ILLINOIS POLLUTION CONTROL BOARD
April 17, 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):

On October 3, 2012, Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (collectively, complainants) filed a seven-count enforcement complaint against Midwest Generation, LLC (MWG).[1] The complaint alleges that various violations of the Environmental Protection Act (Act), 415 ILCS 5 (2012) and the Board's land and groundwater regulations are the result of MWG's disposal of coal ash in ash ponds. The ash ponds at issue are located at MWG's Powerton generating station in Pekin, Tazewell County; the Joliet 29 generating station, Will and Kendall counties; the Waukegan generating station, Lake County; and the Will County generating station, Will County.

MWG moves to stay this case based on related federal and state proceedings and a business decision affecting the four power plants at issue in this case. Complainants oppose the motion.

In this order, the Board first provides the procedural history relevant to the motion to stay and rules on a procedural motion. Next, the Board summarizes the filings regarding the stay motion, after which the Board analyzes and provides the reasons for denying the motion.

PROCEDURAL MATTERS

Procedural History

On October 3, 2012, complainants filed the complaint, which 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 Act (415 ILCS 5/12(a), 12(d), 21(a) (2012)),

[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.

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.

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 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."

After the dismissal motion was fully briefed, the Board, by order of October 3, 2013, 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.

On January 10, 2014, complainants filed a Notice of Lift of Stay by Bankruptcy Court (Not.), which included 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.

On January 23, 2014, the Board accepted the complaint for hearing. The Board determined that the complaint as modified by the Board's order of October 3, 2013, was neither frivolous nor duplicative. On February 19, 2014, MWG filed a motion to stay proceedings (Mot. to Stay) and a memorandum in support of that motion (Memo.), seeking at least a one-year stay. On March 5, 2014, complainants filed a response (Resp.) in opposition to MWG's stay motion. On March 19, 2014, MWG filed a motion for leave (Mot. for Leave) to file *instanter* a reply to complainants' response to the motion to stay, accompanied by a reply in support of the motion for stay (Reply).

Motion for Leave to File Reply

MWG seeks leave to file *instanter* a reply in support of its stay motion. MWG argues its reply should be accepted to prevent material prejudice, to clarify the scope of relief sought by the stay motion, and to update the Board on MWG's pending acquisition by NRG Energy, Inc. (NRG). Mot. for Leave at 2. Section 101.500(e) provides that "the moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice." 35 Ill. Adm. Code 101.500(e). The Agency did not file a response. If a response to a motion is not filed within 14 days after service of the motion, "the [nonmovant] will be deemed to have waived objection to the granting of the motion." 35 Ill. Adm. Code 101.500(d). Thus, any objection to the granting of the motion for leave to file a reply is waived. Having reviewed the motion and in the absence of any objection to it, the Board grants the motion for leave to file the reply, to prevent material prejudice. The Board will consider the reply, which is summarized below.

Motion to Stay Proceeding

MWG argues that this proceeding should be stayed for at least one year in order to (1) avoid potential conflicts from the coal ash rulemaking initiated by the United States Environmental Protection Agency (USEPA) as well as the Agency's proposed coal ash rules; (2) allow the pending acquisition of MWG by NRG to proceed; (3) allow continued groundwater monitoring to assess the effect of MWG's actions taken pursuant to the CCAs; and (4) recognize that there is no ongoing environmental harm or prejudice to complainants. Mot. to Stay at 1. MWG argues that in ruling on a motion to stay, the Board "may consider factors including comity for other proceedings and prevention of multiplicity and vexation." Memo. at 9, citing Midwest Generation EME, LLC v. IEPA, PCB 04-216, slip op. at 4 (Apr. 6, 2006).

First, MWG argues that a stay should be granted in order to avoid "wasteful multiplicity in response activities" because of the uncertainty of what USEPA's and the Agency's proposed rules will require regarding the management of coal ash. Memo. at 11-12. On January 29, 2014, USEPA agreed to issue by December 29, 2014 final rules regarding regulation of coal ash under either Subtitle C, as hazardous waste, or D, as nonhazardous waste, of the Resource Conservation and Recovery Act (RCRA). Mot. to Stay at 3; Memo. at 4. The USEPA rulemaking has been ongoing since 2010, but the final rule will resolve the RCRA characterization issue. Memo. at 3-4. Further, MWG notes, on October 28, 2013, the Agency filed R14-10, Coal Combustion Waste Ash Ponds and Surface Impoundments at Power Generating Facilities: Proposed New 35 Ill. Adm. Code 841, a rulemaking regarding the

management of coal ash, in which the Board held hearings on February 26 and 27, 2014. Mot. to Stay at 3. MWG argues that before both rulemakings come to a final decision, there is uncertainty for all coal-fired power plants on how the proposed rules will affect coal ash management. Memo. at 4. MWG states that the Board has previously stayed proceedings, in similar situations, in order to allow USEPA proceedings to conclude. Memo. at 10, citing U.S. Steel v. IEPA, PCB 10-23, slip op. at 12 (Feb. 2, 2012) (Board found that "the present uncertainty over the impact that the U.S. EPA proceeding could have on this appeal supports a stay").

Second, MWG argues that this proceeding should be stayed to allow the acquisition of MWG by NRG to be completed. Mot. to Stay at 2. According to MWG, NRG, on October 18, 2013, agreed to acquire MWG and expects to close the acquisition by the end of the first quarter of 2014. Mot. to Stay at 2; *see* Memo. at 4. MWG states that the acquisition requires approval by the Bankruptcy Court as well as the Federal Energy Regulatory Commission (FERC). Mot. to Stay at 2; Memo. at 4. MWG argues that a stay is justified because of comity and consideration for the Bankruptcy Court's and FERC's approval of the acquisition. Memo. at 12.

MWG further argues that the Board has granted stays in the past in similar situations to allow business decisions to conclude. Memo. at 10, citing Herrin Security Bank v. Shell Oil Co., PCB 94-178, slip op. at 1 (May 18, 1995). Further, because NRG will control the future of the MWG stations, MWG argues that it "cannot, and should not, propose any actions or pursue any specific strategy for the Stations" until the acquisition is finalized and NRG takes control of the company. Memo. at 12 (arguing that the "ash ponds are an integral part of the Station's operations and any further compliance actions would be a significant expenditure"). MWG stresses that a stay is needed because any decision that it makes now could be abrogated by NRG upon completion of the acquisition, which would result in further delays in the "eventual resolution of this matter." Memo. at 12.

Third, MWG argues that a stay should be granted in order to allow for continued groundwater monitoring to assess the impact of MWG's recent completion of actions pursuant to CCAs entered into with the Agency. The CCAs, executed October 24, 2012, address alleged violations concerning MWG's ash ponds at the four power stations. Mot. to Stay at 2; *see also* Mot. to Stay at 4. MWG states that it has timely completed all the terms of the CCAs and has agreed to continued monitoring at the plants. Mot. to Stay at 2; Memo. at 5, citing Exh. B-E, IEPA Compliance Statements. Specifically, regarding the Joliet 29 Station, MWG completed installation of the high density polyethylene (HDPE) liner under Pond #3, thus allowing all ash ponds at that station to be completely lined with HDPE liners. Memo. at 5. For the Powerton Station, MWG maintains that it completed the installation of HDPE liners under two basins and installed an additional groundwater monitoring well. Memo. at 6. In regard to the Waukegan Station, MWG installed two additional groundwater monitoring wells and continues to monitor them on a quarterly basis. Memo. at 7. Lastly, at the Will County Station, MWG diverted all process waters from two ash ponds and completed installation of a HDPE liner. MWG adds that all ash ponds at the station are now lined with HDPE liners. Memo. at 8.

MWG argues that the Board has stayed proceedings in similar situations to allow for sufficient time to proceed with technical work and remediation actions at a site. Memo. at 10,

citing People v. White & Brewer Trucking, PCB 97-11, slip op. at 1 (Jan. 18, 2001); Pearl v. Biocoastal Corp., PCB 96-265, slip op. at 3 (Apr. 3, 1997). MWG suggests that its actions taken pursuant to the CCAs have already achieved the same corrective results sought by complainants' complaint. Memo. at 14. MWG argues that it has "further ensured against any potential release of constituents from the ash ponds." Memo. at 13. Therefore, MWG argues that a stay should be granted to "avoid wasteful multiplicity and vexation while MWG confirms that the compliance actions have had the necessary effect." Memo. at 14. MWG explains that it is conducting groundwater monitoring at the four stations, and time is required to allow these actions to improve the groundwater there. Memo. at 14.

Lastly, MWG argues that a stay would not cause environmental harm or prejudice the complainants. Mot. to Stay at 4. MWG argues that these considerations are relevant in the Board's determination whether to grant a stay. Memo. at 9, citing North Shore Sanitary Dist. v. IEPA, PCB 03-146, slip op. at 3 (March 20, 2003) (Board granted stay of permit appeal in part because "no environmental harm will come from granting a stay"); Herrin Security Bank, PCB 94-178, slip op. at 1. MWG argues that there is no ongoing environmental harm here because it has "executed compliance actions that resolved the alleged violations. . . ." Memo. at 11. MWG also argues that "there is no public harm because all persons are prevented from contact with the impacted groundwater by the establishment of the [Environmental Land Use Controls (ELUCS)] at three of the Stations, and the absence of public groundwater use at the Joliet 29 Station." Memo. at 14.

MWG further states that the Board has granted a stay when prejudice would not result. Memo. at 15, citing Herrin Security Bank, PCB 94-178, slip op. at 1 (finding that a "stay was appropriate and the Respondent would not be prejudiced by a pause in the proceeding"). MWG argues that granting a stay would "avoid unnecessary litigation expenses" and "contribute to the expeditious resolution of this action." Memo. at 15. According to MWG, the parties would incur unnecessary litigation expenses if they were to litigate this case before the final USEPA and Board coal ash management rules were published and before MWG's monitoring determined the effectiveness of the compliance actions it has already taken. Memo. at 15.

Response in Opposition to Motion to Stay

Complainants argue that the motion to stay should be denied. Resp. at 1. Complainants assert that while the Board does take into consideration the factors MWG cites, the Board has "made clear that it does not apply this test when the complainant files its causes of action before the Board well before the Respondent files claims in another court." Resp. at 2, citing Park Forest v. Sears, Roebuck & Co., PCB 01-77, slip op. at 4 (Feb. 15, 2001); People v. White & Brewer Trucking, Inc., PCB 97-11 (consol.) (July 10, 1997). Complainants maintain that in a case where the Board proceeding was filed first, the Board considers only whether the subsequent proceeding obviates the Board proceeding. Resp. at 3. Complainants maintain that this test should apply here because they filed this action before the CCAs were entered into and before the bankruptcy proceeding was filed. Resp. at 3. But even if the standard factors were to apply to this case, complainants add, there still would be no basis for a stay. Resp. at 3.

First, complainants argue that the Board and USEPA rulemakings do not obviate this action. Resp. at 3. Complainants explain that rulemakings do not supersede ongoing enforcement actions because they are "inherently different processes with distinct aims." Resp. at 4. Accordingly, complainants add, neither the federal nor state coal ash rulemakings will have any "legal effect," in terms of *res judicata* or mootness, on this case, which distinguishes U.S. Steel, PCB 10-23, from this case. Resp. at 4, n. 2. Rulemakings, according to complainants, are forward-looking, whereas enforcement actions address past violations. Resp. at 5. Further, complainants argue that enforcement proceedings may result in the imposition of penalties for current violations, including "punitive measures" for stopping egregious violations and deterring future ones. Resp. at 5. Complainants assert that the Board's coal ash rulemaking does not obviate enforcement actions like this one because "even with the rule in place, exceedances of groundwater standards will continue to be grounds for an enforcement action." Resp. at 5, citing Coal Combustion Waste Ash Ponds, R14-10, IEPA Technical Support Document at 35-36. Resp. at 5. Complainants also contend that the Bankruptcy Court, in lifting the automatic stay, recognized that the Board's coal-ash rulemaking would not "obviate" this case. Resp. at 5.

Complainants further argue that there are mechanisms in place to ensure that any relief granted in this proceeding will not conflict with whatever the final USEPA and Illinois rules may require. Resp. at 6. According to complainants, the Agency's proposed rule is "simply a codification of a process to be used (similar to the current CCA process)" and does not mandate a specific outcome. Resp. at 6, citing Coal Combustion Waste Ash Ponds, R14-10, IEPA Statement of Reasons at 1. Complainants assert that this distinction is repeated several times in the Agency's pre-filed testimony in support of the proposed rule. Resp. at 6. Complainants assert that because "the rule does not prescribe specific outcomes for impoundments, the Agency can use the process provided to avoid duplicative or inconsistent results." Resp. at 7. Similarly, complainants argue, USEPA's proposed coal ash rulemaking also does not mandate specific measures and thus is not in conflict with any relief the Board may order here. Resp. at 7. Complainants explain that the federal rule would only require planning, assessments, and selection of remedial measures should groundwater contamination be found, and thus the proposed rule would not prevent the Board from ordering specific corrective measures in this case. Resp. at 7, citing 75 Fed. Reg. 35,128, 35,248 (2010). Complainants assert that the Board can "take efforts to avoid wasted resources of and ensure consistency with any final State or federal rules," just as it can take into account MWG's compliance with CCAs in ordering relief in this action. Resp. at 7-8, citing Sierra Club v. Midwest Generation, LLC, PCB 13-15, slip op. at 20 (Oct. 3, 2013).

Complainants also claim a stay should not be granted because what the proposed rulemakings might require, and when they will be finalized, is highly uncertain. Resp. at 8. Further, complainants contend it will most likely be "years" before the new rules take effect, which is one of the reasons that the Bankruptcy Court lifted the bankruptcy stay in this case. Resp. at 8. Complainants assert that even though USEPA is under a consent decree to promulgate final coal ash rules by a date certain, there are "many examples" of USEPA's agreeing to a promulgation date but ultimately "needing more time" to issue a rule. Resp. at 8-9. For example, complainants continue, USEPA extended three separate times the deadlines under a consent decree for issuing proposed and final regulations setting effluent limitation guidelines on toxic metals for electric generating units. Resp. at 9, citing Defenders of Wildlife v. EPA, No.

10-cv-01915 (D.D.C. Mar. 18, 2012). Another example, the complainants continue, is USEPA's failure to even propose New Source Performance Standards for carbon pollution from refineries a year after the standards were supposed to be finalized pursuant to a settlement agreement. Resp. at 9.

Furthermore, complainants argue that beyond timing, there is uncertainty about what the final rules will require. Resp. at 9. Complainants maintain that "[p]roposed 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." Resp. at 9. Further, according to complainants, even MWG has acknowledged that the outcome of the proposed rulemakings is unclear. Resp. at 9, citing Mot. to Stay at 12 ("the Board may modify the proposed rules based upon the hearings scheduled through May 2014"). Additionally, complainants argue that the impact of the rulemakings on the violations alleged in this case is also uncertain because of their "far-off compliance dates." Resp. at 10, *see also* Resp. at 10, n. 8. Complainants add that even if USEPA met the consent decree deadline, the earliest date that MWG would have to perform corrective action would be June 13, 2016. Resp. at 10; *see also* Resp. at 10, n. 8. And, complainants continue, assuming groundwater monitoring reveals contamination attributable to the MWG power plants, "corrective action requirements might not be triggered until years later." Resp. at 10; *see also* Resp. at 10, n. 9. Lastly, complainants argue that the Board has refused to grant a stay when the timing of a decision in a related proceeding is uncertain. Resp. at 11, citing Midwest Generation EME, LLC v. IEPA, PCB 04-216, slip op. at 6 (Feb. 15, 2007). Thus, complainants argue, the proposed state and federal rulemakings have no bearing on the Board's decision whether this action should proceed. Resp. at 11.

Complainants then address MWG's argument that comity and consideration for the Bankruptcy Court, FERC, and the NRG sale warrant a stay, asserting that these considerations are not relevant here because this case was commenced before those matters. Resp. at 11-12, citing Park Forest, PCB 01-77, slip op. at 4. Complainants contend that the cases on which MWG relies, Midwest Generation EME, LLC and Herrin Security Bank, are not relevant and are distinguishable here. Resp. at 12. Complainants assert that Midwest Generation EME looked to factors that the Board has made clear it does not consider in a case like this. Resp. at 12. Complainants further explain that Midwest Generation EME is also distinguishable because in that proceeding two different bodies were deciding the same issues regarding the same facts. Resp. at 12, n. 10. According to complainants, here, by contrast, the Bankruptcy Court is resolving bankruptcy issues, while this Board proceeding presents environmental matters. Resp. at 12, n. 10. Additionally, complainants explain that Herrin Security Bank is distinguishable from this case because there, the second case concerned potential reimbursement that would have a direct effect on the amount of relief sought in the Board proceeding. Resp. at 12, n. 11.

Complainants opine that even if comity was a relevant factor, MWG's argument would fail because the Bankruptcy Court, "the most appropriate court to consider the effect" of this action on the bankruptcy estate and NRG acquisition, already rejected it in deciding to lift the stay. Resp. at 12, citing In re Edison Mission Energy, 2013 Bankr. Lexis 5230, at *19-20 (finding that "the continuation of the IPCB Proceeding will not result in great prejudice to MWG or to the Debtors' estate"). In addition, complainants note that "[i]n 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 to the sale to NRG." Resp. at 13. Complainants also contend the Bankruptcy Court found that resolving the environmental violations they allege would benefit MWG as well as NRG, as a prospective purchaser. Resp. at 13. Complainants further argue that the uncertain timing of FERC approval of the sale to NRG also militates against a stay. Resp. at 13. Complainants contend that MWG can simply consult with NRG about any binding business decisions MWG might need to make in or as a result of this proceeding. Resp. at 14.

With respect to the CCAs, complainants insist they do not warrant a stay. Resp. at 14. Complainants argue that MWG's contrary argument fails because the Board held in denying MWG's dismissal motion that the existence of the CCAs is not a proper basis for "dismissing or delaying" this case. Resp. at 14, citing Midwest Generation, PCB 13-15, slip op. at 20 (Oct. 3, 2013). Complainants also contest MWG's assertions that it has already "presumptively" ceased and desisted from the violations and that, therefore, its actions under the CCAs have achieved the same result as the relief sought in this case would afford. Resp. at 15. According to complainants, MWG made the same arguments in its motion to dismiss and the Board rejected them, and the only thing that has changed since then is that the ELUCs and Groundwater Management Zones have been implemented. Resp. at 15. Complainants contend that the relief they seek is far more extensive and encompasses a longer time period than the violations alleged in the Notice of Violations issued by the Agency that led to the CCAs, because, for example, the CCAs do not allege the open dumping violations asserted in this case. Resp. at 16.

Further, complainants argue that they seek a remedy distinct from that ordered by the CCAs. Resp. at 16. For example, complainants continue, the relief requested in this case would require "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 Waukegan and Will County." Resp. at 16-17. But, complainants state, the CCAs do not require permanent removal of coal ash from the ash ponds or pumping and treating of contaminated groundwater. Resp. at 17. Further, complainants claim that the ELUCs do not redress groundwater contamination because they only prevent human contact with the groundwater. Resp. at 17. Complainants also opine that before anyone can conclude that the remedy the CCAs provide affords all the relief their complaint requests, experts must evaluate the groundwater data to determine what relief is necessary. Resp. at 17. Additionally, complainants note that the Board has already held that this proceeding is not duplicative of the CCA process. Resp. at 18, citing Midwest Generation, PCB 13-15, slip op. at 20 (Oct. 3, 2013). Complainants also state that the Board found it could avoid duplication and ensure consistency in fashioning an appropriate remedy, if any, in this case, so there is no risk the Board will impose duplicative requirements in this action. Resp. at 18.

Finally, complainants argue that, assuming prejudice is a relevant consideration in a case like this, it strongly weighs against a stay. Resp. at 18. Complainants stress that a stay would clearly prejudice them and put the public health and environment at risk. Resp. at 18. Complainants insist they have already expended considerable time and money gathering documentation, commencing this proceeding, and defending against MWG's motion to dismiss. Resp. at 18-19. Complainants add that the Bankruptcy Court held that complainants' hardship

from a stay would outweigh any hardship MWG would suffer, claiming that "any 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." Resp. at 19, citing In re Edison Mission Energy, 2013 Bankr. Lexis 5230, at *21-22 (emphasis in original).

Complainants also argue that the environmental issues at stake here "weigh strongly" against a stay. Resp. at 19. Complainants contend that 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.'" Resp. at 19, citing Illinois. Const. art. XI; International Union v. IEPA, PCB 94-240, slip op. at 95 (Aug. 1, 1996). And, complainants continue, the pollutants found in coal ash have serious health implications since they are toxic, and "there is no evidence that the [groundwater] contamination has ceased." Resp. at 19. Complainants also note that the Bankruptcy Court held there is a risk to the environment and public health. Resp. at 20, citing In re Edison Mission Energy, 2013 Bankr. Lexis 5230, at *20.

Reply In Support of the Motion to Stay

In its reply, MWG first reiterates that a stay is warranted because of (1) the state and federal coal ash rulemakings; (2) the potential NRG acquisition; (3) actions taken under the CCAs; and (4) the lack of environmental harm or prejudice to the complainants. Reply at 2. MWG also reiterates its argument that the Board has previously granted stays to avoid uncertainty regarding related proceedings, to allow for business decisions to conclude and technical work to proceed, and where there is no environmental harm or prejudice to the nonmovants. Reply at 2-3.

Further, MWG argues that complainants misunderstand the scope of the Board's authority to grant injunctive relief. Reply at 1. MWG maintains that the Board cannot grant injunctive relief, but can only order a party to cease and desist and to pay penalties. Reply at 1, citing 415 ILCS 5/33(b) (2012). Nevertheless, MWG continues, complainants' response to the stay motion makes clear that they seek just such relief: an order requiring MWG to remove all coal ash ponds, install systems to treat contaminated groundwater, and permanently remove coal ash from the ponds. Reply at 3-4, citing Resp. at 16-17. MWG points out that the Board "is a creature of statute and can only operate within the bounds of its powers set out by the statute by which it was created," which are those conferred by Section 33(b) of the Act—*i.e.*, order parties to cease and desist and impose civil penalties. Reply at 4, citing 415 ILCS 5/33(b) (2012).

MWG contends that because the Board can only order MWG to cease and desist and the violations have ceased, complainants are not entitled to any additional remedy. Reply at 1-2. MWG adds that the Agency testified in the Agency's coal ash rulemaking that the remedial actions taken pursuant to the CCAs are working as intended. Reply at 5. In particular, according to MWG, the Agency testified that the liners are preventing contaminants from ash ponds from leaching contaminants into the environment. Reply at 5.

Nor are complainants entitled to pursue penalties in this case, according to MWG, because the Bankruptcy Court ordered that "penalties may not be collected at this time." Reply at 6, citing In re: Edison Mission Energy, et al., No. 12-49219, slip op. at 14 (Dec. 11, 2013). Thus, MWG argues that even if the allegations in the complaint were proven, no penalties could be collected against it until the end of the bankruptcy proceeding. Reply at 6. MWG maintains that continuing this enforcement proceeding now would waste resources because "[t]he most Complainants could receive is an order to cease violations that the Agency has already determined to have ceased, and a penalty they could not collect." Reply at 6-7.

MWG also insists that a stay would not cause environmental harm or prejudice to complainants. Reply at 6-7. MWG contends that the Agency's testimony in R14-10 "clearly shows" there is no risk of ongoing environmental harm. Reply at 6. MWG adds that any environmental harm that may have existed has been addressed by MWG's actions in accordance with the CCAs. Reply at 6.

According to MWG, complainants misstate the Board's standards for granting a motion to stay. Reply at 2. In particular, MWG elaborates, the basis for the stay need not arise prior to the Board proceeding. Reply at 2; *see also* Reply at 8. MWG argues that the "Board has repeatedly stayed a proceeding due to a new development following the initial filing." Reply at 7, citing Midwest Generation EME, LLC, PCB 04-185 (Apr. 6, 2006) (Board granted a stay to respect USEPA's decision and avoid conflicting determinations even though Board proceeding began first); Inverse Investments, LLC, PCB 11-79 (Oct. 17, 2013) (Board granted a stay two years into the proceeding upon notice of USEPA's evaluation of site at issue); U.S. Steel, PCB 10-23 (Feb. 2, 2012) (Board granted a stay two years after initial filing even though the basis for the stay arose after the original appeal was filed). MWG claims the Board should give consideration and deference to the Agency's decision to enter into the CCAs and its assessment that the violations alleged in the CCAs have ceased. Reply at 8. MWG also maintains that the Board "should give deference to the transition to NRG," because MWG must be "circumspect in what information it may share with its potential new owners until the purchase is approved and finalized." Reply at 8. MWG adds that until NRG has assumed "full control" of MWG and "may be fully informed," MWG cannot and should not make any "binding decisions" that NRG may subsequently modify or reject entirely. Reply at 8.

In that regard, MWG notes that on March 11, 2014, the Bankruptcy Court approved NRG's purchase of certain Edison Mission Energy assets including MWG, and on March 18, 2014, FERC approved the transfer of MWG to NRG. Reply at 2, n. 1. MWG argues that a stay is justified to give NRG time to determine the "direction and decision-making for this matter and set the policy decisions for the future of the Stations at issue." Reply at 6.

In addition, MWG reiterates its argument that the Board can grant a stay to await conclusion of a pending rulemaking, despite an uncertain rulemaking deadline. Reply at 8. MWG argues that the Board has done so previously, for example, in In Matter of: Petition of Sundstrand Corp., AS 98-3 (Dec. 18, 1997), where the Board granted a stay pending promulgation of a final rule because the rulemaking would obviate the need for the adjusted standard. Reply at 8-9. MWG also repeats its claim that "[g]ranting a stay would avoid vexation and harassment to MWG in coordinating its responsibilities under the new Federal and State

regulations." Reply at 9. MWG further notes that the Board has granted stays even absent a "date certain by which the stay should end." Reply at 9, citing U.S. Steel, PCB 10-23 (Board stayed proceeding for one year and ordered six-month update from U.S. Steel); Inverse Investments, PCB 11-79 (granting a stay even though it was unknown how long USEPA's evaluation would last).

DISCUSSION

Legal Background

Under Section 101.514(a) of the Board's procedural rules, a motion to stay a proceeding

> 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. 35 Ill. Adm. Code 101.514(a).

The decision to grant or deny a motion for stay is "vested in the sound discretion of the Board." *See* People v. State Oil Co., PCB 97-103 (May 15, 2003), *aff'd sub nom* State Oil Co. v. PCB, 352 Ill. App. 3d 813, 822 N.E.2d 876 (2d Dist. 2004). When exercising its discretion to determine whether an arguably related matter pending elsewhere warrants staying a Board proceeding, the Board may consider the following factors: (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. *See* A.E. Staley Mfg. Co. v. Swift & Co., 84 Ill. 2d 245, 254, 419 N.E.2d 23, 27-28 (1980); *see also* Environmental Site Developers v. White & Brewer Trucking, Inc.; People v. White & Brewer Trucking, Inc., PCB 96-180, PCB 97-11, slip op. at 4 (July 10, 1997) (applying the Illinois Supreme Court's A.E. Staley factors). The Board may also weigh the prejudice a stay would cause the nonmovant against the policy of avoiding duplicative litigation. *See* Village of Mapleton v. Cathy's Tap, Inc., 313 Ill. App. 3d 264, 267, 729 N.E.2d 854, 857 (3d Dist. 2000).

Board Ruling

First, the Board addresses complainants' threshold argument that the four factors mentioned do not apply where the complainant files a Board proceeding before the respondent files claims in another court. *See* Resp. at 2. Complainants argue that under Village of Park Forest, this principle applies here because this case was filed before the CCAs were executed, the pending sale to NRG was contemplated, and the federal and state coal ash rulemakings were initiated. Resp. at 3. In Village of Park Forest, the Board enforcement proceeding sought to be stayed was filed before a contract action was filed in circuit court. Village of Park Forest v. Sears, Roebuck, & Co., PCB 01-77, slip op. at 5 (Feb. 15, 2001). The Board ruled that it would not apply the four-factor Illinois Supreme Court test there because the Board proceeding was filed "well before" the respondent filed the contract action in circuit court. *Id.* at 6. In denying the stay motion, the Board reasoned that because the environmental enforcement action and

contract dispute turned on distinct issues, the later-filed contract action could not obviate the Board proceeding. *Id.* at 5.

Village of Park Forest is clearly distinguishable from this case. Here, while the relative timing of the Board and related proceeding is similar (*i.e.*, the Board proceeding came before the related action), MWG does not ask the Board for a stay based on any subsequently or later-filed claims pending in a court. *See* White & Brewer Trucking, Inc., PCB 96-180, PCB 97-11, slip op. at 4 (finding that the four-factor test is to be "considered in determining whether the later-*filed* of two arguably related actions should be stayed") (emphasis added). Instead, MWG seeks to delay this action pending rulemakings, a potential sale, and a pre-enforcement process, none of which, unlike the later-filed court case in Village of Park Forest, could conceivably obviate this case. Accordingly, the Board finds it inappropriate to consider only whether these subsequent proceedings and actions would obviate this case, and applies the standard four stay factors below.

Comity

Comity is the principle that courts give effect to the decisions of a court of another jurisdiction, not as a matter of obligation but as a matter of deference and respect. *See* White & Brewer Trucking, PCB 96-180, PCB 97-11, slip op. at 4, citing *Black's Law Dictionary*, 6th Ed. (1990). Here, MWG argues a stay would properly respect the approval processes of the Bankruptcy Court and FERC concerning NRG's pending acquisition of MWG. *See* Memo. at 12. However, as noted above, MWG, in its reply, informs the Board that the Bankruptcy Court approved the purchase on March 11, 2014, and FERC approved it on March 18, 2014. Reply at 2, n. 1. Accordingly, the Board finds MWG's request for the Board to stay this case pending court and regulatory approval of the NRG sale moot.

Next, MWG argues a stay would appropriately give NRG "time to determine the direction and decision-making for this matter and set the policy decisions for the future of the Stations at issue." Reply at 6. MWG claims the Board has granted a stay "to allow for business decisions to conclude," and should do so here, too. Memo. at 10, citing Herrin Security Bank v. Shell Oil Co., PCB 94-178 (May 18, 1995). However, Herrin Security Bank, the only authority MWG cites for this proposition, does not support staying this case. There, the Board granted a stay to allow a determination to be made by the Office of the State Fire Marshall (OSFM) concerning whether the bank's UST remediation costs were eligible for reimbursement from the UST fund. Herrin Security Bank, PCB 94-1278, slip op. at 1. The Board reasoned that a stay was warranted because reimbursement from the fund, if available, would directly affect the amount of damages complainant sought in the citizens enforcement proceeding before the Board. Herrin Security Bank, PCB 94-178, slip op. at 1-2. Thus, Herrin Security Bank simply stands for the premise that the Board may grant a stay where relevant regulatory actions may contribute to the expeditious resolution of the Board proceeding—not merely because it would allow business decisions to conclude, as MWG contends.

The Board finds that consideration of comity does not warrant a stay in this proceeding. The Board agrees with complainants that the Bankruptcy Court is the most appropriate forum to consider the effect of allowing this case to proceed on the pending NRG acquisition. And, on

that issue, the Bankruptcy Court ruled that the acquisition of MWG by NRG does not warrant leaving in place the bankruptcy stay in this proceeding, reasoning that "[r]equiring 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. . . ." In re: Edison Mission Energy, et al., No. 12-49219, 2013 WL 6504710 at *5 (Bankr. N.D. Ill. Dec. 11, 2013). Furthermore, the Bankruptcy Court found that any impact on the NRG sale that continuation of this case might have would be outweighed by the prejudice to complainants if a stay were in place. In re: Edison Mission Energy, et al., No. 12-49219, 2013 WL 6504710 at *5-6. Nothing in this record persuades the Board to conclude otherwise, particularly given that MWG seeks a stay of "at least one year," (Mot. at 1) and the NRG acquisition is expected in the near future.

Lastly, the Board notes that while comity as it relates to the Bankruptcy Court is appropriate for its findings relating to bankruptcy and financial issues, there is no basis for the Board to defer to the Bankruptcy Court on environmental matters. *See* Midwest General EME, LLC v. IEPA, PCB 04-216 (Apr. 6, 2006) (comity was appropriate because both decision-making bodies were deciding the same issues). Here, the Bankruptcy Court is, of course, handling bankruptcy issues, while the Board faces the environmental issues, so allowing this case to proceed poses no potential conflict with matters pending before the Bankruptcy Court.

Prevention of Multiplicity, Vexation, and Harassment

Invoking the second stay factor, MWG argues that a stay "will avoid wasteful multiplicity in response activities that will likely be caused by the issuance of the U.S. EPA final rule on managing coal ash and the new Board regulations on coal ash." Memo. at 11-12. According to MWG, because of the uncertainty as to what the federal and state coal ash rules will ultimately require, a stay is warranted to avoid interfering with MWG's coordination of its responsibilities for coal ash management and response activities. Memo. at 11-12.

The Board is not persuaded that the federal and state coal ash rulemakings provide a reason to stay this case. The Board notes that rulemakings and enforcement actions are entirely distinct proceedings with different aims. Rulemakings are forward-looking and impose future obligations, while enforcement actions concern alleged past or ongoing violations and the proper remedies to redress proven violations. In this case, the Board notes that according to the Agency, the proposed state coal ash rule would not displace an enforcement action based on exceedances of groundwater standards. *See* Coal Combustion Waste Ash Ponds, R14-10, IEPA Technical Support Document at 35-36 (noting that under Agency's rulemaking proposal, exceedances of groundwater quality standards could subject owner or operator to notice of violation "that could result in penalties" and corrective action).

Further, the Agency's coal ash rulemaking proposal would not mandate any specific outcomes at specific sites, but is intended to be a codification of a process to be used generally. *See* Coal Combustion Waste Ash Ponds, R14-10, IEPA Statement of Reasons at 1; *see also id.*, Buscher Testimony at 2 ("The proposed regulations establish a process for assessing groundwater quality at ash impoundments . . . ."). Similarly, USEPA's proposed rule also would not mandate any specific action at a particular site, but would instead require planning and

assessment of groundwater contamination. *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 (June 21, 2010). There is nothing in either rulemaking proposal that would prevent the Board from ordering tailored remedial measures if complainants establish the violations alleged in this action. Thus, regardless of the end result of the federal and state rulemakings, neither can be expected to obviate this proceeding or render any aspect of it moot.

Additionally, the Board agrees with complainants that a stay is unwarranted based on the coal ash rulemaking proposals because of the uncertain timing and duration of the rulemakings. There is no way to predict with any confidence when compliance with proposed rules will be required. The Board finds that staying this proceeding pending the outcome of the rulemakings would unnecessarily delay resolution of this action.

MWG nevertheless argues that the Board has granted stays to allow USEPA proceedings to conclude. Memo. at 10, citing U.S. Steel Corp., PCB 10-23, slip op. at 12 (Feb. 2, 2012). However, in U.S. Steel Corp., the second proceeding involved U.S. Steel's petition to USEPA regarding a subsequent version of the same permit at issue in the Board proceeding, such that the federal proceeding could directly affect or render the Board case entirely moot. *Id.* Moreover, the parties in U.S. Steel Corp. agreed that the pending USEPA proceeding could moot the Board proceeding. *Id.* Here, by contrast, as discussed above, neither the state nor federal proposed rulemaking would obviate this proceeding, and the Board sees no reason to hold up this proceeding pending the conclusion of rulemaking proceedings that, whenever completed, cannot be expected to moot this case.

Likelihood of Obtaining Complete Relief in Foreign Jurisdiction

MWG also asserts a stay is warranted because its corrective actions pursuant to the CCAs have already achieved the same remedies sought by complainants in this case—or at least the only relief they could possibly obtain. Memo. at 14.

The Board disagrees with this assertion. In denying MWG's motion to dismiss, the Board rejected MWG's argument that the CCAs provide a basis to dismiss this action. The Board found that the actions required by the CCAs, which MWG claims it has now completed, and the potential remedies available in this proceeding upon proof of the alleged violations are clearly different. Sierra Club, et al. v. Midwest Generation, LLC, PCB 13-15, slip op. at 23 (Oct. 3, 2013). In this case, complainants seek civil penalties as well as an order requiring MWG to cease and desist from future violations, modify its coal ash disposal practices, and remediate the contaminated groundwater. *See* Comp. at 18-19. Furthermore, the complaint alleges violations extending over a different time period than those alleged in the Notices of Violations and addressed by the CCAs. *See* Sierra Club, PCB 13-15, slip op. at 23. Thus, even if MWG has effectively taken all the actions required under the CCAs, such actions cannot provide all the relief complainants seek in this case. Additionally, the CCAs of course do not entail penalties for past violations, which the complaint here requests. The Board finds no more reason to stay this case based on the CCAs than there was to dismiss this case on that basis. Rather, the CCAs would be legally relevant only at the remedial phase of this case, if it is reached. As the Board

concluded in denying the motion to dismiss, if "the Board were ultimately to find that MWG has committed the violations alleged in the complaint, the CCAs Board would, in fashioning an appropriate remedy, take into consideration any compliance by MWG with the CCAs." Sierra Club, PCB 13-15, slip op. at 20.

Furthermore, MWG argues that the complaint effectively seeks injunctive relief, which the Board is not authorized to grant. Reply at 3. The Board finds, however, that this is not the appropriate stage of the proceeding to determine what remedies would be available to complainants if they prevailed on the allegations in their complaint. Beyond that, however, the Board does not agree that the relief sought in the complaint is necessarily unauthorized. The complaint seeks, among other things, a Board order requiring MWG to cease and desist from future violations of the Act—relief that the Board is authorized to impose pursuant to Section 33(b) of the Act. 415 ILCS 5/33(b) (2012). And while, as MWG notes, the Board lacks authority to issue injunctive relief (*e.g.*, Janson v. PCB, 69 Ill. App. 3d 325, 328, 387 N.E.2d 404, 408 (3d Dist. 1979); Pawlowski v. Johansen, PCB 00-157, slip op. at 2 (May 4, 2000)), Section 33 of the Act gives the Board "wide discretion in fashioning a remedy" (Roti v. LTD Commodities, 355 Ill. App. 3d 1039, 1053, 823 N.E.2d 636, 647 (2d Dist. 2005); *see also* Discovery South Group, Ltd. v. PCB, 275 Ill. App. 3d 547, 557-61, 656 N.E.2d 51, 58-61 (1st Dist. 1995) (upholding Board decision requiring outdoor amphitheater to conduct sound monitoring and meet sound level restrictions tailored to theater)). The Board expresses no view as to whether complainants are entitled to the remedies they request here; rather, at this stage of this case, it suffices to clarify that such relief is not necessarily outside the Board's authority to impose.

Nor does the Board agree that a stay is warranted because the Bankruptcy Court's order lifting the automatic stay in this case bars collection of any penalties that might be imposed in this case. In re: Edison Mission Energy, et al., No. 12-49219, 2013 WL 6504710, at *10 (Bankr. N.D. Ill. Dec. 11, 2013). By its terms, the Bankruptcy Court's order bars complainants, "at this time," from "seeking to enforce any monetary penalty that may be awarded" in this case; it does not purport to prohibit the imposition of penalties upon a showing that MWG has violated the Act. *Id.* The Board retains authority under the Act to impose penalties in this case if warranted, even if any order imposing such penalties could not, at this time, be enforced under the Bankruptcy Court's order. Thus, the Board finds that the bar on collecting any Board-imposed penalties does not support staying this case.

The Board also is not persuaded by MWG's contention that the Agency testified that actions taken under the CCAs effectively redress the violations alleged in complainant's complaint here. It is true that the Agency testified in the Board's coal ash rulemaking that, "[a] n adequate liner would be at least two feet of clay compacted to one times ten to the minus 7th centimeters per second, or a synthetic liner with an equivalent amount that provides an equivalent amount of protection," *and* that the synthetic liners listed in Exhibit N (liners at MWG stations) are adequate. Coal Combustion Waste Ash Ponds, R14-10, 2/26/14 Tr. at 229-30. That testimony plainly was intended as a general statement about measures appropriate to contain coal ash in ponds at electric generating stations, and not as a site-specific determination that the use of such liners affords the same relief that a cease and desist order in this case would. Thus, the Agency's rulemaking testimony is not a proper basis for the claim that the Agency has concluded

there is no potential for groundwater contamination from the ash ponds at MWG's generating stations.

Res Judicata Effect of a Foreign Jurisdiction

While MWG makes no argument that the outcome of any purportedly related proceeding could bar complainants' claims based on the doctrine of *res judicata*, the Board notes that no such argument could be made here. *Res judicata* is the legal doctrine which states that "once a cause of action has been adjudicated by a court of competent jurisdiction, it cannot be retried again between the same parties or their privies in a new proceeding." White & Brewer Trucking, PCB 96-180, PCB 97-11, slip op. at 6, citing Burke v. Village of Glenview, 257 Ill.App.3d 63, 69, 628 N.E.2d 465, 469 (1st Dist. 1993). The elements of *res judicata* are "(1) a final judgment on the merits rendered by a court of competent jurisdiction, (2) an identity of cause of action, and (3) an identity of parties, or privity between subsequent parties and the original parties." *Id.* at 6, citing People *ex rel.* Burris v. Progressive Land Developers, Inc., 151 Ill.2d 285, 294, 602 N.E.2d 820, 825 (1992). Where the Board finds these elements present, "a judgment in a suit between the parties will be conclusive of all questions" and will "bar relitigation of any such issues." *Id.* at 6, citing Progressive Land Developers, 151 Ill. 2d 285, 294, 602 N.E.2d 820, 825.

Here, no final decision in any pending proceeding—*i.e.*, the bankruptcy proceeding and the federal and state coal ash rulemakings—could possibly have *res judicata* effect on the violations alleged in this Board proceeding. The Board found above that the other proceedings will not obviate any aspect of this case because no legal question raised in this case is also before another tribunal. It follows that there is no identity of cause of action between this case and the other proceedings on which MWG relies. That is sufficient to defeat *res judicata*, so the Board does not consider whether any other element of the doctrine could be met here. *See* Rein v. David A. Noyes & Co., 172 Ill. 2d 325, 335, 665 N.E.2d 1199, 1204 (1996) (all elements of *res judicata* must be met for doctrine to apply).

Environmental Harm and Prejudice to the Nonmovant

MWG argues there is no ongoing or threatened environmental harm here because it has completed all the measures required by the CCAs, resolving the alleged violations. Memo. at 11. The Board disagrees. Complainants' complaint alleges that MWG's disposal of coal ash at each of the four power stations at issue has caused or contributed to violations of groundwater quality standards with contaminants that make the groundwater unusable, pose risks to adjacent surface water bodies, and jeopardize human health as well as aquatic ecosystems. Comp. at ¶¶ 9-26. The Board finds that if the violations alleged in the complaint are proved, the risk of environmental harm would be serious. Thus, the Board believes that consideration of the risk of environmental harm weighs strongly against a stay.

Lastly, MWG argues that far from threatening to prejudice complainants, a stay would actually benefit the parties because they would not have to incur unnecessary litigation expenses. Memo. at 15. The Board finds no indication in this record that further litigation would generate unnecessary expenses. As the Board found above, none of the other proceedings MWG cites would obviate this case, making expenditures on this case unnecessary. In addition, the Board

notes that the Bankruptcy Court concluded that "any 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, No. 12-49219, 2013 WL 6504710, at *7 (Bankr. N.D. Ill. Dec. 11, 2013). More generally, it would be anomalous, and certainly contrary to complainants' interests, for the Board to stay this proceeding after the Bankruptcy Court decided to lift the automatic stay in this case. Despite that consideration, however, the Board does not believe complainants have demonstrated that they would suffer actual prejudice—such as loss of evidence or potential witnesses—if a stay were granted. Thus, the Board finds that this factor neither supports nor weighs against a stay in this proceeding.

Nonetheless, the Board has found that the other stay-related factors do not support a stay. Accordingly, the Board finds that a stay is not warranted, and denies MWG's motion.

CONCLUSION

For the above reasons, the Board denies MWG's motion to stay this proceeding.

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 April 17, 2014, by a vote of 4-0.

John Therriault, Clerk
Illinois Pollution Control Board