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 2013-015**
Complainants,	)	**(Enforcement – Water)**
	)	
v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

NOTICE OF FILING

TO: John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board Respondent's Reply in Support of Its Motion to Dismiss, a copy of which is herewith served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: July 9, 2013

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MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

RESPONDENT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Respondent, Midwest Generation, LLC ("MWG"), by its undersigned counsel, submits this Reply in Support of MWG's Motion to Dismiss, to reply to the Response filed by the Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (collectively "the Complainants") pursuant to Sections 101.500(e) and 103.212 of the Illinois Pollution Control Board's ("Board") Procedural Rules. 35 Ill. Adm. Code 101.500(e), 103.212.

I. INTRODUCTION

The Board has at least three independent legal bases for dismissing the Complaint and Complainants' response does not eliminate any of these alternative grounds for dismissal. First, the Complaint is frivolous because MWG and the Illinois EPA entered into binding and enforceable Compliance Commitment Agreements ("CCAs"). Thus, there is no "disagreement" between the Agency and MWG as required by Sections 31(c) and (d) of the Illinois Environmental Protection Act ("Act"). Complainants' argument – that the language of these

Sections of the Act does not reflect "common sense" – is a veiled attempt to ask the Board to ignore the plain language of the statute and to insert itself into the legislative process. Second, the Complaint is also frivolous because it specifically alleges that MWG violated federal regulations and the Board does not have the authority to implement or enforce federal statutes or regulations. Complainants' argument that all of RCRA is automatically incorporated into Illinois law by reference in one simple statement in a single regulatory definition asks this Board to ignore both the legislative process and its own rulemaking authority. Third, the Complaint is duplicative because it is substantially similar to the facts and allegations resolved by the binding CCAs. Complainants' claim that the facts are different because they extend over a slightly longer time period merely reflects the passage of time and has no impact on the remedies the Illinois EPA has resolved through the CCAs. For any of the above reasons, the Board may find the Complaint either frivolous or duplicative, and should dismiss the Complaint accordingly. 415 ILCS 5/31(d), 35 Ill. Adm. Code 103.212(a).[1]

II. ARGUMENT

The Complaint is frivolous because the alleged violations are no longer a subject of disagreement between the Illinois EPA and MWG, as required by Sections 31(c) and (d) of the Act. 415 ILCS 5/31(c), (d). The primary requirement under Section 31(c) of the Act, as required by Section 31(d), is that "a subject of disagreement" remains between the Agency and the respondent. 415 ILCS 5/31(c), (d). Under the amended Section 31 enforcement process, and within only weeks of Complainants filing their complaint, MWG and Illinois EPA resolved the

[1] The Board has dismissed cases for being only frivolous or only duplicative. *See Larry D. Welch v. Dekalb Sanitary District*, PCB 12-131, October 18, 2012 (Board dismissed complaint because it was frivolous, even though Board found complaint not duplicative); *Anielle Lipe and Nykole Gillette v. Village of Richton Park*, PCB 12-44, Nov. 17, 2011 (Board dismissed complaint only because it was frivolous); *Flagg Creek Water Reclamation District v. Village of Hinsdale et al*, PCB 06-141, June 1, 2006 (Board found complaint not duplicative but was in part frivolous because it alleged violations of legal authority other than the Act and the Board's regulations); *Northern Illinois Anglers' Assoc. v. The City of Kankakee*, PCB 88-183, January 5, 1989 (Board dismissed complaint because it was duplicative).

same alleged violations at the same stations by executing binding and enforceable CCAs. 415 ILCS 5/31(a). Complainants' arguments ignore the amendments to Section 31(a) of the Act. The amendments make the CCAs binding and enforceable agreements. Complainants instead rely on inapplicable arguments and case law to suggest that citizens should be able to proceed with a complaint under any circumstance, whether the State has acted or not. The argument flies in the face of, and threatens to severely undermine, the Illinois EPA's delegated authority to enforce the Act and the avoidance of conflicting enforcement remedies. Complainants' position also turns on its head the overriding intent of the legislature to allow citizen suits to proceed under those limited circumstances when the State is not acting, not to interject in a process created by the General Assembly to effectively and efficiently resolve alleged violations. CCAs, as recently amended, are enforceable settlement agreements between the State and a respondent. The Board must give greater value to these new enforceable CCAs and refuse to allow a private party more authority than envisioned by Illinois lawmakers.[2]

The Complaint is also frivolous because it alleges violations of federal regulations, which the Board does not have the authority to enforce. The Board has declined to adopt the federal regulations Complainants use as a basis to allege the open dumping counts of their Complaint. Pursuant to the Illinois Administrative Procedures Act, unless the Board conducts a rulemaking through its rulemaking authority, no rules, including federal rules, are authorized. Because the open dumping counts are not authorized by Illinois law, they should properly be dismissed.

Finally, the Complaint is duplicative because it is merely an attempt to re-litigate the same facts and the same violations as were alleged by the Illinois EPA and resolved in the

[2] Further, because the enforceable CCAs resolve the alleged violations, the case is moot and frivolous because it fails to state a cause of action.

enforceable CCAs. For all of these reasons, MWG requests that the Board dismiss the Complaint with prejudice.

A. The Complaint is Frivolous and Should be Dismissed Because There is No Disagreement Between the Agency and MWG.

The clear language of Section 31(d) of the Act allows a citizen to file a complaint only when the complaint meets the requirements of Section 31(c). 415 ILCS 5/31(c), (d). Section 31(c) begins by stating that it is "[f]or alleged violations which remain the subject of disagreement between the Agency and the person complained against…" 415 ILCS 5/31(c)(1). Thus, the primary requirement for complaints filed pursuant to Sections 31(c) and 31(d) is that there remains a disagreement between the Agency and the person complained against. Citizen suits under the Act must meet the requirements of Section 31(c), "which pertains to alleged violations that remain the subject of disagreement between the [Illinois EPA] and the person complained against." *Chrysler Realty Corp. v. Thomas Industries, Inc.*, 97 F.Supp.2d 877, 879 n.1 (N.D. Ill. 2000) *citing* 415 ILCS 5/31(d).[3]

Despite the plain language of the Act, Complainants' argue that the Board should completely ignore the language of Section 31(c) in order to allow their case to proceed. Complainants assert that the language couldn't possibly apply to them, while providing no support for their position other than their perception of "common sense." Complainants cannot point to any case in which the Board has either allowed a citizen suit to go forward when the citizen suit failed to follow the requirements under Section 31(c), or where the Board has stated that certain provisions of Section 31(c) are inapplicable to citizen suits under Section 31(d). In fact, the opposite is true. The Board has consistently held that a citizen suit must comply with

[3] Although in the Chrysler Realty case, the District Court for the Northern District of Illinois made this statement in a footnote because it was not directly pertinent to the holdings of that case, it is clear from the reasoning of the Court's opinion that the court found the language applicable and appropriately gave it meaning.

Section 31(c). *See Brian Finley et al. v. IFCO ICS-Chicago, Inc.*, PCB 02-208, December 5, 2002 (holding that "*[b]ecause Section 31(d) provides that a complaint must meet the 31(c) requirements*, and 31(c)(1) requires a hearing, a hearing in a citizen's enforcement action cannot be waived.") (emphasis added). Until the legislature changes the Act to specifically exclude citizen suits from 31(c), the plain statutory language cannot be ignored. Pursuant to Section 31(d) of the Act, a citizen suit must follow Section 31(c) and the first requirement in Section 31(c) is that there is a disagreement between the Agency and the alleged violator. 415 ILCS 5/31(c), (d).

As there is no longer a disagreement between the Agency and MWG, Complainants cannot fulfill the primary requirement under Section 31(c) of the Act. 415 ILCS 5/31(c). Complainants do not dispute that the Illinois EPA and MWG have entered into, and are presently following, enforceable CCAs to resolve alleged violations with the same underlying facts as the allegations in the Complaint.[4] Complainants do not, and cannot, refute that the CCAs were issued under the amended Section 31(a) of the Act, which make them enforceable documents subjecting MWG to additional violations and penalties should they not be followed. 415 ILCS 5/31(a). These new, enforceable CCAs are unlike any other CCAs previously evaluated by the Board. By complying with their terms and conditions, MWG will resolve the alleged violations under the direction and authority of the Illinois EPA, the government agency delegated to enforce the Act.

When the Illinois General Assembly amended Section 31(c), it stated that the purpose of the amendment was to make the CCAs "more meaningful, so that they have more of an impact. It sends the right message to the U.S.EPA, which is also a concern for our State." (97th Ill.Gen.

[4] See Exhibits A through F of Complainants' Response which are MWG's proposals, submitted for Illinois EPA approval, for Groundwater Management Zones and Environmental Land Use Controls at the MWG Stations, as agreed to and required by the enforceable CCAs.

Assembly, Senate Proceedings, 30th Legislative Day, April 13, 2011, p. 90). Further, the Illinois EPA made it clear that these are binding agreements that resolve alleged violations. Illinois EPA changed the CCA to make it a "formal document" that must be signed by both the alleged violator and the Illinois EPA and that "[u]tilization of a formal CCA document will provide greater certainty to the regulated community regarding *the full and final resolution of alleged violations* contained in a Violation Notice." (See Illinois EPA CCA webpage, attached as Ex. 17 to Respondent's Motion to Dismiss, emphasis added).

Because the MWG CCAs, entered into under a new regulatory scheme, are binding agreements between the Illinois EPA and MWG which resolve all alleged violations, there is no longer a disagreement between the Illinois EPA and MWG. In the absence of any such disagreement, the Complaint cannot fulfill the requirements under Section 31(c) and the Complaint must be dismissed.

1. Complainants Cannot Supplant the Illinois EPA's Enforcement Authority.

Complainants attempt to dismiss the plain language of Section 31(d) of the Act by stating that it defies "common sense" to only allow citizens to proceed if there is a subject of disagreement remaining with the Agency; yet, the most common sense assessment of Sections 31(c) and (d) is that a citizen suit should proceed only when the State fails to or elects not to act. Allowing Complainants to interject while the Illinois EPA is executing its enforcement discretion through the new Section 31(a) tools granted it by the General Assembly undermines the Illinois EPA's authority and ignores the very purpose of citizen suits under environmental laws.

The United States Supreme Court has explained that a "citizen suit is meant to supplement rather than supplant governmental actions." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60, 108 S.Ct. 376, 383 (1987). In fact, the

Supreme Court foretold a scenario very similar to the instant case in *Gwaltney*. In evaluating the citizen suit provisions under the Clean Water Act, the Supreme Court stated as an example:

> "Suppose that the Administrator identified a violator of the Act and issued a compliance order under § 309(a). Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take. If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of the discretion of state enforcement authorities. Respondents' interpretation of the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive. *Gwaltney of Smithfield, Ltd.* 484 U.S. at 60-61, 108 S.Ct. at 383.

That is the case here. Allowing a citizen suit to proceed after the Illinois EPA and a respondent have entered into an enforceable CCA for the same underlying facts and events would supplant the Illinois EPA's authority and diminish the importance and effectiveness of a CCA. This is not what the Illinois legislature intended when it modified Section 31 in 2011 to make CCAs more meaningful and to give them greater legal impact. Allowing Complainants' action to continue after enforceable CCAs have been entered would change the nature of a citizen suit's role from interstitial to potentially intrusive. When the State authority is properly and effectively resolving the alleged violations, a citizen group cannot intrude upon that authority. The Illinois EPA's enforcement discretion would be curtailed dramatically and a regulated entity would have no incentive to enter into an enforceable CCA if it is possible for a private party to bring a suit regardless of an agency CCA and resolution.

Environmental laws generally are structured to only allow citizen suit participation after a government agency has elected not to act or has failed to act. Federal environmental statutes explicitly state that a citizen suit may not go forward if the United States or a state is proceeding

with an action to require compliance.[5] Similarly, Illinois has structured section 31(c) and (d) to allow a citizen suit only when the Illinois EPA has not been able to resolve disputes with the respondent and a disagreement remains. 415 ILCS 5/31(c), (d). The structure is consistent with federal environmental laws and makes perfect sense.

Complainants' main argument, that they disagree with the response actions MWG is required to perform under the enforceable CCAs, highlights the inherent flaws in Complainants' position. First, Complainants ignore the need for Agency deference. An Agency is granted deference to its experience and expertise to interpret and enforce the Act and the underlying regulations it was created to implement. *Fox Moraine, LLC v. United City of Yorkville,* 960 N.E.2d 1144 (2nd Dist. 2011) (Court granted Board deference to its experience and expertise in upholding Board's decision). In reviewing the enforceable CCAs and the remedial actions required to be taken, the Board should grant Illinois EPA deference in the execution of the CCAs due to its experience and expertise in creating resolutions to alleged violations at the MWG stations.

Second, Complainants ignore the legislative process. Complainants argue that they should have the opportunity to intervene in a binding agreement created by the General Assembly for use by the Illinois EPA to effectively and efficiently resolve alleged violations. The proper venue for such a request is with the General Assembly. Until the General Assembly amends the CCA process to authorize citizen participation, Complainants do not have a right to insert their private opinions into the CCA process.[6]

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[5] *See e.g.,* Clean Water Act, 33 U.S.C. §1365; Solid Waste Disposal Act, 42 U.S.C. §6972, Clean Air Act, 42 U.S.C. §7604; and CERCLA 42 U.S.C. §9659.

[6] Illinois EPA has provided Complainants and other interested parties the opportunity to participate through other means. Illinois EPA has developed an Ash Impoundment Strategy and has been accepting comments from the public. http://www.epa.state.il.us/water/ash-impoundment/. Further, Illinois EPA recently issued comprehensive draft regulations on coal ash impoundments which provides another opportunity for Complainants to comment on how ash impoundments are managed.

Third, Complainants ignore the problem of conflicting remedies. Complainants discuss in great detail that they would seek different relief than what was agreed to in the enforceable CCAs. They also cite cases in which the Board declined to dismiss a case because the requested relief was different. However, in those cases in which injunctive relief was requested, either (a) the State was a part of the civil action, (*See, e.g., People v. Freeman United Coal Mining Co.* PCB 10-61, Nov. 15, 2012) or (b) the Board could not grant the relief ordered by the administrative agency, (*See Finley v. IFCO ICS-Chicago, Inc.*, PCB 02-208 (Dec. 5. 2002)).[7] Importantly, none of the cases cited involve administrative agreements in which the Board could grant similar relief. As stated in MWG's Motion, and not rebutted in Complainants' response, the remedies Complainants' suggest could actually conflict with the binding CCAs already finalized. If their requested remedies were granted, MWG would be in the untenable position of either violating the CCA or violating a Board order. Clearly this was not the intent when the General Assembly modified Section 31(a) to make the CCAs more meaningful and enforceable.

2. *People v. Freeman United Mining Coal, LLC* is Inapplicable.

Complainants' reliance on *People v. Freeman United Mining Coal Co., LLC.,* PCB 10-61, is misguided because the Board's decision on the CCA was limited in scope and concerned an "old" CCA under the now amended CCA provisions. The Freeman United Coal Mining Company ("Freeman United") CCA was issued in 2005 and was simply a letter from the Illinois EPA stating the technical terms of the agreement. In contrast, the MWG CCAs are binding agreements between the Illinois EPA and MWG which both parties formally executed. (See Exs. 1 – 4 attached to MWG Motion to Dismiss). The MWG CCAs order MWG to comply with all

[7] In the remaining case cited by Complainants, both the State and the citizens were only pursuing penalties and so there was no actual conflict in the requested reliefs. *United City of Yorkville v. Hammon Farms*, PCB 08-96, April 2, 2009.

provisions of the CCA, and failure to comply with any term or condition will subject MWG to an additional civil penalty of $2,000 in addition to any other remedy or penalty that may apply.

Further distinguishing *Freeman Coal*, the citizens groups in that case were permitted to intervene in a State enforcement action because the State did not object to the involvement of the citizens group and the Board could coordinate all of the parties' demands to resolve the matter. Thus, there was no likelihood that the remedies would conflict or that the citizens group would supplant the State's authority to administer the Act and underlying regulations. In this case, the State has already implemented its discretion by executing enforceable CCAs which have binding terms and conditions that MWG may not violate. Any of the suggested remedies by Complainants here would conflict with the enforceable terms and conditions of the CCAs.

Finally, the Board in *Freeman Coal* decided the case on grounds unrelated to MWG's position in the instant case. The Board in *Freeman Coal* ruled on a Motion for Summary Judgment that the citizens' suit could go forward as a part of a State enforcement action because the Freeman United CCAs addressed only one outfall, whereas the citizens' complaint alleged multiple violations of the NPDES permit. *See Id.* p. 64. Although Freeman United argued that the citizens groups' action was barred because the preface to Section 31(c) of the Act requires a disagreement between the Agency and the Respondent, and also argued that allowing citizens to enforce violations addressed by CCAs would significantly undermine the incentives for the regulated entities to enter into CCAs, the Board did not address those issues. *Freeman United Coal Mining,* PCB 10-61 & 11-02, Nov. 15, 2012, at p. 59. The Board did not reject Freeman United's arguments on the broader implications of the CCA because it did not need to for its decision under a summary judgment standard. In fact, the Board effectively applied a "duplicative" standard and stated that if the Board did accept the argument that the existence of a

CCA limited the ability of a citizen's group to prosecute violations, such limitation would be to the items covered in the CCA. *See Id.* p. 64. Here, all the violations alleged by Complainants are covered by the CCAs. As detailed below, Complainants' stated claims for open dumping, which are based on substantially similar facts and circumstances as Illinois EPA's violation notices and the CCAs, cannot be supported by law because they are based on federal regulations which are not before the Board. Complainants' remaining allegations are addressed by the CCAs.

Because the Freeman Coal CCA was issued under the old and unenforceable CCA statute and the Board's opinion was limited in scope, it is inapplicable to evaluating the MWG CCAs. For all of these reasons, the Complainants' complaint is frivolous and must be dismissed.

B. <u>As There is no Longer a Controversy, the Complaint is Moot and Should be Dismissed as Frivolous.</u>

As stated in the Motion to Dismiss and not disputed by Complainants, the Complaint should be dismissed as frivolous because the Complaint is moot. The CCAs, as binding agreements, render the Complaint moot because no actual controversy exists. "A moot controversy is one that once existed but that, because of the happening of an event, has ceased to exist and no longer presents an actual controversy between the parties." *McCaster v. Greenwood*, 328 Ill.App.3d 643, 645, 766 N.E.2d 666, 668 (5th Dist. 2002), *citing Shifris v. Rosenthal*, 192 Ill.App.3d 256, 261, 548 N.E.2d 690, 693 (1st Dist. 1989). The issuance of the enforceable CCAs for each of the stations has ended any controversy because the CCAs resolve the alleged violations and provide effective relief under the direction and authority of the Illinois EPA. Although Complainants point out that their complaint was filed before the MWG CCAs were finalized, Complainants do not dispute or even make any reference to rebut the fact that once the CCAs were executed, the issues became moot.

Because of the issuance of the enforceable CCAs, the controversy has ceased to exist and no longer presents an actual controversy between the parties.

C. The Complaint is Frivolous Because Complainants Allege MWG Violated Federal Regulations.

Counts 1, 2 and 3 of the Complaint, concerning open dumping, are based on federal regulations. They should be dismissed as frivolous because they fail to state a cause of action upon which the Board can grant relief. Complainants do not dispute that the Board does not have the authority to implement or enforce federal statutes or regulations. *Hurley Rulon, et al. v. Double D Gun Club*, PCB 03-7, Aug. 22, 2002. In fact, Complainants seem to agree and state in their response: "To be clear, Citizen Groups are not alleging violations of federal law before the Board." (p. 8 of Response). However, according to their own complaint, Complainants state: "MWG…has caused or contributed to contamination of the groundwater … in violation of …*40 C.F.R. §§257.1 and 257.3-4."* (¶¶ 43, 46, and 49 of the Complaint, emphasis added). The Complaint very clearly alleges violations of federal law before the Board. For that very reason, Counts 1, 2 and 3 are outside the authority of the Board and should be dismissed.

After asserting that they are not alleging violations of federal law, Complainants' argue that the entire body of RCRA regulations are incorporated by reference in Illinois through a single line in a definition. Complainants again ignore the Illinois legislative process and rely on an outdated case. In Illinois, no rule, including federal rules, may be adopted except in accordance with all the provisions of the Illinois Administrative Procedures Act ("IAPA"), 5 ILCS 100/ *et seq*. The IAPA provides that "[a]ll rulemaking authority exercised after the effective date of this amendatory Act of the 96th General Assembly is conditioned on the rules being adopted in accordance with all provisions of this Act and all rules and procedures of the Joint Committee of Administrative Rules (JCAR); *any purported rule not so adopted for*

whatever reason, including without limitation a decision of a court of competent jurisdiction holding any part of this Act or the rules or procedures of JCAR invalid, is unauthorized." (5 ILCS 100/5-6, emphasis added). Thus, Complainants' unique and over-broad argument that the entire body of RCRA regulations are incorporated by reference is not accurate. Complainants improperly rely on *Commonwealth Edison v. Illinois Pollution Control Board*, 468 N.E.2d 1339 (3rd Dist. 1984) to support their position. The effective date of the amendatory Act was February 26, 2009 and the *Commonwealth Edison* case was decided in 1984. Accordingly, the *Commonwealth Edison* case is superseded by the IAPA because it was decided before the effective date of the IAPA amendments. Any rule not adopted in accordance with the IAPA rules and procedures, including a decision of a court of competent jurisdiction, is neither authorized nor applicable in Illinois.

The Board has explicitly declined to adopt 40 C.F.R. 257.1 and 257.3-4, the exact provisions cited in Complainants' complaint to support the claims of open dumping. The Board may adopt rules via its general rulemaking authority under Section 27 of the Act, or through its identical in substance rulemaking authority under Sections 7.2, 22.4 or 22.40 of the Act.[8] The purpose of the identical in substance statutes is to provide for quick adoption of regulations that are "identical-in-substance" to federal regulations that the USEPA adopts. The Board has not used either of its rulemaking authorities to enact 40 C.F.R. 257, but has explicitly stated that it viewed the 40 CFR 257 requirements outside the scope of its mandate under Section 22.40 of the Act. *See* p. 17 of Memorandum, *citing In the Matter of: RCRA Subtitle D Update, USEPA*

[8] Section 7.2 of the Act is the general mandate to adopt regulations to secure federal authorization for program regulations that are identical in substance. Section 22.4 of the Act is the specific mandate to adopt regulations that are identical in substance to federal regulations promulgated by the USEPA to implement Sections 3001 through 3005 of RCRA, 42 USC §§6921-6925. Section 22.40 is the specific mandate to adopt regulations that are identical in substance to federal regulations promulgated under Sections 4004 and 4010 of RCRA insofar as those regulations relate to a municipal solid waste landfill unit program.

Regulations (July 1, 1996 through December 31, 1996), R97-20, Final Order, November 20, 1997, slip op. p. 2.

The Board expanded upon that statement in a later rulemaking when it was considering new USEPA regulations under 40 CFR 257.5 through 257.30 for an identical in substance rulemaking. *In the Matter of: RCRA Update, USEPA Regulations*, R97-21, R98-3, and R98-5, Final Order, August 20, 1998, slip op. at p. 11. The Board stated that the Illinois counterparts to subpart A, 40 CFR 257.1-257.4, were the open dumping sections in the Act, and subpart B, 40 CFR 257.5-257.30, fell outside the scope of the Board's identical in substance mandate because it was not a part of RCRA Subtitle C or a part of the municipal solid waste landfill rules. *Id.* Importantly, describing Section 257 as a "counterpart" to the Illinois EPA open dumping sections does not mean that the Board adopted those sections. As stated above, for the Board to adopt those federal regulations, the Board must proceed under its general or identical in substance rulemaking authority. Complainants misleadingly quote from the Board's opinion in R97-21, by leaving out the full paragraph of the quote on p. 11 of their response. The full paragraph of the Board's quote is below:

> "*Illinois does not currently have regulations comparable to 40 C.F.R. 257 relating to non-Subtitle D solid waste disposal facilities. This is because* USEPA adopted part 257 in 1979…to further the purposes of RCRA Subtitle D and provide guidance as to whether a site is an illegal "open dump" or a legal "landfill."…The counterpart in Illinois law is to this older segment of 40 C.F.R. 257 is Section 3.24 and 21(a) of the Act, which define and prohibit "open dumping" in Illinois." *In the Matter of RCRA Update, USEPA Regulations*, R97-21, R98-3, R98-5, Final Order and Opinion of the Board, Aug. 20, 1998, p. 11. (internal citations omitted, emphasis added)

It is clear that the Board does not adopt or even reference 40 CFR 257, but is merely explaining its reasoning in its rulemaking for not adopting the new USEPA regulations 40 CFR 257.5 through 257.30. Instead, the Board chose to retain its reference to those sections in Section 721.105 of the Board's Regulations, and that remains the only reference to 40 C.F.R. 257 in the

Board Regulations. 35 Ill. Adm. Code 721.105. The Board does not reference the federal regulations alleged by Complainants, 40 C.F.R. 257.1 and 257.3-4, in any Board regulation. Until the Board engages in a rulemaking to adopt 40 CFR 257 pursuant to its rulemaking authority and the rules and procedures under the IAPA, 40 CFR 257 has not been adopted in Illinois and the Board does not have the authority to enforce the federal regulations. Thus, Counts 1, 2, and 3 must be dismissed as frivolous because they allege violations of the Federal regulations.

D. <u>The Complaint is Duplicative Because it Concerns Substantially the Same Facts and Violations.</u>

Yet another independent basis to dismiss the Complaint is that it is duplicative. When the Board dismisses Counts 1, 2, and 3 because it cannot implement or enforce federal authority, all that remains are alleged violations strikingly similar to those alleged in Illinois EPA's VNs and resolved by the enforceable CCAs. Consequently, the Complaint is duplicative and must be dismissed. The Complaint and supporting facts are based exclusively on the same groundwater monitoring well data MWG submitted to Illinois EPA and upon which Illinois EPA issued its VNs. *See* Complaint Exs. D, F, H, J, and K-N. Complainants did not include any other facts to support their allegations.[9]

MWG is responding to the alleged violations in the enforceable CCAs, enacted under the new statutory provisions. The CCAs are essentially a settlement agreement entered into with the Illinois EPA because they are binding enforceable documents which include stipulated penalties. (*See* Section III.A.2 of MWG Memorandum in Support of Motion to Dismiss). When a Respondent enters into a settlement agreement, then a citizen suit that raises the same issues is

[9] Complainants attach additional groundwater monitoring well data it received from the Illinois EPA to its Response. MWG agreed to submit the groundwater monitoring well data to the Illinois EPA as a part of its enforceable CCAs for the stations, and they are a part of the ongoing response actions pursuant to the CCAs. Therefore, the results are merely an extension of the ongoing response actions to the Illinois EPA VN and are not substantially different from the original Illinois EPA action.

duplicative. *Northern Illinois Anglers' Assoc. v. the City of Kankakee*, PCB 88-183, January 5, 1989. Complainants' reliance on *Freeman Coal* to argue that CCAs do not constitute a basis for finding an action duplicative is inapplicable because, as discussed above, *Freeman Coal* concerns a CCA enacted under the old provisions of the Act. Here, MWG has settled with the State to resolve alleged violations of the Act and groundwater water quality standards. Complainants allege essentially the same violations as those alleged in the Illinois EPA violation notices, based upon the same groundwater data submitted to the Illinois EPA by MWG pursuant to the enforceable CCAs. The relief agreed to in the CCAs will resolve all of the alleged violations under the direction and authority of the Illinois EPA. Thus, as in *Northern Illinois Anglers' Assoc*., the citizen suit brought by Complainants is duplicative and should be dismissed.

III. CONCLUSION

For the reasons stated herein and in Respondent's Motion to Dismiss and the supporting Memorandum of Law in Support of the Motion to Dismiss, Respondent, Midwest Generation, LLC, respectfully requests that the Board dismiss the Complaint, with prejudice.

Respectfully submitted,

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman
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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing and Respondent's Reply in Support of Its Motion to Dismiss were filed electronically on July 9, 2013 with the following:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

and that true copies were mailed by First Class Mail, postage prepaid, on July 9, 2013 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman