BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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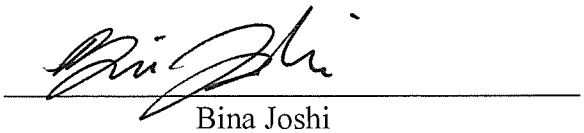
PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board, the attached **RESPONDENT MIDWEST GENERATION, LLC'S MOTION TO DISMISS** and **RESPONDENT MIDWEST GENERATION, LLC'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS**, copies of which are herewith served upon you.

Dated: February 18, 2014

MIDWEST GENERATION, LLC,



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RESPONDENT MIDWEST GENERATION, LLC'S MOTION TO DISMISS

Respondent Midwest Generation, LLC ("MWG"), by its undersigned counsel, respectfully requests that the Illinois Pollution Control Board (the "Board") enter an order dismissing the Complaint brought by Complainant Sierra Club in its entirety pursuant to 35 Ill. Adm. Code §§ 101.500-.506 and 103.212. The Complaint should be dismissed as frivolous for the reasons set forth in Respondent Midwest Generation, LLC's Memorandum in Support of its Motion to Dismiss, which MWG has contemporaneously filed.

WHEREFORE, Respondent, Midwest Generation, LLC, respectfully requests that the Board enter an order:

1. dismissing the Complaint in its entirety with prejudice, and
2. granting such other and further relief as the Board deems necessary.

Respectfully submitted,

Dated: February 18, 2014

MIDWEST GENERATION, LLC

By: _____
One of Its Attorneys

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RESPONDENT MIDWEST GENERATION, LLC'S
MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

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Through this action, Sierra Club seeks to overturn decades of established law and directly enforce against Midwest Generation, LLC ("MWG") the new 1-hour sulfur dioxide ("SO_2") National Ambient Air Quality Standard ("NAAQS"), which was adopted August 23, 2010. Filed on the same day that MWG filed for bankruptcy before any area in Illinois was designated nonattainment, the Complaint seeks to sidestep the carefully crafted administrative process for designating NAAQS nonattainment areas and for bringing such areas into attainment. The Complaint has no legal basis; it should be dismissed with prejudice.

A NAAQS is not legally or practicably enforceable against individual sources, like those that Sierra Club targets through this suit. If allowed to proceed, Sierra Club's action would unlawfully usurp the roles of the Illinois Environmental Protection Agency ("IEPA") and the United States Environmental Protection Agency ("USEPA") to determine whether an area is in attainment with a NAAQS and to develop, adopt, and implement a State Implementation Plan ("SIP") to demonstrate the means to attain a new NAAQS, including regulations that reflect policy choices regarding which sources must reduce emissions, by when, and by how much. Since Sierra Club filed its Complaint, USEPA has made its initial designations of nonattainment area in Illinois, and IEPA is preparing its SIP to demonstrate attainment through a statutorily prescribed process that will include public participation. The Complaint improperly asks the Board to exercise authority it does not have to designate areas as nonattainment, to determine which sources are causing or contributing to nonattainment, and to develop source-specific SO_2 emissions limitations to ensure attainment of the 1-hour SO_2 NAAQS through an enforcement action. Such actions, including the creation and imposition of source-specific limitations, may be accomplished only through rulemakings by a combination of state and federal agencies. Those rulemakings are underway.

Even if the Board otherwise could reach the merits of the asserted claims, the Complaint fails to join necessary parties, whose presence would be required for the Board to provide the requested relief. The joinder required in this case is not feasible.

The Complaint also should be dismissed as frivolous because it fails to state a claim upon which the Board can grant relief. Sierra Club seeks to enforce the 1-hour SO_2 NAAQS against certain MWG power stations even though the 1-hour SO_2 NAAQS itself does not impose any standard or limitation upon individual sources. MWG cannot be in violation of 415 ILCS 5/9(a) ("§ 9") or 35 Ill. Adm. Code § 201.141 ("§ 201.141") based on the alleged violation of an air quality standard that does not impose any enforceable source obligation. These statutory and regulatory sections, upon which Sierra Club misplaces its reliance, do not impose any independent, enforceable limitation. Sierra Club's attempts to plead around this obvious constraint—by inventing a "Necessary Limit" for each of four power stations and alleging that the stations exceeded those invented limits—do not save its claims.

Sierra Club's attempts to characterize its claims as violations of Illinois law, separate and apart from the regulatory structure for promulgation and implementation of the NAAQS, fail. Sierra Club fails to plead the elements of a claim under § 9(a) or § 201.141. Count 1 fails to allege a nuisance condition, which is a necessary element of its § 9(a) claim. In Count 2, even assuming that a claim for causing NAAQS nonattainment otherwise can be brought under § 201.141, Sierra Club improperly and illogically alleges that nonattainment "violations" of § 201.141 caused by MWG may be premised on emissions from other sources and that MWG can be held liable for "preventing" the attainment of a NAAQS before any area in the State is required to attain that NAAQS. Moreover, based on rulemakings after the Complaint was filed, USEPA has determined that only two of the four stations are even in nonattainment areas. Sierra

Club's broad expansion of §§ 9(a) and 201.141 would render countless other state and federal regulations concerning NAAQS virtually meaningless. It would deprive MWG of fair notice of what emission limitations apply to its plants by holding MWG liable for failing to comply with source-specific emission limitations that Sierra Club derived years after-the-fact. Additionally, the Complaint lacks the specificity regarding alleged violations required under the Board's Rules.

For each of these reasons, which are more fully described below, MWG respectfully requests that the Board dismiss Sierra Club's Complaint in its entirety as frivolous pursuant to 35 Ill. Adm. Code §§ 101.500-.506 and 103.212.[1]

BACKGROUND

I. MWG's Power Stations

The Complaint, filed December 17, 2012, relates to four MWG power stations: the Joliet Generating Station in Will County, Illinois ("Joliet Station"); the Powerton Generating Station in Tazewell County, Illinois ("Powerton Station"); the Waukegan Generating Station in Lake County, Illinois ("Waukegan Station"); and the Will County Generating Station in Will County, Illinois ("Will County Station") (together referred to as the "Stations"). All four Stations include coal-fired electric generating units. In accordance with Illinois and federal law, MWG operates the Stations under air operating permits issued by IEPA. The permits for each of these Stations include SO_2 limitations. (*see* Compl. ¶ 21.) Sierra Club does not allege that MWG has violated any of those applicable limitations.

[1] The bankruptcy court order that resulted in lifting the stay in this action provided that Sierra Club is prohibited from enforcing any monetary penalty that might be awarded in this action. Order Granting Relief From the Automatic Stay at 1, *In re Edison Mission Energy*, Case No. 12-49219 (Bankr. N.D. Ill. Nov. 13, 2013). That penalty enforcement prohibition does not impact this motion to dismiss all claims in the Complaint.

Notably, the Stations are already subject to stringent, carefully crafted SO_2 reduction requirements pursuant to the Combined Pollutant Standard ("CPS"), set forth at 35 Ill. Adm. Code § 225.295(b), and two related modest variances that this Board granted on August 23, 2012 (PCB 12-121), and April 4, 2013 (PCB 13-24). To control SO_2 emissions pursuant to the CPS, MWG uses ultra-low sulfur coal and has begun installation of a series of dry sorbent injection systems utilizing Trona (also known as flue gas desulfurization equipment, or "FGDs"). MWG keeps IEPA abreast of its progress in complying with CPS SO_2 control and reduction requirements, including through routine communications (*e.g.*, applications for construction permits and updates to already-issued construction permits) and through the quarterly and annual progress reports that are required pursuant to the PCB 13-24 variance. Notably, as an IEPA official testified at a public hearing concerning the PCB 13-24 variance, emissions from the Stations at levels allowed under the variance do not "jeopardize[]" or "impact" the State's "obligations for the 2010 [1-hour] SO_2 NAAQS."

II. NAAQS Promulgation and Implementation Process

The Clean Air Act ("CAA") provides a systematic process for promulgating and implementing NAAQS. Under the CAA, USEPA is responsible for establishing NAAQS for certain air pollutants. 42 U.S.C. §§ 7408, 7409. NAAQS are air quality goals that apply to geographic areas, 42 U.S.C. § 7407, and are prescribed based on USEPA's judgment of what is "requisite to protect the public health" within those areas with an "adequate margin of safety," 42 U.S.C. § 7409(b)(1).[2] The CAA further directs USEPA, working with the states, to designate

[2] There are two types of NAAQS that USEPA establishes under the CAA: primary NAAQS and secondary NAAQS. Primary NAAQS are established based on protecting human health with a margin of safety. 42 U.S.C. § 7409(b)(1). Secondary NAAQS are established based on a different standard, protecting public welfare. *Id.* at § 7409(b)(2). The 1-hour SO_2 NAAQS that is relevant to this case is a primary NAAQS, notwithstanding Sierra Club's reference to protection of the "environment" in paragraph 32 of the Complaint.

which areas of the country are in attainment with a NAAQS, which areas are in nonattainment, and which areas are unclassifiable. 42 U.S.C. §§ 7407, 7502. An area is designated attainment of a given NAAQS if the concentration of the relevant pollutant in the ambient air within the area meets the standard prescribed by that NAAQS. *Id.* at § 7407(d)(1)(A)(ii). An area may be designated nonattainment if the ambient concentration of a relevant pollutant in that area does not meet that NAAQS. *Id.* The CAA requires states to make designation recommendations to USEPA, and then, based upon relevant data provided by the states, USEPA promulgates designations, which become final after publication in the *Federal Register*. *Id.* § 7407(d). Finally, an area could be designated as unclassifiable if the area "cannot be classified on the basis of available information as meeting or not meeting the [NAAQS]." *Id.* § 7407(d)(1)(A).

As USEPA has explained, the CAA provides that "[s]tates are primarily responsible for ensuring attainment and maintenance of ambient air quality standards once [US]EPA has established them." Primary National Ambient Air Quality Standard for Sulfur Dioxide, 75 Fed. Reg. 35520, 35522 (June 22, 2010) (the "1-hour SO_2 NAAQS Final Rule"); *see also*, 42 U.S.C. §§ 7401(a), 7407(a), 7410(a). Within 18 months after any nonattainment designation, states are required to submit for USEPA's approval demonstrations that include any limitations on emissions necessary for the nonattainment area to attain the NAAQS. 42 U.S.C. §§ 7410(k), 7514(a). These SIPs include specific standards and limitations that apply to individual sources. *Id.* at § 7410(a). Generally, SIPs must provide for nonattainment areas to come into attainment within five years of the nonattainment designation by USEPA. 42 U.S.C. §§ 7502(a)(2)(A), 7514a. The SIP process requires the opportunity for public participation prior to adoption of a SIP by a state and again prior to USEPA's approval or disapproval of the proposed SIP. 42 U.S.C. § 7410(a) and (l); 5 U.S.C. § 553.

SO_2 is one of the pollutants for which USEPA has developed NAAQS. USEPA first developed primary NAAQS for SO_2 in 1971. National Primary and Secondary Ambient Air Quality Standards, 36 Fed. Reg. 8186 (Aug. 30, 1971). Illinois adopted its first plan to attain and maintain that SO_2 NAAQS in 1972. *In re Emission Standards*, R 71-23 (Apr. 13, 1972). Those regulations were subsequently approved by USEPA and incorporated into the Illinois SIP. Approval and Promulgation of Implementation Plans, 37 Fed. Reg. 10841, 10862-63 (May 31, 1972). USEPA is required to review the NAAQS from time to time. 42 U.S.C. § 7410. USEPA retained the 1971 SO_2 NAAQS without revision and promulgated no other primary NAAQS for SO_2 until 2010, when USEPA adopted the 1-hour SO_2 NAAQS. USEPA, Table of Historical NAAQS, available at http://www.epa.gov/ttn/naaqs/standards/so2/s_so2_history.html (last visited Jan. 2, 2014). This 2010 1-hour SO_2 NAAQS is at issue in the Complaint.

III. The 1-hour SO_2 NAAQS

On June 22, 2010, USEPA promulgated the new 1-hour SO_2 NAAQS of 75 parts per billion ("ppb") based upon a three-year average of the fourth highest values measured in the ambient air. 1-hour SO_2 NAAQS Final Rule, 75 Fed. Reg. 35520. No single hourly measurement of SO_2 in the ambient air is sufficient to determine whether an area attains or does not attain the NAAQS. USEPA finalized initial nonattainment designations for the 1-hour SO_2 NAAQS on August 5, 2013, which became effective October 4, 2013, nearly one year **after** Sierra Club filed this Complaint. Air Quality Designations for the 2010 Sulfur Dioxide (SO2) Primary National Ambient Air Quality Standard, 78 Fed. Reg. 47191 (Aug. 5, 2013) ("1-hour SO_2 Designations"). These final nonattainment designations are based upon three years of monitored air quality data (not modeling) measured by certified monitors located throughout Illinois. *Id.*

In the 1-hour SO_2 NAAQS Final Rule, USEPA explained that it would determine whether areas are in attainment or nonattainment with the 1-hour SO_2 NAAQS by collecting and examining at least three years of monitored air quality data. Attainment or nonattainment is then determined "based on the 3-year average of the annual 99th percentile (or 4th highest) of the yearly distribution of 1-hour daily maximum concentrations"; *i.e.*, the area is in nonattainment when the three-year average of the 99th percentile of 1-hour daily maximum concentrations of SO_2 in the ambient air at a monitor exceeds 75 ppb. 1-hour SO_2 NAAQS Final Rule, 75 Fed. Reg. at 35523. USEPA has indicated that in a second, future phase, nonattainment designations based upon modeling of theoretical potential levels of SO_2 to which the public might be exposed may be appropriate in those areas not covered by certified air quality monitoring stations. *See, e.g.,* Next Steps for Area Designations and Implementation of the Sulfur Dioxide National Ambient Air Quality Standard, USEPA Guidance Document (Feb. 6, 2013) available at http://www.epa.gov/oaqps001/sulfurdioxide/pdfs/20130207SO2StrategyPaper.pdf. Notably, as discussed in Part II.A.2. of this brief, the use of modeling to designate nonattainment areas has been challenged and may face further judicial challenge.

The modeling that would be required to determine attainment status in that second phase of designations—assuming that the use of such modeling to designate nonattainment areas survives any further judicial review—is not a simple, straight-forward exercise. To the contrary, USEPA has recognized that states will need further guidance prior to conducting the modeling. In the 1-hour SO_2 NAAQS Final Rule, USEPA noted that, "in order for States to conduct modeling on a large scale for the new 1-hour NAAQS, [US]EPA expects additional guidance would be needed to clarify how to conduct dispersion modeling . . . and how to identify and appropriately assess the air quality impacts of sources that potentially may cause or contribute to

violations of the NAAQS." 1-hour SO_2 NAAQS Final Rule, 75 Fed. Reg. at 35570.[3] USEPA issued its initial draft modeling guidance for the 1-hour SO_2 NAAQS in May 2013 and a second draft in December 2013, both after Sierra Club filed this Complaint. (Draft) SO_2 NAAQS Designations Modeling Technical Assistance Document (December 2013), ("*Draft Modeling Guidance*") available at http://epa.gov/oaqps001/sulfurdioxide/pdfs/SO2ModelingTAD.pdf. However, USEPA has not yet issued its final modeling guidance detailing the type of modeling that will be required to make attainment designations based upon modeling, and the second phase of designations has not begun. USEPA contemplates that modeling will be conducted by state and local environmental agencies and that such agencies will conduct the modeling using "the most recent 3 years of actual emissions." *Id.* at 9, 32-33. Sierra Club's allegations, even if they could be countenanced in an enforcement action at all, are premature.

When Sierra Club filed this Complaint, USEPA had not yet designated any area as nonattainment of the 1-hour SO_2 NAAQS. Based upon actual monitored data and IEPA's recommendations, USEPA has since designated two areas in Illinois as nonattainment of the 1-hour SO_2 NAAQS, effective October 4, 2013: "Lemont, IL," which is defined to include certain townships in Cook and Will Counties; and "Pekin, IL," which is defined to include certain townships in Tazewell and Peoria Counties. 1-hour SO_2 Designations, 78 Fed. Reg. at 47199. Accordingly, the 18-month period for Illinois to adopt and submit a plan to bring these two nonattainment areas into attainment and the five-year period for these areas to come into attainment started on October 4, 2013. 42 U.S.C. §§ 7410, 7514, 7514a. Illinois has until April 6, 2015, to adopt and submit to USEPA a SIP designed to attain the 1-hour SO_2 NAAQS in the

[3] USEPA provides guidance to the states regarding the modeling because it conducts its NAAQS designations in consultation with the states. 42 U.S.C. § 7407.

designated nonattainment areas. 1-hour SO_2 Designations, 78 Fed. Reg. at 47193. Air quality in these areas must attain the new standard by October 4, 2018. *Id.*

Only two of the Stations, Powerton and Will County, are in areas designated nonattainment by USEPA. 78 Fed. Reg. at 47199. IEPA has not yet made a final determination regarding the extent to which Powerton Station or Will County Station (or any other source) contributes to nonattainment of the 1-hour SO_2 NAAQS or the amount by which emissions from Powerton Station or Will County Station (or any other source) will have to be reduced below limitations already prescribed by law, if at all, for the designated nonattainment areas to attain by 2018. That determination will implicate policy, economic, and technical choices that fall within the expertise of IEPA, including highly technical decisions concerning relative emission contributions and the cost, availability, and effectiveness of controls across various sources in multiple industries. Yet, Sierra Club asks this Board to find that all four Stations are causing nonattainment and to single them out and subject them to stringent emission limitations that Sierra Club invented for this enforcement action.

IEPA has begun its process for developing a plan to attain the 1-hour SO_2 NAAQS in the nonattainment areas. It has begun its predictive air quality modeling process, through which it determines the amount of reduction necessary for a nonattaining area to attain.[4] It has begun meeting with owners and operators of sources that it has identified as contributors to levels of SO_2 in the vicinity of the nonattaining certified air quality monitors to ensure that its data inputs are correct and to learn what actions such sources may already have underway that would result in reductions of SO_2 emissions. As described above, MWG is already in the process of

[4] Note that this predictive modeling may be very different from the modeling upon which the second phase nonattainment designations may be based. The predictive modeling that IEPA has undertaken is to (1) determine the level of reductions necessary for an area to attain and (2) identify the most effective reductions.

implementing control measures to reduce SO_2 emissions from the Stations to comply with the CPS. Other sources may be reducing emissions as well.

After meeting with stakeholders and working through the complex policy and technical issues related to what emission limitations to impose, upon whom, and when, IEPA will develop actual regulatory language to codify any additional requirements necessary for the nonattainment areas to attain by October 2018. 415 ILCS § 5/4; 42 U.S.C. § 7410. These regulations may include general requirements as well as site-specific requirements, including any requirements applicable to those Stations that IEPA may find contribute to nonattainment. 42 U.S.C. § 7410.

Once IEPA has developed proposed emission limits, it will submit the proposal to the Board for review and promulgation. 415 ILCS §§ 5/28.5. In addition to the informal public process that IEPA utilizes in the development of the proposed regulations, the Board is required to hold one or more public hearings and to consider comments from the public on the proposed regulations. 415 ILCS § 5/28.5; 35 Ill. Admin. Code Part 102. After considering the record and comments, the Board will promulgate the appropriate emission limitations as regulations, which then become enforceable on the state level. *Id.* After a public hearing on the entire attainment demonstration package, IEPA will submit the attainment demonstration, including the rulemaking record, to USEPA. 42 U.S.C. § 7410. USEPA will then review and analyze the attainment demonstration, including the new regulations, and will propose those regulations for approval into the SIP. *Id.* This is a rulemaking on the federal level that offers yet another opportunity for public participation. *See* 5 U.S.C. § 553.

IV. The Allegations

At heart, both counts in the Complaint are premised on alleged violations by the Stations of the 1-hour SO_2 NAAQS. The first count alleges that MWG violated § 9(a) of the Illinois Environmental Protection Act (the "Act") "by emitting SO_2 in amounts that exceed those set

forth in the table in paragraph 28 . . . that, either alone or in combination with SO_2 emissions from other sources, cause ambient air quality to exceed the 1-hour SO_2 NAAQS, which are set to protect human health and the environment,[5] and therefore causes or tends to cause air pollution in violation of Section 9(a) of the Act." (Compl. ¶ 32.) The second count similarly alleges that MWG violated § 9(a) "by emitting or threatening to emit SO_2 into the environment in amounts that, either alone or in combination with contaminants from other sources, prevent the attainment or maintenance of the 1-hour SO_2 NAAQS . . ." in violation of § 201.141 of the Board's regulations. (*Id.* ¶ 34.) While paragraph 34 does not explicitly reference the table in paragraph 28, which paragraph 32 does, that table appears to be the basis of both counts. The table in paragraph 28 sets forth emission levels in lbs/MMBtu and lbs/hour that Sierra Club, itself, has calculated and titled "Necessary Limit[s]." (*Id.* ¶ 28.) Sierra Club explains that these "Necessary Limit[s]" should be imposed by the Board to ensure that the Stations "do not cause or threaten to cause violations of the 1-hour SO_2 NAAQS, and do not threaten to interfere with maintenance of the 1-hour SO_2 NAAQS." Sierra Club further alleges that emissions from the Stations exceed these Sierra Club-invented limits and, therefore, "cause violations of the 1-hour SO_2 NAAQS, or prevent maintenance of the NAAQS in the areas downwind from the plants." (*Id.* ¶ 29.)

Section 9(a) of the Act provides:

> No person shall [] [c]ause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act.

[5] Based on the totality of the Complaint, MWG understands Sierra Club to focus on the primary standard, notwithstanding the Complaint's reference to the environment, because there is no 1-hour SO_2 secondary NAAQS standard.

415 ILCS 5/9(a). Section 201.141 of the Board's regulations provides:

> No person shall cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as, either alone or in combination with contaminants from other sources, to cause or tend to cause air pollution in Illinois, or so as to violate the provisions of this Chapter, or so as to prevent the attainment or maintenance of any applicable ambient air quality standard.

35 Ill. Adm. Code § 201.141. "Air pollution" is defined as "the presence in the atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property." *Id.* at § 201.102; 415 ILCS §5/3.1115.

The Complaint acknowledges that each of the Stations is already subject to permitted SO_2 limits. (Compl. ¶ 21.) The Stations are also subject to various regulatory SO_2 limits, including under the CPS—a fact that the Complaint ignores. The Complaint does not allege a violation of any of these limits. Rather, the Complaint alleges that some type of "computerized dispersion modeling," the specific method or type of which is never identified, suggests that (1) the permitted emissions from MWG's stations "*could* result in" concentrations of SO_2 that "threaten violations of the 1-hour SO_2 NAAQS;" (2) in 2011, emissions did exceed Sierra Club's invented "Necessary Limit[s];" and (3) "[a]dditional violations likely occurred in 2012." (*Id.* ¶¶ 22-29.) (emphasis added). Sierra Club's claimed modeled emission impact of each of the Stations is apparently based on the permitted limit of 1.8 lb/MMBtu, ignoring the SO_2 reductions that are required under the CPS and related variances, (Compl. ¶ 22), and on reported stack emissions from the Stations for only one year, 2010 (*Id.* ¶ 26), a year in which MWG was not required to comply with any of the CPS SO_2 limits. Moreover, Sierra Club never explains the inputs or methodology for the modeling that it used to calculate the "Necessary Limits" set forth in paragraph 28, which form the basis for its claims. (*Id.* ¶ 28.) Sierra Club concedes that it lacks

actual monitoring data to assess attainment. (*Id.* ¶ 27.) Yet, it claims that its mystery modeling supports the creation of new stringent emission limitations that should be imposed solely upon the Stations "to ensure" that the NAAQS is not exceeded given the additional emission "contributions" from other unnamed sources. (*Id.* ¶¶ 27 and 28.)

The relief requested in the Complaint includes asking for a Board order that MWG:

> [1] Cease and desist from emissions that, alone or in combination with emissions from other sources, cause or threaten to cause violations of the 1-hour SO_2 NAAQS,
> [2] Limit SO_2 emissions to the hourly rates determined necessary to prevent any violation of the 1-hour SO_2 NAAQS, [and]
> [3] Further reduce SO_2 emissions to offset unlawful past SO_2 emissions....

(Compl. Relief Requested ¶ 5.)

APPLICABLE STANDARD

When considering a complaint filed pursuant to Section 31(d) of the Act, the Board must determine whether the complaint is frivolous. 415 ILCS 5/31(d), 35 Ill. Adm. Code § 103.212(a). If a complaint is frivolous, it must be dismissed. *222 Elston LLC v. Purex Indus. Inc.*, PCB 03-55, 2003 WL 21512768, at *7 (June 19, 2003) ("The Board must dismiss a case as frivolous if the Board determines that the complaint 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.") A complaint is frivolous if it either 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." 35 Ill. Adm. Code § 101.202.

The Board takes all well-pleaded allegations in a complaint as true in ruling on a motion to dismiss. *Import Sales, Inc. v. Cont'l Bearings Corp.*, 217 Ill. App. 3d 893, 900, 577 N.E. 2d 1205, 1210 (1st Dist. 1991) (citations omitted); *People v. Sheridan Sand & Gravel Co.*, PCB 06-177, slip op. at 4 (Sept. 7, 2006). In ruling on a motion to dismiss, the Board looks to Illinois

civil practice for guidance. *Elmhurst Mem'l Healthcare et al. v. Chevron U.S.A. Inc. and Texaco Inc.*, PCB 09-66 (Dec. 16, 2010). In assessing the adequacy of pleadings in a complaint, the Board has recognized that "Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action." *Rolf Schilling, et al. v. Gary Hill et al.*, PCB 10-100, slip op. at 7 (Aug. 4, 2011); *citing Loschen v. Grist Mill Confections, Inc.*, PCB 97-174, slip op. at 4 (Jun. 5, 1997). "[L]egal conclusions unsupported by allegations of specific facts are insufficient." *LaSalle Nat'l Trust N.A. v. Village of Mettawa*, 606 N.E.2d 1297, 1303 (2d Dist. 1993). "[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." *Smith v. Cent. Ill. Reg'l Airport*, 802 N.E.2d 250, 254 (Ill. 2003).

Sierra Club can plead no set of facts that would entitle it to the relief it seeks.

ARGUMENT

Sierra Club asserts a novel and improper enforcement action against MWG under § 9(a) of the Act and § 201.141 of the Board's regulations for alleged violations by the Stations of the 1-hour SO_2 NAAQS. Sierra Club does so by first inventing "Necessary Limit[s]" for the Stations and then alleging that, by exceeding those invented "limits" in the past and potentially the future, MWG "emit[ted] or threaten[ed] to emit SO_2 in amounts that cause violations of the 1-hour SO_2 NAAQS, or prevent maintenance of the NAAQS." (Compl. ¶¶ 28, 29.) Sierra Club invented these "Necessary Limit[s]" because it could not enforce the NAAQS directly against MWG and MWG's SO_2 emissions do not exceed any applicable standards. Through the invented "limits," Sierra Club, in effect, attempts to enforce the 1-hour SO_2 NAAQS directly against the Stations and to circumvent the carefully crafted regulatory process for making attainment designations and bringing areas that are in nonattainment into attainment. As discussed in more detail below, Sierra Club's Complaint should be dismissed because it would

usurp authorities that are reserved for USEPA and IEPA and reinvent Illinois law after 40 years of established practice, it ignores the language and requirements of the statute and rules upon which it relies, and it fails to join necessary parties and to satisfy pleading requirements. In short, Sierra Club's Complaint is frivolous.

I. The Complaint Requests Relief the Board Does Not Have the Authority to Grant.

The Complaint is frivolous because (1) the relief sought asks the Board to perform duties and functions that belong to USEPA and IEPA, not the Board and, even if the Board had such authority, (2) the Complaint asks for relief that the Board cannot grant without joining other necessary parties. Allowing this enforcement action to go forward would usurp authority that has belonged to USEPA and IEPA for over 40 years and would result in an expansion of the Board's authority beyond its statutorily authorized duties. In Illinois, "[a]n administrative agency's powers consist only of those granted to it by the state legislature and 'any action it takes must be specifically authorized by the legislature.'" *Prazen v. Shoop*, 974 N.E.2d 1006, 1015 (4th Dist. Ill. 2012) *aff'd,* 998 N.E.2d 1 (Ill. 2013) (citing *JMH Properties, Inc. v. Indus. Comm'n*, 773 N.E.2d 736, 737 (4th Dist. Ill. 2002)). *See also*, *Lombard v. Pollution Control Bd.*, 363 N.E.2d 814, 815 (Ill. 1977) ("An administrative Agency, such as the Pollution Control Board, has no greater powers than those conferred upon it by the legislative enactment creating it.")

A. The requested relief requires the Board to perform duties and functions granted only to other agencies.

Sierra Club asks the Board to determine that each of the Stations is causing or contributing to nonattainment of and preventing the attainment of the 1-hour SO_2 NAAQS and then to limit emissions of SO_2 from those Stations. (Compl. ¶¶ 32, 34 and Relief Requested ¶¶ 2, 3 and 5.) To provide the relief requested, the Board would first need to determine where

nonattainment exists following the rules USEPA has adopted for determining attainment status. For any identified nonattainment area, the Board would need to determine whether each Station does, in fact, cause or contribute to that nonattainment. The Board would then need to establish and impose source-specific limitations for each Station meeting the reduction targets Sierra Club seeks—targets set to not only prevent "any violation of the 1-hour SO_2 NAAQS" (whatever it means to "violate" the NAAQS) but also to "further reduce $_{SO2}$ [sic] emissions to offset unlawful past SO_2 emissions" (apparently, those past emissions that exceeded Sierra Club's invented "Necessary Limits" for ensuring that the 1-hour SO_2 NAAQS is met). (Compl. Relief Requested ¶ 5, bullet 3.) As discussed below, the Board can take none of these actions.

1. Only USEPA can make a nonattainment designation, and only IEPA can determine which sources are causing or contributing to such nonattainment.

The Complaint essentially asks to Board to make nonattainment designations (an authority granted by the CAA only to USEPA, 42 U.S.C. §§ 7407, 7502) and to determine that the Stations are causing or contributing to those areas that have been designated nonattainment (an authority granted by the Act only to IEPA, 415 ILCS § 5/4). (Compl. ¶¶ 32, 34 and Relief Requested ¶¶ 2, 3 and 5.)

The Complaint does not specify what areas are claimed to be nonattainment areas impacted by emissions from each of the Stations. Nor is the answer self-evident. Sierra Club alleges that the Stations are impacting nonattainment "downwind," but does not specify where those alleged downwind nonattainment areas are located. (Compl. ¶ 24.) This lack of specificity is no surprise because, at the time the Complaint was filed, USEPA had not designated any area in Illinois as nonattainment. Therefore, one can conclude only that Sierra Club was asking the Board to identify some area or areas in Illinois as nonattainment. Subsequent to Sierra Club's filing of the Complaint, USEPA designated two nonattainment areas in Illinois. But this

subsequent designation does not answer the question. Only two of the four Stations are located in areas USEPA has subsequently designated as nonattainment. And even as to those Stations, the Complaint lacks sufficient specificity (as further addressed in Part I.B. of this Argument) to determine whether those areas coincide, in whole or in part, with the areas that are the subject of the Complaint.

As a result, the Complaint would require the Board to identify which nonattainment area(s) designated by USEPA, if either, is at issue, and possibly to identify—or in effect designate—additional areas as nonattainment even though USEPA did not designate such areas as nonattainment. Additionally, the Complaint asks the Board to determine that all four Stations are, in fact, contributing to such nonattainment areas, even though IEPA has not finalized such an assessment. The Board cannot make nonattainment designations nor can it determine whether any of the Stations are in fact impacting the two nonattainment areas that have been designated in a manner that requires the imposition of some emission limitation.

The CAA provides that only USEPA can designate nonattainment areas. 42 U.S.C. §§ 7407, 7502. Moreover, in Illinois, the authority to propose nonattainment area boundaries to USEPA rests with IEPA, not Sierra Club and not the Board. 415 ILCS 5/4. *See also*, Letter from Laurel L. Kroack, Chief, IEPA, Bureau of Air to Cheryl A. Newton, Director, USEPA, Office of the Air and Radiation Division regarding 1-hour SO_2 NAAQS designations for Illinois (June, 2, 2011) available at http: //www.epa.gov/so2designations/recletters/R5_IL_rec_wtechanalysis.pdf (making designation recommendations to USEPA regarding the 1-hour SO_2 NAAQS based on monitoring). There is no statute granting the Board the authority to make a nonattainment designation.

USEPA has addressed nonattainment designations under the 1-hour SO_2 NAAQS as proposed by IEPA based upon actual monitored ambient air quality data. 1-hour SO_2 Designations, 78 Fed. Reg. at 47199. USEPA has said that it currently plans to make further nonattainment designations based on its approved modeling guidance in the future. *Next Steps for Area Designations and Implementation of the Sulfur Dioxide National Ambient Air Quality Standard, USEPA Guidance Document* (Feb. 6, 2013), available at http://www.epa.gov/oaqps001/sulfurdioxide/pdfs/20130207SO2StrategyPaper.pdf. USEPA's modeling guidance for these further nonattainment designations is not yet final. *Draft Modeling Guidance* at ii. If and when final, IEPA will implement the guidance to make recommendations to USEPA regarding the need for any additional nonattainment designations based on the modeling. After nonattainment designations are finalized, IEPA is given the authority to determine which sources are contributing to the nonattainment areas as part of its duties to develop a SIP to achieve compliance with the NAAQS. 415 ILCS 5/4.

Sierra Club, based on its own modeling, argues that each of the Stations (including Joliet and Waukegan, which are not in either of the nonattainment areas designated by USEPA) is causing or contributing to some unspecified nonattainment area(s) today. This is for USEPA and IEPA to determine, not Sierra Club or the Board.[6] These agencies have the data and technical expertise necessary to make such determinations. *See, e.g.* 415 ILCS § 5/4(b) (providing IEPA with the authority to acquire technical data necessary to carry out the purposes of the Act, "including ascertainment of the quantity and nature of discharges from any contaminant source and data on those sources"); *Citizens Util. Co. of Illinois v. Ill. Pollution Control Bd.*, 639 N.E.2d

[6] As discussed in Part II.A.2., below, even if Sierra Club or the Board could make a nonattainment designation—which they cannot—Sierra Club's modeling, as pleaded, fails to establish any nonattainment of the 1-hour SO_2 NAAQS.

1306, 1311-1312 (Ill. App. Ct. 1994) (explaining that IEPA was created to perform a "technical" function and includes a staff qualified to perform that function); *Elgin v. County of Cook*, 660 N.E.2d 875, 882 (Ill. 1995). Any determination of nonattainment by Sierra Club or the Board could conflict with USEPA's official designations. If Sierra Club wants to have an input in the designation process for the 1-hour SO_2 NAAQS, it is provided with that opportunity through the regulatory process. To the extent Sierra Club disagrees with the nonattainment designations made by USEPA, it is provided the opportunity to comment on those designations. 74 U.S.C. § 7407; s*ee also*, USEPA Responses to State and Tribal 2010 Sulfur Dioxide Designation Recommendations: Notice of Availability and Public Comment Period, 78 Fed. Reg. 11124 (Feb. 15, 2013) (inviting public comment regarding proposed 1-hour SO_2 nonattainment designations based on air monitoring data). Sierra Club will also have the opportunity to analyze the data to be used in development of future area designations based on IEPA modeling because this information is made publicly available, and it can voice any disagreements through the public participation process. *See, e.g.,* 1-hour SO_2 Designations, 78 Fed. Reg. at 47191-92 (noting that state designation recommendations and related technical support documents were publicly available via website and at designated USEPA offices); 74 U.S.C. § 7407. Additionally, to the extent Sierra Club believes USEPA is not fulfilling its duty to make nonattainment designations, it is free to pursue an action against USEPA. 42 U.S.C. § 7604 (allowing citizen suit against USEPA for failure to perform an act or duty required under the CAA).

Thus, Sierra Club may voice its opinions about possible nonattainment to USEPA through a regulatory forum; however, it may not make NAAQS designations itself or ask the Board to do so. Only USEPA, with input from IEPA, has the authority to determine

nonattainment. Then, only IEPA has the authority to determine which sources are contributing to that nonattainment.

2. Only IEPA has the authority to develop emission limitations for individual sources in order to bring an area in Illinois into attainment with a NAAQS.

The Complaint asks the Board to order MWG to (1) "cease and desist" from emissions that "alone or in combination . . . cause or threaten to cause violations of the 1-hour SO_2 NAAQS"; (2) "limit" SO_2 emissions to levels Sierra Club believes are necessary to prevent violation of the 1-hour SO_2 NAAQS; and (3) further reduce SO_2 emissions to offset past SO_2 emissions. (Compl. Relief Requested ¶ 5.) This is relief that cannot be granted by the Board through an enforcement proceeding. Only IEPA, not the Board, has statutory authority to develop emission limits that may be necessary to achieve compliance with a NAAQS in Illinois.

The CAA gives states the primary authority for developing plans to implement NAAQS:

> Each State shall have the *primary responsibility* for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

§ 7407(a) (emphasis added). Several courts have reiterated this role. "The Clean Air Act in its original form and as amended in 1990 specifies that the State has primary responsibility for satisfying pollution requirements and requires it to develop a plan in the first instance." *Coal. for Clean Air v. S. California Edison Co.,* 971 F.2d 219, 233 (9th Cir. 1992). *See also, Luminant Generation Co. v. U.S. Envtl. Prot. Agency*, 675 F.3d 917, 921 (5th Cir. 2012) ("The Act assigns responsibility to the [US]EPA for identifying air pollutants and establishing [NAAQS]. The states, by contrast, bear 'the primary responsibility' for implementing those standards.") (internal citations omitted); *Hall v. U.S. Envtl. Prot. Agency,* 273 F.3d 1146, 1153 (9th Cir. 2001) ("By virtue of the States' roles in devising a strategy and adopting an implementation plan, ... '[i]t is to

the States that the [CAA] assigns initial and primary responsibility for deciding what emissions reductions will be required from which sources.'") (quoting *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 470–72 (2001)); *Save Our Health Org. v. Recomp of Minnesota, Inc.*, 37 F.3d 1334 (8th Cir. 1994) ("Under the Clean Air Act, states have primary authority for establishing a plan that will achieve acceptable levels of pollutants in the air.").

In Illinois, the authority to determine source-specific SO_2 limitations or reductions that may be required to help an area achieve a NAAQS falls squarely on IEPA as part of its authority to develop a SIP to demonstrate compliance with the NAAQS. 42 U.S.C. §§ 7410, 7514 (providing states and local governments with the authority to develop SIPs to bring nonattainment areas into attainment); 415 ILCS § 5/4(b) (allowing IEPA to gather technical data and ascertain the quantity and nature of discharges); 415 ILCS § 5/4(j), (l) (providing IEPA with the duty to represent Illinois "in any and all matters pertaining to plans . . . relating to environmental protection" and designating IEPA as *the* "air pollution agency for the state for all purposes of the Clean Air Act"); 415 ILCS § 5/28.5 (providing that IEPA must propose to the Board rules that are required under the CAA). If IEPA determines that any emission limitations in addition to those already required by the Act and the Board's regulations are necessary for attainment of the 1-hour SO_2 NAAQS in Illinois, it will develop those limitations as part of the SIP. It would then propose those limitations to the Board, which has authority to promulgate those limitations through a rulemaking proceeding. 415 ILCS §§ 5/5, 5/28.5; 35 Ill. Adm. Code Part 102. Among other requirements, IEPA would have to include documentation supporting the basis for its rule, provide a summary of economic and technical data upon which it relied in drafting the rule, and make available to the public any documents upon which it relied in drafting the rule. 415 ILCS § 5/28.5; 35 Ill. Adm. Code § 102.302.

To complete the federal process required for NAAQS, IEPA would then submit the newly adopted state rules plus other necessary components to USEPA as the attainment demonstration for the NAAQS.[7] 42 U.S.C. §§ 7410; 7514. Rather than allow the NAAQS implementation process to proceed as required under the CAA, the Act, and the Board's Rules, Sierra Club is asking that the Board ignore IEPA's authority, override the SIP process (including IEPA's decisions about which sources to control, how, and to what extent), set emission limits through this enforcement proceeding that Sierra Club alleges are necessary to "prevent any violation of the 1-hour SO_2 NAAQS," and then further "offset unlawful past SO_2 emissions" (presumably those past emissions that exceeded the limits Sierra Club now seeks to impose).

Sierra Club similarly seeks to ignore and override the timelines provided though the administrative process. The CAA generally allows states 18 months after a nonattainment designation to develop their SIPs (which specify any source-specific requirements) and five years after a nonattainment designation to attain the NAAQS. 42 U.S.C. §§ 7410, 7514, 7514a; 1-hour SO_2 Designations, 78 Fed. Reg. at 47193. Those are the time periods that apply to the 1-hour SO_2 NAAQS. *Id.* Consequently, while two of the four Stations are in areas that have been designated as nonattainment with the 1-hour SO_2 NAAQS, those areas are not required to attain the NAAQS until October 4, 2018. *Id.* Through the relief it requests in this action, Sierra Club ignores these statutorily provided timelines.

Again, Sierra Club is not without a voice when it comes to the implementation of the 1-hour SO_2 NAAQS; but this enforcement action is not the right process for it to raise any issues it might have. Any emission limitations that IEPA believes are necessary to implement the 1-hour

[7] If USEPA finds that the proposed SIP does not adequately provide for the attainment and maintenance of NAAQS, it may impose a federal implementation plan upon the state. 42 U.S.C. § 7410.

SO_2 NAAQS must be proposed to and adopted by the Board. 415 ILCS § 5/28.5. The Board's rulemaking proceedings include public hearings and comment periods. *Id.*; 35 Ill. Adm. Code § 102.108. Then IEPA is required to submit its proposed 1-hour SO_2 NAAQS SIP to USEPA. 42 U.S.C. § 7410; 1-hour SO_2 Designations, 78 Fed. Reg. at 47193; 415 ILCS § 5/4(j), (l). Such a plan cannot be adopted in Illinois without "reasonable notice and public hearing," in which Sierra Club may participate. 42 U.S.C. § 7410. To the extent IEPA proposes any emission reduction rule as a result of its SIP for the 1-hour SO_2 NAAQS, Sierra Club and other interested parties can offer positions to the Board during the public comment period for that proposed rule. 35 Ill. Adm. Code Part 102; (requiring public participation before Board can approve rulemaking). To the extent Sierra Club disagrees with any rule that is ultimately promulgated by the Board, Sierra Club can ask the Board to reconsider the rule, or it can appeal that rule to the Illinois Appellate Court. 35 Ill. Adm. Code §§ 102.702, .706. Additionally, IEPA must hold a hearing on the entire attainment demonstration package, 42 U.S.C. § 7410(a), (l), providing Sierra Club yet another opportunity to participate and comment. Finally, USEPA will propose the SIP in its own rulemaking process, providing Sierra Club a third opportunity to comment. 5 U.S.C. § 553. An enforcement action such as this may be appropriate only if a standard is first established and then emissions from one of the Stations impermissibly exceed that standard in violation of the applicable regulation.

Thus, Sierra Club will have ample opportunity to voice its issues in the upcoming IEPA NAAQS rulemaking. There is no need to contort existing law and practice by allowing Sierra Club to force emission limitations on a few sources in this enforcement action. Indeed, doing so would improperly deprive the public of the right to comment on proposed emission limitations designed to attain or maintain NAAQS.

IEPA and the Board are authorized to perform distinct functions under the Act. Sierra Club improperly asks the Board to usurp USEPA's and IEPA's authority and to sidestep the administrative process that is in place for achieving compliance with new NAAQS. Sierra Club's Complaint would, in essence, impermissibly expand the Board's limited role to subsume the authority the Act conferred to IEPA. The framework for implementing NAAQS—as established by federal law and applied by the federal and state governments for over 40 years—is apparently not sufficient for the Sierra Club. It wants more action on the 1-hour SO_2 NAAQS *now*. But Sierra Club's desires cannot override the law.

3. Sierra Club has acknowledged that it cannot obtain the enforcement relief it seeks.

Sierra Club is well aware that rulemaking, not enforcement against a single company, is the proper process to address any nonattainment concerns. Apparently dissatisfied by the regulatory pace of action, Sierra Club is currently pursuing multiple lawsuits challenging USEPA's failure to timely make nonattainment designations for the 1-hour SO_2 NAAQS. *See Sierra Club v. U.S. Envtl. Prot. Agency*, Case No. 13-1262 (D.C. Cir. Oct. 3, 2013) (Sierra Club petitioned for review of USEPA's August 2013 1-hour SO_2 NAAQS designations for failure to make designations for all areas); *Sierra Club v. McCarthy*, Case No. 13-3953 (N.D. Cal. Aug. 26, 2013) (seeking to compel USEPA to promulgate and publish attainment and nonattainment designations). These suits demonstrate that Sierra Club knows the proper process for challenging a perceived failure to proceed timely with designations under a new NAAQS—compelling action from USEPA, the agency with the authority to make NAAQS designations. Similarly, a perceived failure to timely proceed with adopting a SIP designed to bring a nonattainment area into attainment or a belief by Sierra Club that the SIP ultimately adopted for the 1-hour SO_2 standard in Illinois does not adequately address nonattainment would require

action against IEPA or against USEPA by petitioning it to develop a FIP for Illinois. In no case is it appropriate to bring an enforcement action against individual sources to compel attainment of a NAAQS at this point, when two of those sources are not even in USEPA designated nonattainment areas, an implementation plan has not yet been adopted and requirements to achieve attainment of the NAAQS have not yet been imposed on the sources.

Sierra Club has acknowledged in these lawsuits against USEPA that the relief it requests from this Board is simply not available. As Sierra Club recently stated in one of these lawsuits, "Sierra Club does not, and cannot, ask this Court to order particular designations for particular areas, to order [US]EPA to follow a particular methodology in determining the appropriate designations, or to dictate procedures for implementing the standard." *McCarthy*, Plaintiffs' Response in Opposition to States' Motions to Intervene, Case No. 13-3953, (N.D. Cal. Oct. 28, 2013). Just as Sierra Club has acknowledged that it cannot ask a federal court to designate areas as nonattainment or to dictate procedures for implementing a NAAQS, it cannot ask the Board to do so.

B. The Complaint fails to join necessary parties.

Even if the Board had authority to grant the relief Sierra Club seeks, it could not do so unless it first joined a large number of necessary parties to this proceeding. Joinder of parties to a matter is necessary when "[a] complete determination of a controversy cannot be had without the presence of the person who is not already a party to the proceeding," when the person "has an interest that the Board's order may affect," or if "[i]t may be necessary for the Board to impose a condition on the person who is not already a party to the proceeding." 35 Ill. Adm. Code §§ 101.403, 103.206; *McIntosh, LTD – Holdings, v. Ill. Envtl. Prot. Agency*, PCB 88-81, 1988 WL 160497 (May 5, 1988) (ordering joinder when complete determination regarding petition could not be made without party); *Geber v. Clayton Moushon*, 2003 WL 21246830, PCB 03-96 (May

15, 2003) (ordering joinder when it might be necessary for Board to impose condition upon party); *Int'l Union v. Caterpillar Inc.*, PCB 94-240 (Nov. 4, 1994) (joining IEPA because it was necessary for "complete determination" of the claim and because the case had "the potential to impact" an IEPA program). An adjudication on the merits "entered in the absence of a necessary party is void." *Chariot Holdings, Ltd. v. Eastmet Corp.*, 505 N.E.2d 1076, 1084 (Ill. App. Ct. 1987); *see In re Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130*, R 00-20 (Dec. 21, 2000) (the Board's provisions on joinder "closely mirror those of the Illinois Code of Civil Procedure").

This case requires joinder of the numerous other sources that emit SO_2 in the areas around the Stations. It also requires joinder of USEPA and IEPA. All of these parties must be joined in order to facilitate "a complete determination" of the case, all of these parties have "an interest that the Board's order may affect," and the Board may need to impose conditions on one or more of these parties as a result of the relief Sierra Club seeks. As such, this case cannot proceed unless the Board joins these parties.

The Complaint asks the Board to determine whether the Stations "alone or in combination with SO_2 emissions from *other sources* . . . cause air quality to exceed the 1-hour SO_2 NAAQS" or "prevent the attainment or maintenance of the 1-hour SO_2 NAAQS." (Compl. ¶¶ 32, 34 (emphasis added).) As Sierra Club admits in its Complaint, to the extent there is nonattainment to which the Stations may have contributed, other sources also have or may have caused or contributed to that nonattainment. Even if the Board had the authority under the Act to do so, it cannot determine MWG's contribution to the alleged nonattainment and related necessary emission rates without also determining the impact, contribution and necessary emission rates for those other sources. The Board cannot provide relief related to the alleged

nonattainment without joining those other sources. Unless it joins those sources, an unfair share of the burden to reduce SO_2 emissions in the area(s) may fall upon the Stations, and regardless of fairness, contributions from other sources may be needed to achieve attainment. Indeed, as mentioned above, when a state develops a plan to attain NAAQS, it takes into consideration all of the sources that may help achieve attainment. *Cate v. Transcontinental Gas Pipe Line Corp.*, 904 F. Supp. 526, 536 (W.D. Va. 1995). Sierra Club seeks to single out one company and avoid this holistic approach, but the Board cannot ignore other potential contributors of SO_2 emissions in the vicinity of the Stations.

Additionally, the relief requested could not be provided without joining USEPA and IEPA. Again, the Board cannot reach a decision regarding whether nonattainment exists without including USEPA, the entity with responsibility for making NAAQS designations and for determining the methods for making those designations. 42 U.S.C. §7407; *McCarthy*, Plaintiffs' Response in Opposition to States' Motions to Intervene, Case No. 13-3953, (N.D. Cal. Oct. 28, 2013) ("Sierra Club does not, and cannot, ask this Court . . . to order [US]EPA to follow a particular methodology in determining the appropriate designations."). IEPA, the agency in Illinois authorized to propose to USEPA nonattainment boundaries, also has a vital interest whenever NAAQS designations are made. *See McCarthy*, slip op. at 2-3 (N.D. Cal. Dec. 6, 2013) (granting states permissive intervenor status in suit seeking to compel NAAQS designations by USEPA because states have an interest in when USEPA makes its designations and states' obligations are affected by USEPA's designations). Furthermore, the Board may not grant the emissions limitations requested in the Complaint without joining IEPA. Otherwise, the Board's order might directly conflict with IEPA's plan to bring Illinois nonattainment areas into attainment. 42 U.S.C. §§ 7410, 7514.

Joining of all necessary parties is not feasible and this action should be dismissed. Pursuant to § 101.403(b) of the Board's rules, the Board will not dismiss an adjudicatory proceeding for failure to name a necessary party without first providing a reasonable opportunity to add such person as a party. 35 Ill. Adm. Code § 101.403(b). However, in this case such an opportunity would be futile. Two of the necessary parties are administrative agencies, including one federal agency. The doctrine of sovereign immunity precludes any joinder of USEPA in this state proceeding. *See, e.g., Sauget v. IEPA*, PCB 86-63, 1986 WL 26922 (June 5, 1986). Further, while all contributing sources to any nonattainment would be necessary parties, significant time and effort would be required just to attempt to identify all such sources. And even the process for doing so is not clear. Even if USEPA's nonattainment designation modeling guidance were final, the process of conducting modeling to determine a source's contribution to nonattainment is a complex task, something reserved for the technical expertise of USEPA and IEPA. *See e.g., Citizens Util. Co. of Illinois*, 639 N.E.2d at 1311-12 (explaining that IEPA was created to perform a "technical" function and can do so due to "a technical staff capable of performing independent investigations"); *Elgin*, 660 N.E.2d at 882 (noting reliance on IEPA's decision-making was "entirely consistent with the Act's goal of uniformity in establishing a statewide agency with the technical expertise to uniformly apply rules and regulations to safeguard the environment"). While the number and identity of all potentially relevant sources is not known, what can be said is that there are numerous sources of SO_2, including mobile sources. The joinder of all necessary parties, including federal and state agencies and numerous private parties including mobile sources, is simply not feasible, and this action should therefore be dismissed. *Ragsdale v. Superior Oil Co.*, 237 N.E.2d 492 (Ill. 1968) (complaint subject to motion to dismiss for failure to join necessary parties).

Finally, even if all of the required joinders could be accomplished, that would result in significant, unnecessary time and expense because the very relief requested in the Complaint is concurrently being addressed through the proper administrative processes. USEPA, IEPA, the Board and other sources would be forced to expend resources in this matter, while addressing similar issues through the proper NAAQS designation and SIP development and implementation processes. Thus, the Complaint should be dismissed as frivolous.

II. The Complaint Fails to State a Claim for Which the Board Can Grant Relief.

Even if the Board had authority to proceed with this action, the Complaint should be dismissed as frivolous because it fails to state a legally viable claim. This is because (1) both counts are premised on standards that do not apply to MWG's Stations and (2) the allegations are not set out with sufficient specificity.

A. The Complaint is premised on alleged violations of standards that do not apply to MWG's Stations.

Both counts of the Complaint are based on allegations that the Stations somehow violated the 1-hour SO_2 NAAQS. Count 1 alleges that MWG's emissions "alone or in combination with SO_2 emissions from other sources, cause ambient air quality to exceed the 1-hour SO_2 NAAQS" and for that reason alone cause air pollution in violation of Section 9(a) of the Act. (Compl. 32.) For support, Sierra Club cites back to emission amounts listed in a table located under paragraph 28 of the Complaint. The SO_2 amounts listed in this table are not limits that apply to the Stations under any law but, rather, are amounts Sierra Club deems to be "Necessary Limit[s]" to attain the 1-hour SO_2 NAAQS. Count 2 similarly alleges that the Stations "prevent the attainment of the 1-hour SO_2 NAAQS" and therefore violate Section 201.141, which is a violation of Section 9(a) of the Act. (Compl. ¶ 34.) At heart, both of these counts are based on an alleged violation of the NAAQS generally. They in no way allege a violation of a specific state plan to attain the 1-hour

SO_2 NAAQS; indeed, such a plan is still in the process of being developed and implemented in Illinois. 1-hour SO_2 Designations, 78 Fed. Reg. 47191 (starting 18-month clock for Illinois to propose an implementation plan). Dressing them up as state-law claims, alleging violations of the Act and Illinois regulations, does not save them. Sierra Club failed to properly plead violations of any recognized standard, limit, or prohibition under Illinois law. Accordingly, the Complaint fails to state a claim and should be dismissed as frivolous.

1. The NAAQS are not directly enforceable against MWG's Stations.

Sierra Club cannot bring claims seeking to directly enforce a NAAQS against individual sources. A NAAQS is not a standard that applies to individual sources. "NAAQS implementation is a requirement imposed on the states in the SIP; it is not directly imposed on a source." Operating Permit Program; Final Rule, 57 Fed. Reg. 32250, 32276 (Jul. 21, 1992). Indeed, it is well-established that a NAAQS is not even an "emission standard or limitation" as defined by the Clean Air Act. *See, e.g., Clean Air Council v. Mallory*, 226 F. Supp. 2d 705, 719 (E.D. Pa. 2002) ("[T]his court recognizes that NAAQS themselves are not 'emission standard[s] or limitation[s]' as defined by the [CAA]"); *Cate*, 904 F. Supp. at 530, 536 (stating "[i]t is well-established that the NAAQS are not an 'emission standard or limitation' as defined by the Act" and holding private citizen suit could not enforce the NAAQS). Rather, the SO_2 NAAQS is a level of air quality that USEPA has determined should be achieved nationally to protect human health with a margin of safety. 42 U.S.C. § 7409. It is not something that can be enforced directly against a source. *See Cate*, 904 F. Supp. at 536 ("NAAQS are not directly enforceable against a source."); *Wilder v. Thomas*, 854 F.2d 605, 609, 614-15 (2d Cir. 1988) ("The [CAA] and the regulations promulgated thereunder [] emphasize the distinction between the attainment of the NAAQS, which is a goal of the [CAA], and the specific provisions of an SIP which are the only permissible subjects of a citizen suit."). Under the federalist structure of the CAA, states

must promulgate specific plans to provide for the attainment of the SO_2 NAAQS. 42 U.S.C. §§ 7410, 7514(a); *Concerned Citizens of Bridesburg v. U.S. Envtl. Prot. Agency*, 836 F.2d 777, 779 (3d Cir. 1987) ("[S]tates have the primary authority for establishing a specific plan, known as a State Implementation Plan ('SIP'), for achieving and maintaining acceptable levels of air pollutants in the atmosphere."). Those plans typically set emission limitations, and it is those limitations, not the underlying NAAQS, which apply to a regulated source. *See e.g. Coal. Against Columbus Ctr. v. City of New York*, 967 F.2d 764 (2d Cir. 1992).

As mentioned above, both counts of the Complaint are based on an alleged violation by the Stations of the 1-hour SO_2 NAAQS. Even Count 1, which refers to amounts listed in the table located in paragraph 28 of the Complaint, is based on an alleged violation of the NAAQS, because the "Necessary Limit[s]" in the table are created by Sierra Club in an attempt to directly hold the Stations solely accountable for attaining the 1-hour SO_2 NAAQS. Expressed another way, it is an attempt to directly enforce the 1-hour SO_2 NAAQS against MWG. Currently, the 1-hour SO_2 NAAQS applies to and places requirements on only USEPA and the states. 1-hour SO_2 Final Rule, 75 Fed. Reg. 35520 (requiring USEPA to conduct attainment designations for the new NAAQS); 1-hour SO_2 Designations, 78 Fed. Reg. at 47193 (requiring states with areas designated nonattainment to propose implementation plans within 18 months and come into attainment within five years of nonattainment designation). In Illinois, no requirement related to nonattainment of the NAAQS will apply with respect to individual sources unless and until IEPA proposes and the Board adopts any rules IEPA has determined are necessary for the nonattainment areas to achieve attainment. 42 U.S.C. §§ 7410; 7514.

Sierra Club will surely protest that it is not alleging a direct violation of the NAAQS, recognizing that it could not do so. But the Complaint reveals Sierra Club's true intent. The

Complaint is premised on the notion that emitting a pollutant that contributes in any way to nonattainment is, in all cases, a violation of Illinois law, one that warrants the imposition of penalties and other punitive relief. Sierra Club treats these alleged violations as if they were violations of a standard that applies directly to the Stations. How else can one explain Sierra Club's request that this Board order MWG to "reduce $_{so2}$ [sic] emissions to offset unlawful past SO_2 emissions"? (Compl. Relief Requested ¶ 5.) The other elements of the relief requested further point to this conclusion. For example, Sierra Club asks the Board to order MWG to "[c]ease and desist from emissions that . . . cause violations of the 1-hour SO_2 NAAQS" and to impose emission limitations so as to "prevent any violation of the 1-hour SO_2 NAAQS." Sierra Club simply cannot escape the fact that this Complaint is grounded in its view that emissions from the Stations somehow violated the 1-hour SO_2 NAAQS.

Because the 1-hour SO_2 NAAQS does not apply to the Stations, Sierra Club's claims fail. Not surprisingly, in the over 40 years since NAAQS were first promulgated by USEPA, a suit of a similar nature does not appear to have been brought against an owner or operator of a source before the Board or in an Illinois state or federal court. Sierra Club cannot seek enforcement of the unenforceable; accordingly, the Complaint fails to state a claim and should be dismissed as frivolous.

2. Both counts fail because Sierra Club's modeling cannot now establish nonattainment.

The Complaint discloses precious little about the modeling underlying Sierra Club's allegations of violations of §§ 9(a) and 201.141, but what little it says confirms that the modeling cannot prove what Sierra Club claims.

As noted above, Sierra Club premises its claims on the allegations that MWG's stations have exceeded the "Necessary Limit[s]" set forth in paragraph 28. (*See, e.g.,* Compl. ¶ 32.)

Specifically, Sierra Club appears to equate the exceedance of these newly invented "Necessary Limit[s]" as the predicate for identifying some unidentified areas as nonattainment. (Compl. ¶ 28.) Sierra Club also alleges that those are the same "limits" that must be imposed on the Stations to bring the unidentified areas into attainment. (Compl. ¶ 28.) Sierra Club explains that those "Necessary Limit[s]" are premised on "computer dispersion modeling." (Compl. ¶ 28.) But Sierra Club's allegations concerning the basis for its modeling begin and end there.[8]

One fact is clear. Sierra Club has failed to allege that its modeling satisfies the requirements of the 1-hour SO_2 NAAQS Final Rule. The 1-hour SO_2 NAAQS is "based on the 3-year average of the 99th percentile of the yearly distribution of 1-hour daily maximum SO_2 concentrations." 1-hour SO_2 NAAQS Final Rule, 75 Fed. Reg. at 35521. When USEPA made its nonattainment designations, it based those designations on a 3-year average of monitored data. 1-hour SO_2 Designations, 78 Fed. Reg. at 47193.

USEPA has not finalized any guidance for determining attainment status through modeling. Moreover, while USEPA has stated that it expects to rely on modeling in the future for certain 1-hour SO_2 NAAQS nonattainment designations, the D.C. Circuit Court of Appeals has held that such statements are nothing more than "an indefinite, anticipated plan." *Nat'l Envtl. Dev. Ass'ns Clean Air Project v. U.S. Envtl. Prot. Agency*, 686 F.3d 803, 809 (D.C. Cir. 2012). In that case, several states and state agencies, together with corporations and industrial associations, petitioned for review of the 1-hour SO_2 NAAQS. *Id.* at 805. One basis for the appeal was a challenge to whether USEPA complied with the Administrative Procedure Act by

[8] Sierra Club performed two other sets of modeling, described for example in paragraphs 22 and 25; the former appears to have been based on permitted emissions, and the latter on one year of actual emissions data. The Complaint fails to allege what period of data was used for meteorological data, or any other parameter, for either of those sets of modeling. And it is not clear whether either of these modeling runs is in any way related to the modeling for the "Necessary Limit[s]."

stating, in its preamble, that it would consider, in part, computer modeling to determine attainment with the 1-hour SO_2 NAAQS. *Id.* at 807-08. The D.C. Circuit held that such statements did not constitute final agency action and, so, the D.C. Circuit lacked jurisdiction to consider whether inclusion of such statements in the rule complied with law. *Id.* at 808. Such statements, the D.C. Circuit explained, "do not create obligations from which legal consequences will flow." *Id.* The D.C. Circuit noted that "Petitioners will be free to challenge any final action [US]EPA takes that imposes an obligation Petitioners [including regulated sources] must meet. The challenged provisions here do not meet that standard." *Id.* at 809. USEPA's nonattainment designations in Illinois were based on monitoring, not modeling.[9] And this decision makes clear that the possible future requirement to conduct modeling for nonattainment designations did not impose any requirements on the petitioners (including the corporate petitioners) today. Statements in the preamble concerning modeling similarly do not impose any obligations on MWG.

If and when USEPA finalizes its guidance regarding when and what modeling may be used to determine attainment status, another court challenge seems likely. At least until USEPA completes its guidance and in fact commences using modeling for nonattainment designations, and assuming that such guidance survives legal challenge, modeling is not the means to determine attainment status. Sierra Club does not allege that it considered any available monitoring data in its own analysis, instead relying solely on "computer dispersion modeling" of some sort. (Compl. ¶ 28.) For that reason alone, the Complaint fails to state a claim.

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[9] USEPA underscored its reliance on monitoring to defend the 1-hour SO_2 NAAQS Final Rule. As the D.C. Circuit noted, USEPA explained that its initial designations would be based on "existing monitoring capabilities, as well as 'any refined modeling the State chooses to conduct specifically for initial area designations.'" *Nat'l Envtl. Dev.*, 686 F.3d at 809 (emphasis added).

3. Both counts fail because Sierra Club fails to plead the elements of a claim under § 9(a) or 201.141.

Even assuming that the Board has authority to address the asserted claims, the Complaint fails because it does not state a valid claim under the state statute and rule upon which it relies. Section 9(a) prohibits causing or threatening emissions that either (1) "cause or tend to cause air pollution in Illinois" or (2) "violate regulations or standards adopted by the Board" under the Act. 415 ILCS § 5/9(a). Count 1 is premised on the first prong of § 9(a). But such actions are allowed only when premised on nuisance conditions, which Sierra Club has not alleged here. Count 2 is premised on the second prong, specifically on an allegation that MWG violated § 201.141 and thereby violated § 9(a). But Sierra Club misapplies § 201.141. Sierra Club fails to state a claim under either § 9(a) or § 201.141. Its claims—and its goal of commandeering the carefully crafted NAAQS regulatory process by expanding the scope of §§ 9(a) and 201.141—should be denied.

a. Count 1 fails because Sierra Club fails to allege a nuisance.

Actions premised on the "cause or tend to cause air pollution" prong of § 9(a) are allowed only when they are based on or related to nuisance conditions. *Arendovich v. Koppers Co., Inc.*, PCB 88-127, 1988 WL 160678, at *10 (Sept. 8, 1988) (allowing claim for violation based solely on 9(a) and 201.141 when odor allegedly caused a nuisance by interfering with enjoyment of life or property); *Envtl. Prot. Agency v. Aurora Metal Co., Faskure Division*, PCB 72-392, 1973 WL 5582 (May 24, 1973) (allowing 9(a) claim for odor and particulate matter even though defendant was in compliance with permit limitations when "odor and particulate *nuisance*" had been established) (emphasis added); *Envtl. Prot. Agency v. City of Springfield*, PCB 70-9 (May 12, 1971) (allowing claim under 9(a) for causing or tending to cause air pollution based on nuisance resulting from defendant's SO_2 in 1971, before the SO_2 NAAQS were established and before

Illinois adopted any specific SO2 emission standards or limitations). In the rulemaking promulgating § 201.141, the Board explained that the statutory prohibition of "air pollution" in § 9(a) and restated in § 201.141 "means that substances not covered by numerical standards may not be emitted so as to cause a nuisance, since no code of rules could ever provide numerical standards for all contaminants."[10] *In re Emission Standards, Opinion of the Board*, R 71-23 at 4-301 (April 13, 1972) (citing *City of Springfield*, PCB 70-9). Further, even where there are numerical limits, "under special circumstances of geography, meteorology, or configuration, emissions meeting the standards may cause a nuisance, and that the statute flatly forbids." *Id.* Thus, the "cause or tend to cause air pollution" portion of § 9(a) is clearly intended to apply only when nuisance conditions are created.

The Seventh Circuit similarly declined to broadly construe the "air pollution" prong of § 9(a) when it recently examined this prong as restated in § 201.141. *McEvoy v. IEI Barge Servs., Inc.*, 622 F.3d 671, 678 (7th Cir. 2010). The Seventh Circuit held that § 201.141 is "little more than the commandment 'thou shall not pollute.'" *Id.* The Seventh Circuit highlighted the following language from § 201.141 in explaining its holding: "No person shall cause . . . or allow the discharge or emission of any contaminant into the environment in any State so as . . . to cause or tend to cause air pollution in Illinois. . . ." *Id.* (citing § 201.141). This same language is at issue in § 9(a), as pleaded in Count 1. As the Seventh Circuit explained, this is "not an 'emission limitation' or 'emission standard,'" as defined by the CAA. *Id.* "Indeed, we cannot see how this broad, hortatory statement could be viewed as a 'standard' or 'limitation' at all. . . ." *Id.* The Seventh Circuit observed that not all "emissions" were prohibited "pollution" under the

[10] 35 Ill. Adm. Code § 201.141 was originally codified as Rule 102 when it was promulgated in 1972.

Act and noted that emissions prohibited by the Act must be "defined with some greater specificity, so that people will know what is forbidden." *Id.*

Sierra Club does not allege that MWG has contributed to any nuisance conditions—or that a nuisance condition even exists. Thus, Sierra Club cannot claim that MWG's alleged contribution to nonattainment somehow creates an action under the "cause or tend to cause air pollution" prong of § 9(a). And Sierra Club's attempt to rely on its invented, post-hoc "Necessary Limits" to determine what constitutes pollution further underscores the clear lack of any applicable standard or any true air pollution under the Act. Sierra Club invented the limits precisely because, otherwise, there would be no way to describe why Midwest Generation's emissions constituted air pollution—no way, in the words of the Seventh Circuit, for Midwest Generation or the Board to "know what is forbidden." *McEvoy*, 622 F.3d at 678. Accordingly, Count 1 fails to state a claim and should be dismissed as frivolous.

b. Count 2 fails because it misapplies Section 201.141.

Section 201.141 does not impose any obligation directly enforceable against a source. Even if it did, Count 2 fails because it ignores the plain language of that section. Count 2 improperly premises the alleged violations on emissions from not only the Stations but also from other sources, and it ignores that no area in Illinois is currently required to attain the 1-hour SO_2 NAAQS.

The Seventh Circuit's holding in *McEvoy* is equally instructive with respect to the allegations in Count 2 as it is for Count 1. While the Seventh Circuit highlighted language from § 201.141 that restated the "cause or tend to cause air pollution" prong of § 9(a), its discussion was not limited to that aspect of the regulation. Rather, the Seventh Circuit plainly held that § 201.141 is "little more than the commandment 'thou shall not pollute.'" *McEvoy*, 622 F.3d at

678. Sierra Club's attempt to rely on its invented, post-hoc "Necessary Limits" to determine what constitutes pollution or prevents attainment under this rule only underscores the lack of any notice concerning "what is forbidden" by this rule, which the Seventh Circuit found to be so important. *Id.* Moreoever, as discussed further in the next section, Illinois has for 40 years achieved the general goals stated in this rule through a rulemaking. Adopting Sierra Club's view of this rule would override that established practice and create havoc with the process for attaining NAAQS in this state. For these reasons, Count 2 fails.

To the extent the Board finds that § 201.141 does provide notice of and impose some standard on the Stations that may be enforced in an enforcement action, Sierra Club has improperly applied the standard. Sierra Club alleges that emissions or threatened emissions from MWG's Stations "in combination with contaminants from other sources" prevent the attainment of the 1-hour SO_2 NAAQS in violation of § 201.141, which in turn violates § 9(a). (Compl. ¶ 34.) Sierra Club's allegation is flawed because (1) it would hold MWG liable and subject MWG to penalties and other relief due to emissions from other sources and (2) it would require that MWG comply today with a standard that the ambient air in Illinois is not required to meet until October 4, 2018. Neither the language of § 201.141 nor common sense supports such an absurd result.

First, rulemaking, not enforcement, is the proper means to address the potential contribution of a many sources to any nonattainment. In paragraph 28 of the Complaint, Sierra Club claims that emissions from the Stations "must be limited to the rate that, together with the contribution of other pollution sources, does not . . ." cause nonattainment. Sierra Club goes on to allege that MWG violates § 201.141 "by emitting or threatening to emit SO_2 into the environment in amounts that, either alone or in combination with contaminants from other

sources, prevent the attainment or maintenance of the 1-hour SO_2 NAAQS. . . ." While the phrase "either alone or in combination with contaminants from other sources" is lifted directly out of § 201.141, that phrase is not used in § 201.141 in reference to the prevention of attainment or maintenance of an applicable ambient air quality standard.

The confusion in Sierra Club's Complaint begins because Sierra Club selectively quotes from § 201.141. (Compl. 16.) Section 201.141, in full, provides as follows:

> No person shall cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as, either alone or in combination with contaminants from other sources, to cause or tend to cause air pollution in Illinois, or so as to violate the provisions of this Chapter, or so as to prevent the attainment or maintenance of any applicable ambient air quality standard.

35 Ill. Adm. Code § 201.141 (emphasis added). Section 201.141 sets forth three distinct elements, only one of which applies to ambient air quality. All three start with the instruction not to "cause or threaten or allow the discharge or emission of any contaminant into the environment in any State"; for ease of reference, this brief refers to this introductory language as "emitting." Each of the three then is clearly set off by the words "so as." The first addresses emitting "so as, either alone or in combination with contaminants from other sources, to cause or tend to cause air pollution in Illinois." The second, separated from the first by the disjunctive "or," addresses emitting "so as to violate the provisions of this Chapter." And the third, separated from the first and second elements by the disjunctive "or," addresses emitting "so as to prevent the attainment or maintenance of any applicable ambient air quality standard." Sierra Club alleges a violation only of the third. Yet, the phrase "either alone or in combination with contaminants from other sources" appears in and applies to only the first. The third phrase, which is at issue here, addresses only emissions from a single source, not the impact of emissions

when combined with contaminants from other sources. Accordingly, the Count fails to plead the elements of a violation of § 201.141.

Second, for Count 2 to succeed, Sierra Club would need to prove that emissions do, in fact, "prevent the attainment or maintenance of any applicable ambient air standard," which Sierra Club alleges is the 1-hour SO_2 NAAQS. 35 Ill. Adm. Code § 201.141. But Sierra Club ignores that ambient air in Illinois is not required to attain the 1-hour SO_2 NAAQS until October 4, 2018. 1-hour SO_2 Designations, 78 Fed. Reg. at 47193. MWG cannot be found liable for "preventing" the attainment, today and in the past, of a standard that on its face must not be attained until 2018. *Id.* Sierra Club would have the Board require sources, like the Stations, to reduce their emissions the day a new NAAQS becomes effective—before USEPA designates nonattainment areas, before IEPA develops implementation plans with source-specific emission limits, and years before the State itself is required to attain a NAAQS—raising fair notice concerns addressed below. It would deprive other members of the public from their right to participate in the appropriate rulemaking process. And it would avoid the public accountability that both USEPA and IEPA are subject to through that process. Fortunately, the plain language of § 201.141 does not require or even provide a legal basis for such a result.

Because Sierra Club has improperly pleaded an alleged violation of § 201.141, it has also improperly pleaded an alleged violation of § 9(a). As explained above, § 9(a) prohibits causing or threatening emissions that either (1) "cause or tend to cause air pollution in Illinois" or (2) "violate regulations or standards adopted by the Board" under the Act. 415 ILCS § 5/9(a). The alleged violation of § 9(a) that Sierra Club pleaded in Count 2 is based on the second prong,

specifically and narrowly on the alleged violation of a regulation (*i.e.*, § 201.141). Just as Sierra Club's claim fails as to § 201.141, it also fails as to § 9(a).[11]

c. Both counts are thinly veiled attempts to broaden the reach of §§ 9(a) and 201.141 to override the NAAQS regulatory process and create violations without fair notice.

As described in Part I of this argument, Sierra Club asks this Board to take actions that it lacks authority to take. Sierra Club's clear goals bely its true intent in framing this case as nothing more than the alleged violation of §§ 9(a) and 201.141. Reading §§ 9(a) and 201.141 as Sierra Club suggests would run counter to the legislative history and case law cited above. Moreover, it would wreak havoc to the 40-year-old regulatory process for implementing new NAAQS and could impermissibly create violations without fair notice to the regulated community. Due process requires that defendants be provided fair notice of what conduct is prohibited before a sanction can be employed. *See, e.g., United States v. Cinergy*, 623 F.3d 455, 458 (7th Cir. 2010) (holding defendant did not have fair notice of CAA claim when defendant's "conduct complie[d] with a State Implementation Plan that [US]EPA ha[d] approved"); *Nat'l Parks Conservation Ass'n, Inc. v. Tennessee Valley Auth.*, 618 F. Supp. 2d 815, 832 (E.D. Tenn. 2009). The impact on that regulatory process, even viewed alone, makes clear that §§ 9(a) and 201.141 cannot be applied as Sierra Club demands.

Sierra Club's requested relief would penalize MWG for not having lowered emissions of each of its Stations to levels in the past that Sierra Club modeled, years later, to be satisfactory to ensure that, when combined with emission from all other sources, emissions from the Stations would not result in nonattainment of the 1-hour SO_2 NAAQS. It would penalize MWG for

[11] Notably, neither count alleges that MWG violated § 9(a) by violating a standard adopted by the Board. Sierra Club could not make this allegation because its complaint relies entirely upon Sierra Club's own idea of what emissions are allowed, which it has coined the "Necessary Limit[s]" in paragraph 28 of the Complaint.

allegedly not doing enough to ensure, the moment that the 1-hour SO_2 NAAQS was published, that emissions from its Stations would in no way contribute to a nonattainment area. Viewed from a broader perspective, Sierra Club's interpretation of §§ 9(a) and 201.141 would empower any citizen to force immediate emission reductions by sources of their choosing in order to achieve immediate attainment of any newly issued NAAQS, and to impose penalties upon sources based upon modeled emission rates that cannot be known in advance and that are found in no statute or rule. Such a broad reading of these general provisions—which the Seventh Circuit described as "broad, hortatory" language, *McEvoy*, 622 F.3d at 678—would render countless federal and state regulatory provisions pertaining to NAAQS superfluous at best. Further, it would impermissibly impose obligations upon sources, and possibly punitive measures such as penalties for violations of such obligations, without any fair notice of the requirement—a requirement that is derived only through the very enforcement actions in which penalties are sought for alleged noncompliance with that previously non-existent requirement. *See Cinergy*, 623 F.3d 455. Clearly, this is not the intent of § 9(a) or § 201.141. But it is exactly what will happen if Sierra Club's Complaint is allowed to proceed.

B. The Complaint fails to plead the allegations with sufficient specificity.

The allegations in the Complaint are not sufficiently specific to comply with pleading requirements under Illinois law. As noted above, this Board has recognized that Illinois is a "fact-pleading" state. *Rolf Schilling*, PCB 10-100, slip op. at 7. The facts that must be pled are specified in the Act and the Board's rules. Any citizen complaint brought under the Act must meet the requirements of § 31(c) of the Act and the Board's rules. 415 ILCS 5/31(c), (d). Section 31(c) specifies that a citizen complaint "shall specify the provision of the Act, rule, regulation, permit, or term or condition thereof under which such person is said to be in violation and a statement of the manner in and the extent to which such person is said to violate the Act,

rule, regulation, permit, or term or condition thereof." The Board's procedural rules codify the requirements for the content of a complaint, which must include the "dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations." 35 Ill. Adm. Code § 103.204(c).

The Complaint does not come close to including sufficient specificity. The Complaint alleges that the Stations are contributing to nonattainment, but it does not specify where this alleged nonattainment is taking place. In one paragraph, Sierra Club alleges that the Stations threaten to cause certain SO_2 "concentrations in areas downwind from each respective plant," but it does not specify where downwind. (Compl. ¶ 24.) Similarly, the Complaint makes allegations about the threat of emissions from the Stations on nonattainment by adding their alleged impact to "background concentrations" and the "contributions" of other sources (Compl. ¶¶ 24 and 26), while providing no information about background levels and the sources that were included in those calculations, how numbers were derived for those calculations, or the location for which those calculations were conducted.

The Complaint further alleges that, based on "modeling," emissions from the Stations "could result in" concentrations of SO_2 that "threaten violations of the 1-hour SO_2 NAAQS." (Compl. ¶¶ 22-29.) Alleging that emissions might cause levels that could threaten a violation is so vague and tentative that it seems to allege no violation at all. Sierra Club may try to point to the results of its modeling and Appendix A of the Complaint to argue its allegations meet the specificity requirements of the Act and the Board's rules. However, its descriptions of its modeling and results are similarly vague. Sierra Club claims that it has conducted "computerized dispersion modeling." (Compl. ¶ 22.) Some of its modeling appears to be based on only one year of data, 2010, while other modeling appears to be based on MWG's permitted

limits. (Compl. ¶¶ 22 and 25.) The Complaint does not identify what data was used to derive Sierra Club's invented "Necessary Limits." (*See. e.g.,* Compl. ¶ 28.) Sierra Club has not attached its modeling to its Complaint, nor has it described how it conducted its modeling, yet Sierra Club cites to this nebulous modeling as the basis for its Complaint. Thus, any data resulting from Sierra Club's modeling cannot be used to point to specific dates, events, nature, extent, duration or strength of an alleged violation. Further, there must actually **be** a violation to support a complaint of violation; an allegation that there "**could be**" a violation is totally insufficient.

Ultimately, the Complaint is not sufficient to adequately put MWG on notice of the alleged violations. MWG cannot adequately respond to a complaint that vaguely alleges its Stations "could" be threatening or causing or contributing to nonattainment, when some unidentified level of emission contributions from other unnamed sources are considered, while not specifying (1) where that alleged nonattainment is occurring or (2) how violations or threatened violations were determined or (3) who else is allegedly contributing and how much.

CONCLUSION

Through its Complaint, Sierra Club asks the Board to enforce the unenforceable and ignore a 40-year-old statutorily delegated administrative process. The Complaint should be dismissed as frivolous. Ruling otherwise could lead to enforcement without fair notice, competing proceedings with inconsistent results and interference with IEPA policy choices about which sources to regulate and to what extent. For each of the reasons set forth in this brief, MWG respectfully requests that this Board dismiss the Complaint.

Respectfully submitted,

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Dated: February 18, 2014

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 18th day of February, 2014, I have served electronically the attached **RESPONDENT MIDWEST GENERATION, LLC'S MOTION TO DISMISS** and **RESPONDENT MIDWEST GENERATION, LLC'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS**, upon the following persons:

John Therriault, Assistant Clerk
Carol Webb, Hearing Officer
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and electronically and by first class mail, postage affixed, upon:

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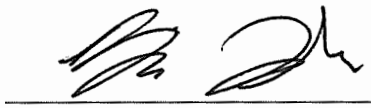

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