

ILLINOIS POLLUTION CONTROL BOARD
February 7, 2013

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

ORDER OF THE BOARD (by C.K. Zalewski):

On October 3, 2012, Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (complainants) filed a 7-count complaint against Midwest Generation, LLC (Midwest Generation, or respondent). The complaint alleges various violations of the Environmental Protection Act, 415 ILCS 5 *et seq.* (2010) and the Board's land and groundwater regulations are the result of Midwest Generation's disposal of coal ash in ash ponds. The ash ponds complained of are located at Midwest's Powerton Station in Pekin in Tazwell County, the Joliet Station in Will & Kendall counties, and the Joliet Station in Waukegan, in Lake County, and the Will County Generating Station in Will County.

In summary, for the reasons more thoroughly described below, the Board finds that this matter was stayed effective December 17, 2012, due to respondent's filing of a bankruptcy petition in the federal bankruptcy court. As a result of this bankruptcy petition, the Board cannot rule on whether it accepts the complaint for hearing or on the merits of respondent's motion to dismiss.

THE COMPLAINT

Under the Environmental Protection Act (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. In this case, complainants allege that, at each of the four locations, respondent's ash pond disposal practices constituted open dumping which caused water pollution in violation of Sections 12(a) and (d) of the Environmental Protection Act (Act), 415 ILCS 5/12(a) and (d) 2010. Complainants allege that various specified contaminants migrated from the ash ponds into groundwater, in violation various provisions of the Board's Class I and Class II groundwater quality standards (GQS) at 35 Ill. Adm. Code 620.115, 620.301(a), and 620.405.

In support of these allegations, respondents attached maps of the groundwater monitoring wells at the various sites, summaries of alleged GQS violations, and groundwater modeling data excerpted from groundwater monitoring reports submitted by Midwest Generation to the Illinois Environmental Protection Agency (Agency), with sampling dates from 2010 through 2012. Comp. Exh. A-J. Complainants also attached Notices of Violation sent by the Agency to Midwest on June 11, 2012 regarding each of the four sites. Comp. Exh. K. - N.

As their request for relief, complainants ask the Board to find respondent committed open dumping and groundwater pollution violations, and to impose civil penalties as provided under Section 42 of the Act (415 ILCS 5/42 (2010)). Complainants also request the Board to order respondent to cease and desist from open dumping of coal ash and causing or threatening to cause water pollution, to modify its coal ash disposal practices so as to avoid future groundwater contamination, to remediate contaminated groundwater so that it meets applicable Illinois groundwater standards, and to grant such other relief as the Board deems just and proper.

SUBSEQUENT FILINGS

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). 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.* Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicative or frivolous. 35 Ill. Adm. Code 103.212(b). Based on any motion and responsive filings received, the Board determines whether to accept the complaint for hearing.

On October 11, 2012, complainant filed proof that respondent received service of the complaint by certified mail on October 5, 2012. On November 5, 2012, respondent timely filed a motion to dismiss the complaint (Mot.Dis.), accompanied by a memorandum (Memo) in support of the motion supported by exhibits (Exh. 1-18).

Respondent denies violating the Act or Board rules, and moves to dismiss the complaint as duplicative and frivolous, alleging, among other things that

Section 31(d) of the Act requires that any citizen suit meet the requirements of Section 31(c) of the Act. 415 ILCS 5/31(c), (d). The first requirement of Section 31(c) is that the alleged violations remain the subject of disagreement between the Agency and the person complained against. Because the [Agency] and [respondent] have agreed to compliance activities through binding and enforceable [Compliance Commitment Agreements, known as] CCAs, no disagreements exist between the Agency and MWG. Therefore, the complaint is frivolous because it fails to state a cause of action upon which the Board can grant relief. Mot.Dis. at 5.

Exhibits 1 through 4 to the Memorandum are CCAs for each site as executed by respondent on October 15, 2012 and the Agency on October 24, 2012. In general summary, among other things, respondent agrees to use ash ponds as treatment ponds to precipitate ash only, and not as permanent disposal sites, requiring periodic ash removal. Relining of some ash ponds is required, and others are to be removed from service. Quarterly groundwater modeling is required, as well as mapping. Midwest Generation is required to submit applications for groundwater management zones (GMZs) and related Environmental Land Use Controls (ELUCs).

On November 15, 2012, complainants timely filed a motion for extension of time in which to respond to the motion to dismiss. By order of November 15, 2012, the hearing officer granted the motion, noting that no objection had been made by respondent. The time for response was extended through December 28, 2012.

On December 21, 2012, complainants filed a letter noting that Midwest Generation had filed a bankruptcy petition, staying this action.

On December 28, 2012, the Board received a Notice of Bankruptcy (Notice) for Edison Mission Energy and certain of its subsidiaries and affiliates, including Midwest Generation. The Notice stated that on December 17, 2012, Edison Mission Energy *et al.* had filed voluntary petitions for relief under the Bankruptcy Code (11 USC Ch. 11), being jointly administered under the lead case name In re Edison Mission Energy, Case No. 12-49219 (PJC), in the United States Bankruptcy Court for the Northern District of Illinois (Bankruptcy Court). The Notice goes on to state that pursuant to 11 USC 362(a), the filing of the petitions

operates as a stay, applicable to all entities, of, among other things: (a) the commencement or continuation of a judicial, administrative, or other action or proceeding against the Debtors (i) that was or could have been commenced before the commencement of the Debtors' cases or (ii) to recover a claim against the Debtors that arose before the commencement of the Debtors' cases; (b) the enforcement, against the Debtors or against any property of the Debtors' bankruptcy estates, of a judgment obtained before the commencement of the Debtors' cases; or (c) any act to obtain possession of property of or from the Debtors' bankruptcy estates, or to exercise control over property of the Debtors' bankruptcy estates. Notice at 2 (footnote omitted).

Also on December 28, 2012, the Board received a motion for extension of time to respond to the motion to dismiss in light of the pending bankruptcy proceeding. By order of January 8, 2012, the hearing officer extended the response time through January 11, 2013.

On January 10, 2013, complainants filed another motion for extension of time to respond to the motion to dismiss (Mot. Ext.). Complainants concede that

No exception to the automatic stay provisions of the Bankruptcy Code applies directly to this pending action against MWG. *See, e.g., In re Chateaugay Corp.*, 118 B.R. 19 (Bankr. S.D.N.Y. 1990) (citizen environmental enforcement action not subject to the bankruptcy code's exception to the automatic stay for governmental units to enforce police and regulatory power). *See also Hilles Motors, Inc. v. Hawaii Auto Dealers' Association*, 997 F.2d 581 (9th Cir. 1993) (requiring courts to give exceptions to the automatic stay provisions in the bankruptcy code the narrowest possible construction to afford debtors the broadest possible protection through the automatic stay). Mot. Ext. at 3.


Under these circumstances, complainants contend that good cause exists for a further extension by the Board of their time to respond to respondent's November 5, 2012 motion to dismiss. Complainants accordingly request an extension of time "until after the Bankruptcy Court presiding over the bankruptcy proceedings of Respondent [] either lifts the automatic stay applicable to this case, or the automatic stay otherwise expires." Mot. Ext. at 4. Respondent has not filed a response to complainants' motion.

In light of the respondent's documented, pending bankruptcy proceeding, the Board finds that complainants have shown that good cause exists for the requested extension. The parties are directed to make any appropriate filing to notify the Board and the hearing officer within 30 days of the expiration of the automatic stay in this case, either by action of the Bankruptcy Court or otherwise. Following receipt of such filing, the hearing officer shall issue any order necessary to recommence this proceeding, including an order setting a date certain for complainants' response to respondent's November 5, 2012 motion to dismiss this action.

IT IS SO ORDERED.

Chairman T.A. Holbrook abstained.

I, John T. 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.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board