consider the effect of this enforcement action on NRG's purchase of MWG and need for "comity and consideration for the Bankruptcy Court and FERC approval of the acquisition of MWG by NRG" is the Bankruptcy Court.

In the bankruptcy proceeding, MWG raised, and the Bankruptcy Court rejected, MWG's arguments regarding the impacts that the present enforcement case would have on the

[10] In any case, *Midwest Generation EME, LLC v.* is distinguishable from the present case. The comity that the Board gave the other proceeding in *Midwest Generation EME, LLC v. EPA* is distinct from the present case because in that proceeding, the two different bodies were deciding the same issue as applied to the same facts. In the present case, MWG asks for comity for the bankruptcy court proceeding when the Bankruptcy Court is deciding bankruptcy issues while the Board case is an enforcement proceeding on an environmental matter. The legal issues are distinct as are the factual considerations. Further, the bankruptcy court, in deciding that the case should not be stayed, implies that no comity is needed for that proceeding. *See In re: Edison Mission Energy, et al.*, No. 12-49219, 2013 Bankr. Lexis 5230.

[11] MWG misleads the Board when it suggests that the Board granted a stay in *Herrin* for purposes of allowing "business decisions to conclude." Mtn. to Stay at 10. In *Herrin*, the second proceeding on potential reimbursement would have a direct effect on the amount of relief being sought by Complainants in the Board case. *Id*. at 1. The Board relied upon this impact on relief in deciding to grant the stay, pointing out that awaiting the state agency decision was warranted "since it would significantly reduce the damages sought in this action." *Id*.

Electronic Filing - Received, Clerk's Office : 03/05/2014

bankruptcy proceeding and risk to the sale to NRG. *Id.* at *19 ("Beyond the general assertion that allowing the IPCB Proceeding to proceed would be disruptive, MWG fails to assert with specificity how moving forward with the IPCB Proceeding will have an adverse impact on the Debtors"). Specifically, MWG argued that "granting stay relief would divide the Debtors' attention and jeopardize its pending transaction with NRG." *Id*. In rejecting MWG's arguments in favor of maintaining the stay, the Bankruptcy Court found that the prejudice to Citizens Groups of the stay outweighed any impacts on the bankruptcy action and risk sale to NRG, *id*. at *21-22, and that, contrary to MWG's arguments, resolving environmental violations would actually benefit MWG and its successors. *Id*. at 16 ("Requiring MWG to take immediate action to address alleged environmental violations will be beneficial to the Debtors' estates and their successors, including the prospective purchasers NRG Energy, Inc. and NRG Energy Holdings, Inc. (collectively 'NRG')"). Without question, the potential impacts on both the NRG sale and the reorganization plan were squarely before the Bankruptcy Court when it made its decision. The Bankruptcy Court lifted the stay on December 11, 2013, *id*. at *26, two months after the sale was announced and one month after the reorganization plan memorializing the sale was filed.[12] The Bankruptcy Court's conclusion that this case does not risk any undue impacts to the bankruptcy proceeding and the NRG sale, and that resolution of this case would in fact benefit MWG and its successors, is sufficient to demonstrate that no stay is needed out of comity and consideration for the Bankruptcy Court, FERC approval, and the NRG purchase.

Additionally, the uncertain timing of FERC approval also supports a denial of the stay. As discussed above, when the timing of a decision in a proceeding is unknown, the Board will deny a motion for a stay. *Midwest Generation EME, LLC v. EPA*, PCB 04-216 at 6 (Feb. 15,

[12] *See* http://www.edisonmissionrestructuring.com/pdflib/1361_49219.pdf and http://www.edisonmissionrestructuring.com/pdflib/1589_49219.pdf.

Electronic Filing - Received, Clerk's Office : 03/05/2014

2007) (denying a stay when movant did not provide a timeline for federal decision). Similarly, Judge Cox of the Bankruptcy Court decided to lift the stay in bankruptcy in the face of possible coal ash rules because "it could be years before the new rule takes effect." *In re: Edison Mission Energy, et al.*, No. 12-49219, 2013 Bankr. Lexis 5230 at *25. MWG itself notes that "the FERC approval date is unknown." Mtn. to Stay at 4. Since the timing of FERC approval is unknown, comity for the FERC proceeding does not provide grounds for a stay.

As to MWG's concern regarding the effect on NRG of any binding, strategic business decisions it might need to make in this action or as a result of this action, MWG can address that by simply consulting with NRG about those decisions. Regardless of that consultation, whoever is the owner of these plants at the time this Board determines what relief, if any, is appropriate, will need to comply with this Board's order and implement that relief. In sum, the bankruptcy process provides absolutely no justification to stay this proceeding, particularly in light of the fact that the Bankruptcy Court has ordered that the stay of this case be lifted.

C. The Compliance Commitment Agreements Do Not Warrant a Stay.

MWG next argues that the Board should stay this case because MWG has implemented the CCAs it agreed to with IEPA. Mtn. to Stay at 13. This argument, like others in MWG's motion, fails because it repeats arguments previously raised by MWG in its Motion to Dismiss that this action is duplicative of or conflicts with the CCAs. The Board has already held in its order on the Motion to Dismiss that the existence of CCAs may affect the fashioning of a remedy, but is not a proper basis for dismissing or delaying this enforcement action. Board Order, PCB 2013-015 at 20 (Oct. 3, 2013) ("[T]he implications of CCAs are appropriate for consideration in determining penalties rather than grounds for dismissing an enforcement action" (internal quotation omitted)). Moreover, as the Board likewise recognized in their order, the

relief sought by Citizen Groups is plainly different and more extensive than that provided by the CCAs. *Id*. at 22-23.

In the complaint, Citizen Groups specifically ask the Board to order MWG to: "[c]ease and desist from open dumping of coal ash and from causing or threatening to cause water pollution," "[m]odify its coal ash disposal practices so as to avoid future groundwater contamination," and "remediate the contaminated groundwater so that it meets applicable groundwater standards. . . ." Compl. 18-19. MWG argues that it has "presumptively 'ceased and desisted' from any continuing violations." Mtn. to Stay at 14.[13] MWG further claims that the actions required by the CCAs, including among other things, lining or relining of the ponds, entering into ELUCs, and establishing GMZs, "achieve the same results" as the relief sought by Complainants. Mtn. to Stay at 14.[14]

The only thing that has changed since MWG made virtually the same argument in its Motion to Dismiss is that Environmental Land Use Controls ("ELUCs") and Groundwater Management Zones ("GMZs") have been approved and implemented and MWG claims completion of the actions required under the CCAs. Contrary to MWG's assertions, and for the reasons already fully explained in Complainants' Response to MWG's Motion to Dismiss and the expert declaration attached to that Response, the requirements in the CCAs allegedly

[13] MWG's use of the term "presumptively" raises a red flag. This wording shows that MWG cannot attest with certainty to having ceased all violations. MWG's choice of words reveals that the Board and Citizen Groups would be taking a huge leap of faith if we were to accept the argument that MWG has stopped violating the standards at issue. This alone demonstrates that the action should not be stayed.

[14] As stated in the Response to the Mtn. to Dismiss,

> The limited effectiveness of lining, and re-lining, ash ponds to prevent groundwater contamination is evidenced by the hundreds of alleged violations of groundwater standards that presently exist at these plants despite the fact that nearly all of the ash ponds at these four plants are lined. (*See* Compl. ¶¶ 1-8.) The existing liners did not suffice to prevent those violations. (Decl., Ex. G ¶¶ 14(a) and 15(a)).

Response to Mtn. to Dismiss at 27.

implemented by MWG do not provide the same relief as the relief sought by Complainants. *See* Response to MWG Mtn. to Dismiss at 24-30.

As explained in Complainants' Response to MWG's Motion to Dismiss, the relief Citizen Groups seek is different and far more extensive than the relief provided by the CCAs, in part because Citizen Groups allege different violations extending over a different time frame than those alleged in the NOVs. *See* Response to Mtn. to Dismiss at 21-30. Citizens Groups' open dumping claims are a key example of the differences between the CCAs and Citizens Groups' allegations. In arguing for the stay, MWG conveniently ignores the open dumping claims that are not covered by the CCAs. In our complaint, Citizens Groups allege 37 separate violations of the Illinois Environmental Protection Act's proscriptions on open-dumping. Compl. ¶¶ 42-50; 415 ILCS § 5/21(a). The CCAs do not address any open dumping violations, so it is no surprise that MWG has not even attempted to argue that Citizens Groups' open dumping claims are resolved by the CCAs.

Moreover, as detailed in the Complainants' Response to MWG's Motion to Dismiss, the remedy sought is distinct from the remedy ordered by the CCAs. Citizen Groups have a wholly different evaluation of what it would take to "cease and desist" from violations than that which is suggested by the requirements that appear in the CCAs. Specifically, the relief Citizen Groups' seek, namely cessation from causing or threatening to cause water pollution and open dumping,[15] would require, at a minimum, 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

[15] Because compliance with Illinois' proscriptions against open dumping depends, in part, on whether the dumped material is being placed in a site where contaminants in groundwater exceed the open dumping Maximum Contaminant Levels, *see* Compl. ¶¶ 33-35, Respondents will not cease and desist open dumping unless and until they prevent further groundwater contamination from occurring.

Electronic Filing - Received, Clerk's Office : 03/05/2014

Waukegan and Will County. The CCAs, and the GMZs and ELUCs provided for therein, do not require the permanent removal of coal ash or other contaminated materials from ash ponds, nor do they require the pumping and treating of contaminated groundwater. *See* Response to Mtn. to Dismiss and attached exhibits.

The inadequacy of the CCAs to address the relief Complainants seek is demonstrated by taking a closer look at the GMZs and ELUCs. MWG argues that it is no longer violating groundwater standards because, as a result of the approved GMZs, "Class I, II, III and IV groundwater standards do not apply to the groundwater area under the Stations." Mtn. to Stay at 13. In short, if violations are, in fact, no longer ongoing, it is not because MWG has actually come into compliance with the standards at issue in the complaint, but rather because MWG is no longer being held to those standards (tellingly, MWG has not said the contamination has stopped). Similarly, the ELUCs do nothing to redress the contamination but simply prevent human contact with groundwater. Simply modifying the standard does nothing to remediate the already-contaminated groundwater or to prevent the existing contamination from spreading. Accordingly, the CCAs provide neither the relief nor the "result" that Citizens Groups seek.

Furthermore, prior to concluding that the remedy Citizen Groups' seek has already been provided by the CCAs, experts must, at a minimum, evaluate the groundwater data to determine what relief is necessary. Indeed that is exactly what the Board held in its Order denying MWG's Motion to Dismiss: that it is appropriate to consider the CCAs in determining proper relief, but that their existence is no grounds for halting the proceeding altogether. Board Order, PCB 2013-015 (Oct. 3, 2013) at 20.[16]

[16] Again, the cases MWG cites in support of this argument are not on point. *People v. White and Brewer Trucking*, PCB 97-11, at 1 (Jan. 18, 2001), unlike this case, was an agreed motion for a stay. In *Herrin Security Bank v. Shell Oil Co.*, PCB 94-178, at 1 (May 18, 1995) and in *Pearl v. Biocoastal Corp. et al*, PCB 96-265, at 3 (April 3, 1997), the Board held that a stay was proper when the result of a second

Electronic Filing - Received, Clerk's Office : 03/05/2014

The Board has already held that this enforcement action is not duplicative of the CCA process. *Id*. at 18. The Board has also held that it can consider the outcome of the CCA process in fashioning a remedy in this proceeding. *Id*. at 20. The Board can and will take efforts to avoid duplication of and ensure consistency with any CCAs when adjudicating the present claims. *Id*. ("Thus, to the extent the Board were ultimately to find in this case that MWG has committed the violations alleged by complainants, the Board would, in fashioning an appropriate remedy, take into consideration any compliance by MWG with the CCAs. *See* 415 ILCS 5/33(c), 42(h) (2012))."). Therefore, there is no risk that the CCA process will not be taken into account in the proceeding. A stay is not appropriate.

D. A Stay Would Prejudice Citizen Groups and Poses A Risk to the Public Health and the Environment

Assuming *arguendo* that prejudice to the non-movant is relevant to considering a stay in these circumstances, *Midwest Generation*, PCB 04-216 at 7 (Apr. 6, 2006) ("The Board may also weigh the prejudice to the nonmovant from staying the proceeding against the policy of avoiding duplicative litigation") (citing *Village of Mapleton v. Cathy's Tap, Inc*., 313 Ill. App. 3d 264, 267, 729 N.E.2d 854, 857 (3rd Dist. 2000)); *cf. People v. White and Brewer Trucking*, PCB 97-11, at 1 (Jan. 18, 2001) (no balancing of prejudice required in an agreed motion for a stay), that factor weighs strongly against a stay here. Granting MWG's motion for a stay would prejudice Citizen Groups, and put public health and the environment at risk. Citizen Groups have expended considerable time and expense gathering and analyzing documentation of violations,

proceeding could significantly impact the relief requested. Here, the Board has already determined that the relief Citizen Groups seek differs from that provided by the CCAs; the question that remains, which can only be resolved by moving forward with this case through discovery and expert evaluation, is what effect, if any, actions taken pursuant to the CCAs will have on any relief granted. In short, the cases cited by MWG do not support a stay here.

Electronic Filing - Received, Clerk's Office : 03/05/2014

commencing the action, and defending against MWG's Motion to Dismiss. *See, e.g.,* Compl., Response to Mtn. to Dismiss. Further, the Bankruptcy Court has already concluded that Citizen Groups' hardship from a stay outweighs any threat of hardship posed to MWG. "[A]ny hardship to MWG will be *de minimis* in comparison to the hardship to the ELPC and the people of Illinois were the automatic stay to remain in effect." *In re: Edison Mission Energy, et al.*, No. 12-49219, 2013 Bankr. Lexis 5230 at *21-22.

Also assuming for the sake of argument that environmental harm is a relevant consideration for the Board when evaluating a stay request in the circumstances of this case, *see North Shore Sanitary District v. Illinois EPA*, PCB 03-146, at 3 (Mar. 20, 2003), the environmental issues at stake here weigh strongly in favor of denying the Motion and continuing with the enforcement action. Contrary to MWG's argument, granting MWG's Motion to Stay Proceedings poses a risk of environmental harm. The Board recognizes the importance and value of private enforcement efforts of entities such as Citizen Groups to help protect the state's environment and fulfill the state's constitutional promise "to provide and maintain a healthful environment for the benefit of this and future generations." Illinois Const. art. XI; *see also Int'l Union et al v. Ill. Envtl. Prot. Agency*, PCB No. 94-240, 1996 Ill. Env. Lexis 579, at *95 (Ill. Pollution Control Bd. Aug. 1, 1996) (citizens filing citizen suit "perform[] the function of private attorneys general, safeguarding their important voice in Illinois' process and serving a vital function in ensuring environmental protection."). The pollutants found in the coal ash at MWG's plants are toxic and have serious health implications. Compl. at ¶¶ 10-27. While the ELUCs may prevent some risk to human health by barring contact or consumption of groundwater, there is no evidence that the contamination has ceased. Thus, because contamination of groundwater may continue, potential harm to the environment is high.

Finally, the Bankruptcy Court, in lifting the automatic stay imposed as a result of the bankruptcy proceeding, already concluded that there is a risk to the environment and public health. "[T]he Court finds it important for the sake of public health to deal with these issues now, rather than wait to do so at a later date." *In re: Edison Mission Energy, et al.*, No. 12-49219, 2013 Bankr. Lexis 5230 at *20. The significant prejudice to the environment alone justifies denial of MWG's motion for a stay.

IV. CONCLUSION

For the foregoing reasons, Citizen Groups respectfully request that the Board deny MWG's Motion to Stay Proceedings.

Dated: March 5, 2014

Respectfully submitted,

Jennifer L. Cassel
Faith Bugel
Environmental Law & Policy Center
35 E. Wacker Dr., Suite 1600
Chicago, IL 60601
jcassel@elpc.org
312-795-3726 (phone)
312-795-3730 (fax)

Attorneys for ELPC, Sierra Club and Prairie Rivers Network

Abel Russ
Whitney Ferrell
Attorney
Environmental Integrity Project
One Thomas Circle, Suite 900
Washington, DC 20005
aruss@environmentalintegrity.org

wferrell@environmentalintegrity.org
202-263-4453 (phone)
202-296-8822 (fax)
Attorneys for Sierra Club and
Prairie Rivers Network

Keith Harley
Chicago Legal Clinic, Inc.
211 W. Wacker, Suite 750
Chicago, IL 60606
kharley@kentlaw.iit.edu
312-726-2938 (phone)
312-726-5206 (fax)
Attorney for CARE

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF ELECTRONIC FILING** and **CITIZEN GROUPS' RESPONSE TO RESPONDENT'S MOTION TO STAY PROCEEDINGS** was served to all parties of record listed below by United States Mail, postage prepaid, on March 5, 2014.

/s/ Erin Morse
Erin Morse
Legal Assistant
Environmental Law and Policy Center
35 E Wacker Drive. Suite 1600
Chicago, Illinois 60601
312-795-3718

PCB 2013-051 SERVICE LIST:

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 West Randolph St
Suite 11-500
Chicago, IL 60601