

ILLINOIS POLLUTION CONTROL BOARD  
February 7, 2013

SIERRA CLUB, )  
)  
Complainant, )  
)  
v. ) PCB 13-27  
) (Citizens Enforcement - Air)  
MIDWEST GENERATION, LLC, )  
)  
Respondent. )

ORDER OF THE BOARD (by J.D. O’Leary):

Sierra Club filed a two-count complaint (Comp.) against Midwest Generation, LLC (MWG) on December 17, 2012, alleging air pollution control violations. The complaint has not been accepted for hearing. As discussed below, this enforcement action has been stayed by operation of federal law due to MWG’s filing of a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Northern District of Illinois. The Board first describes the filings received by the Board in this enforcement action before discussing why this proceeding is subject to the “automatic stay” of Section 362(a) of the Bankruptcy Code (11 U.S.C. § 362(a)).

**FILINGS**

**Complaint**

Sierra Club’s complaint alleges that in 2010 and 2011, MWG’s emissions of sulfur dioxide (SO<sub>2</sub>) resulted in violations of air pollution control requirements of the Environmental Protection Act (Act) (415 ILCS 5/9(a) (2010)) and the Board’s regulations (35 Ill. Adm. Code 201.141) at four coal-fired power plants owned and operated by MWG: (1) the Joliet #9 and #29 Generating Station located in Joliet, Will and Kendall Counties; (2) the Powerton Generating Station located in Pekin, Tazewell County; (3) the Waukegan Generating Station located in Waukegan, Lake County; and (4) the Will County Generating Station located in Romeoville, Will County. Comp. at ¶¶ 3-29, 31-34. As relief, Sierra Club seeks civil penalties, a cease and desist order, and limits and reductions on MWG’s SO<sub>2</sub> emissions. *Id.* at 11.

**“Suggestion Of Bankruptcy”**

On December 19, 2012 and January 3, 2013, respectively, Sierra Club and MWG filed a “Suggestion of Bankruptcy” (SC Sugg.; MWG Sugg.), each documenting that on December 17, 2012, MWG filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Illinois. SC Sugg. at 1; SC Sugg. Att. at 1; MWG Sugg. at 1 (“voluntary” petition). Sierra Club provides a copy of a “Notice of Bankruptcy Case Filing” from the Bankruptcy Court Clerk, identifying MWG’s Chapter 11 case number as 12-49218. SC Sugg. Att. at 1. MWG identifies its Chapter 11 case and those of other

subsidiaries and affiliates of Edison Mission Energy as “being jointly administered under the lead case *In re Edison Mission Energy*, Case No. 12-49219 (PJC).” MWG Sugg. at 1 (voluntary petition of “lead Debtor,” Edison Mission Energy, attached as Exhibit A).

### **DISCUSSION**

For reasons detailed below, this enforcement action has been stayed pursuant to the “automatic stay” of Section 362(a) of the Bankruptcy Code (11 U.S.C. § 362(a)). At this time, the Board therefore does not accept Sierra Club’s complaint for hearing.

### **Citizens Enforcement Action**

Under the Act (415 ILCS 5 (2010)), any person may bring an action before the Board to enforce Illinois’ environmental requirements. *See* 415 ILCS 5/3.315, 31(d)(1) (2010); 35 Ill. Adm. Code 103. An enforcement action brought “by any person who is not authorized to bring the action on behalf of the People of the State of Illinois” is referred to as a “citizen’s enforcement proceeding.” 35 Ill. Adm. Code 101.202. 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) (2010); *see also* 35 Ill. Adm. Code 103.212(a). Within 30 days after being served with the citizens complaint, a respondent may file a motion alleging that the complaint is duplicative or frivolous. *See* 35 Ill. Adm. Code 103.212(b).

In the ordinary course of a citizens enforcement proceeding, the Board issues an order determining whether to accept the complaint for hearing based upon the contents of the complaint and any motion and responsive filings received. *See* 35 Ill. Adm. Code 103.212. In this case, however, the Board has been notified of MWG’s filing of a bankruptcy petition and the resulting automatic stay under the Bankruptcy Code. The Board has received similar notification in Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment v. Midwest Generation, LLC, PCB 13-15 (Feb. 7, 2013), a pending case to which the Board now turns.

### **PCB 13-15**

The Board takes notice here of its decision issued today in Sierra Club, PCB 13-15 (Feb. 7, 2013). The case docketed as PCB 13-15 is another citizens enforcement action brought against MWG that also has not yet been accepted for hearing. Sierra Club, the complainant in PCB 13-27, is one of the complainants in PCB 13-15. As mentioned, both cases have had filings referring to MWG’s bankruptcy proceeding and the automatic stay, but the procedural postures of the two citizens enforcement cases differ.

In PCB 13-15, the complaint and a motion by MWG to dismiss the complaint were respectively filed on October 3, 2012 and November 5, 2012, both well before the bankruptcy petition was filed. Then, on January 10, 2013, the complainants filed a motion asking the Board for an extension of time to respond to the dismissal motion *until the Bankruptcy Court lifts the automatic stay or that stay otherwise expires*. The Board’s February 7, 2013 order grants the

complainants' motion for extension "[i]n light of the respondent's documented, pending bankruptcy proceeding." Sierra Club, PCB 13-15, slip op. at 4.

### **Bankruptcy Code's "Automatic Stay"**

Unlike PCB 13-15, no motion has been filed in PCB 13-27 that relies upon the automatic stay resulting from the bankruptcy petition. Nevertheless, the "Suggestion of Bankruptcy" filings made here refer to a stay of "actions" against MWG automatically taking effect upon the filing of MWG's bankruptcy petition. SC Sugg. Att. at 1; MWG Sugg. at 2. MWG specifically refers to Section 362(a) of the Bankruptcy Code (11 U.S.C. § 362(a)) (MWG Sugg. at 2), which provides in pertinent part as follows:

[A voluntary] petition filed under [Chapter 11] operates as a stay, applicable to all entities, of . . . the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the [bankruptcy] case . . . (11 U.S.C. § 362(a)(1)).

As noted, Section 31(d)(1) of the Act (415 ILCS 5/31(d)(1) (2010)) requires the Board to schedule a hearing on a citizens complaint unless the Board determines that the complaint is duplicative or frivolous. Doing so here, however, may run afoul of the Bankruptcy Code's automatic stay. In light of the "Suggestion of Bankruptcy" filings made with the Board in PCB 13-27, and the order issued today in PCB 13-15 based upon the same bankruptcy, the Board finds that it is in the interest of maintaining orderly dockets to address this proceeding's status at this time.

It is clear that MWG has filed a bankruptcy petition of the sort contemplated by Section 362(a) of the Bankruptcy Code (11 U.S.C. § 362(a)). Sierra Club's citizens enforcement action against MWG, brought before the Board under Section 31(d)(1) of the Act (415 ILCS 5/31(d)(1) (2010)), is just as plainly an "administrative . . . proceeding against the debtor" (11 U.S.C. § 362(a)(1)). Unlike PCB 13-15, however, the record here is unclear as to whether the filing of Sierra Club's complaint preceded the filing of MWG's bankruptcy petition. Sierra Club submitted its complaint to the Clerk's Office of the Board electronically on Saturday, December 15, 2012, the date on which counsel for Sierra Club signed the complaint. Having been received by the Clerk's Office over the weekend, the complaint is deemed by Board procedural rule to have been "filed" on Monday, December 17, 2012, the next business day. *See* 35 Ill. Adm. Code 101.300(b)(3). The "Notice of Bankruptcy Case Filing" from the Bankruptcy Court Clerk states: "A bankruptcy case concerning the debtor(s) listed below [*i.e.*, MWG] was filed under Chapter 11 of the United States Bankruptcy Code, entered on 12/17/2012 at 12:23 AM and filed on 12/17/2012." SC Sugg. at 1.

Further, the Board's procedural rules state that "[a]n enforcement proceeding will be commenced by the service of a notice and complaint . . . upon all respondents and the filing of . . . the notice and complaint with the Clerk." 35 Ill. Adm. Code 103.204(a). Here, the certificate of service accompanying the complaint provides that the complaint was mailed to MWG by certified mail, return receipt requested, on December 15, 2012, two days before the

bankruptcy petition was filed. On December 31, 2012, Sierra Club filed proof that MWG's registered agent received the complaint on December 19, 2012, two days after the bankruptcy petition was filed. *See* 35 Ill. Adm. Code 101.300(c) ("service is deemed complete on the date specified on the registered or certified mail receipt").

The Board refrains from attempting to determine precisely when the automatic stay took effect. Nor for purposes of this order does the Board need to pinpoint when this enforcement action commenced. Those issues relate only to whether the stay might bar the "commencement" of this enforcement action or simply stay its "continuation." 11 U.S.C. § 362(a)(1); *see In re Chateaugay Corp.*, 118 B.R. 19, 21-22 (Bankr. S.D.N.Y. 1990) (citizens group was "barred by the automatic stay imposed by § 362(a) from filing suit against the Debtors"). Sierra Club's complaint relies upon alleged 2010 and 2011 SO<sub>2</sub> emissions. Accordingly, regardless of whether this enforcement action "*was . . . commenced before the commencement of the [bankruptcy] case,*" it "*could have been.*" 11 U.S.C. § 362(a)(1) (emphasis added); *cf. In re Joe DeLisi Fruit Co.*, 11 B.R. 694, 696 (Bankr. Minn. 1981) ("The import of this section is that all legal actions being taken or to be taken against the debtor are halted. No new lawsuits can be commenced and ongoing proceedings are halted. The section is inclusive. Every proceeding of a judicial or quasi-judicial nature is affected."). Based upon the parties' "Suggestion of Bankruptcy" filings and consistent with the Board's order in Sierra Club, PCB 13-15 (Feb. 7, 2013), the Board finds that MWG's bankruptcy petition "operates as a stay . . . of . . . the commencement or continuation" of this enforcement action. 11 U.S.C. § 362(a)(1).

The Board also has no reason to believe that this citizens complaint falls within any exception to the automatic stay. The Board in Sierra Club, PCB 13-15 notes complainants' concession that no exception to the automatic stay applies to their action against MWG. *See Sierra Club*, PCB 13-15, slip op. at 3-4. Complainants' motion in PCB 13-15, which the Board's order there quotes in relevant part, relies upon Chateaugay, 118 B.R. 19 (Bankr. S.D.N.Y. 1990). Chateaugay held that a citizens enforcement action under the Clean Water Act (33 U.S.C. § 1365(b)) did not fall within the Bankruptcy Code's exception to the automatic stay for governmental units enforcing police and regulatory power (11 U.S.C. § 362(b)(4)), despite the claim of the citizens group that it was acting as a "private attorney general." Chateaugay, 118 B.R. at 21-22. The Board's approach to the PCB 13-15 and PCB 13-27 citizens enforcement actions is in accord with Chateaugay.

## CONCLUSION

Based upon MWG's filing of a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Northern District of Illinois, this enforcement action before the Board has been stayed pursuant to the "automatic stay" of Section 362(a) of the Bankruptcy Code (11 U.S.C. § 362(a)). Accordingly, at this time, the Board does not accept Sierra Club's complaint for hearing. The time periods under the Board's procedural rules for any filings responsive to the complaint shall remain stayed until the Board orders otherwise. *See, e.g.*, 35 Ill. Adm. Code 101.506, 103.204(d), 103.212(b). The parties are directed to make any appropriate filings to notify the Board within 30 days after the automatic stay regarding MWG expires, either by

action of the Bankruptcy Court or otherwise.

IT IS SO ORDERED.

Chairman T.A. Holbrook abstained.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 7, 2013, by a vote of 4-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

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John Therriault, Assistant Clerk  
Illinois Pollution Control Board