BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:

SIERRA CLUB,	)	
	)	
Complainant,	)	
	)	
v.	)	**PCB No. 13-27**
	)	**(Citizens Enforcement – Air)**
MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	
	)	

NOTICE OF ELECTRONIC FILING

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PLEASE TAKE NOTICE that on this date I filed electronically with the Clerk of the Pollution Control Board of the State of Illinois: COMPLAINANT SIERRA CLUB'S MEMORANDUM IN RESPONSE TO RESPONDENT MIDWEST GENERATION, LLC'S MOTION TO DISMISS and accompanying exhibits, attached hereto and herewith served upon you.

Respectfully submitted,

Complainant Sierra Club,

Dated: March 14, 2014

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In the Matter of:

SIERRA CLUB, Complainant, v. MIDWEST GENERATION, LLC, Respondent.	)))))))))	**PCB No. 13-27** **(Citizens Enforcement – Air)**

COMPLAINANT SIERRA CLUB'S MEMORANDUM IN RESPONSE TO RESPONDENT MIDWEST GENERATION, LLC'S MOTION TO DISMISS

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This is a citizen action to enforce two longstanding Illinois state law prohibitions on air pollution. By this action, Complainant Sierra Club seeks to enjoin Midwest Generation ("MWG") from causing or threatening emissions of air pollution and from causing or threatening emissions that prevent the maintenance or attainment of an applicable ambient air quality standard, the National Ambient Air Quality Standard for sulfur dioxide. Under Illinois law, as soon as the new ambient air quality standard for sulfur dioxide became effective, MWG was prohibited from causing or threatening emissions from its plants that would cause air pollution to exceed that standard.

The case is brought under state environmental protections, not under the federal Clean Air Act. Illinois long ago decided that the procedures provided by the federal Act would not be the sole protection of the Illinois public from air pollution and that additional protections were required. Both the legislature and this Board created a right to be free of harmful air pollution without having to first wait for the federal government and the Illinois Environmental Protection Agency ("IEPA") to finish the bureaucratic (and often overdue) processes to implement the federal Clean Air Act's process. MWG clearly wishes it could avoid the obligation to protect the public from its excess sulfur dioxide until required under *federal* law, but the more protective Illinois state law contradicts those wishes.

Lacking any good arguments in support of its motion to dismiss, MWG filed a motion containing a scattershot series of baseless attacks that address a claim that Sierra Club has not brought. Contrary to MWG's repeated and erroneous argument, it simply

does not matter whether "nonattainment areas" have been designated by the federal government. The issue of the process to designate nonattainment areas under the Clean Air Act is a red herring. This case is based on the applicable ambient air standards for sulfur dioxide, which MWG does not dispute became final and effective in 2010, that may now been enforced under state law.

MWG's attempt to convince the Board that it lacks authority over this enforcement action, that it has no ability to understand air pollution, and that it should ignore plain language and the Board's own precedents is without merit and must be rejected, along with MWG's Motion to Dismiss.

I. MWG CAUSES OR THREATENS EMISSIONS OF SULFUR DIOXIDE AIR POLLUTION THAT EXCEED THE APPLICABLE AMBIENT AIR STANDARD.

Sulfur dioxide is a danger to public health, and evidence in this case will show an acute and ongoing threat of sulfur dioxide (SO_2) pollution from MWG's aging and outdated coal-fired power plants.

A. The United States Environmental Protection Agency Set The Sulfur Dioxide Air Quality Standard To Protect Human Health.

Sulfur dioxide pollution has long been recognized as an environmental threat. Following the 1970 Clean Air Act, the United States Environmental Protection Agency ("U.S. EPA") established the first National Ambient Air Quality Standard ("NAAQS") for SO_2 at 0.03 ppm (80 micrograms per cubic meter ($\mu g/m^3$), primary 24-hour SO_2 NAAQS at 365 $\mu g/m^3$ (140 parts per billion (ppb)), and secondary 3-hour SO_2 NAAQS at 1300 $\mu g/m^3$ (500 ppb). 36 Fed. Reg. 8,186 (April 30, 1971). More recently, however,

the U.S. EPA has determined that these standards—based on pollution averages over long periods—do not adequately protect human health because adverse respiratory effects occur with short term exposure over periods of as little as five minutes. 75 Fed Reg. 35,520, 35,546 (June 22, 2010).

To protect the public from short term spikes in harmful SO_2 pollution, the U.S. EPA established a new SO_2 NAAQS in 2010 set at 75 parts per billion based on one-hour impacts from pollution. 40 C.F.R. § 50.17(a), 75 Fed. Reg. 13,320. The new SO_2 NAAQS was effective on August 23, 2010. *Id*. The new standard was based on the 99th percentile of the annual distribution of the daily maximum 1-hour average concentrations. 40 C.F.R. § 50.17(b). Due to both the shorter averaging time (over a year rather than over longer period), and a lower concentration value, the new 1-hour SO_2 NAAQS is far more protective of public health than the prior SO_2 NAAQS.

The new NAAQS is projected to have enormous beneficial effects for public health: U.S. EPA estimates that 2,300-5,900 premature deaths and 54,000 asthma attacks a year will be prevented by the new standard. Envtl. Prot. Agency, *Final Regulatory Impact Analysis (RIA) for the SO_2 National Ambient Air Quality Standards (NAAQS) tbl. 5.14* (2010). The new SO_2 NAAQS was adopted through a process that provided an opportunity for all stakeholders, including Sierra Club and MWG, to participate in rulemaking and comments. The NAAQS was final and effective in 2010 and all opportunities to challenge it have passed. 42 U.S.C. § 7607(b).

In the final rule adopting the 1-hour NAAQS, U.S. EPA recognized the "strong source-oriented nature of SO_2 ambient impacts." 75 Fed. Reg. at 35,370. That is, unlike

regional pollution problems, short term SO_2 air pollution problems are caused by single sources and occur in the near vicinity of that source. Thus, the U.S. EPA concluded that the appropriate methodology for purposes of determining compliance, attainment, and nonattainment with the new NAAQS is modeling, since it would be virtually impossible to site sufficient monitors around each individual source of SO_2 pollution. *See* 75 Fed. Reg. at 35,551 (describing dispersion modeling as "the most technically appropriate, efficient, and readily available method for assessing short-term ambient SO_2 concentrations in areas with large point sources."). Accordingly, in promulgating the new SO_2 NAAQS, U.S. EPA explained that, for the 1-hour standard, "it is more appropriate and efficient to principally use modeling to assess compliance for medium to larger sources . . . ." *Id.* at 35,570.

MWG advocates for monitoring, rather than modeling, as a means to determine compliance. (*E.g.*, MWG Br. at 32-34.) In fact, it is well-recognized that site-specific SO_2 pollution is not often detected in existing regional monitors. *See, e.g., Mont. Sulphur & Chem. Co. v. EPA*, 666 F.3d 1174, 1181-82 (9th Cir. 2012) (finding that monitoring for more than 10 years failed to identify violations eventually determined through dispersion modeling), *cert. denied* 133 S.Ct. 409, 184 L.Ed.2d 32 (2012). As U.S. EPA has long recognized:

> Monitoring is not more accurate than computer modeling, except for determining ambient concentrations under real-time conditions at a discrete location. Monitoring is limited in time as well as space. Monitoring can only measure pollutant concentrations as they occur; it cannot predict future concentrations when emission levels and meteorological conditions may differ from present conditions. Computer modeling, on the other hand,

> can analyze all possible conditions to predict concentrations that may not have occurred yet but could occur in the future.

67 Fed. Reg. 22,168, 22,185 (May 2, 2002). Moreover, U.S. EPA has recognized that the use of monitors instead of dispersion models for determining SO_2 pollution is unrealistic since it is "not practical, given the number and complexity of sulfur dioxide emission sources, to install a sufficient number of monitors to provide the special coverage provided by air quality dispersion models." *Mont. Sulphur*, 666 F.3d at 1184. As such, U.S. EPA determined that for the new SO_2 standard, "even if monitoring does not show a violation," that absence of data is not determinative that air quality is meeting the requisite health-based standard because the network of existing monitors is inadequate to make such a conclusion. 75 Fed. Reg. at 35,570.

Thus, broadside attacks of the type attempted by MWG's brief on dispersion modeling have been properly rejected by agencies and courts in light of the shortcomings of reliance on monitoring alone and are not a basis to dismiss this action.

B. As Will Be Proven In This Case, Including Through Modeling Evidence, this Enforcement Action Was Necessary Because Of The Acute And Immediate Threat To Health And The Environment From MWG's SO_2 Emissions.

The main thrust of MWG's motion is that the Board and the Sierra Club should sit back and wait for U.S. EPA action to alleviate SO_2 pollution—an event which will come only many years from now, if at all. Waiting is not required by law; the State of Illinois has proactive policies that allow the state and its citizens to avoid harmful air pollution immediately.

Sierra Club brought this citizen enforcement action because the SO_2 emission rates from MWG plants threaten ambient concentrations immediately downwind that exceed the level that the U.S. EPA determined necessary to protect human health. Sierra Club's members live, work, and recreate downwind from the MWG coal-fired power plants at issue in this case. (Compl. ¶¶ 1-4.) Those plants emit SO_2 in significant amounts. (*Id*. at ¶ 5.) In fact, the hourly emissions that are both possible and actually emitted from the plants are so great that—regardless of whether considered along or in addition to pollution from other sources—they cause or threaten to cause concentrations in the ambient air that exceed the 1-hour SO_2 NAAQS. (Compl. ¶¶ 20-29.)

While not required to plead its evidence in the Complaint, Sierra Club has explained that emissions of 1.8 pounds of SO_2 per Million British Thermal Units (MMBtu) from the plants can cause concentrations far above the 75 ppb (197 $\mu g/m^3$) standard. That is true even before any background pollution is taken into account. (*Id*.) And, Sierra Club distilled the hourly emission rates from each of the MWG coal-fired boilers for each hour of the day during 2010. To further explain the acute threat posed by the plant's SO_2 emissions, the coincidental emission rates were summed for each hour to determine the highest hours of emissions at each plant. (Compl. ¶ 25.) Using those rates, rather than the 1.8 lb/MMBtu emission rate, shows lower concentrations. (*Id*. at ¶ 26.) However, even those lower impacts exceed the NAAQS for all plants other than the Will County plant *without* adding background concentrations, and for all

plants when background concentrations are considered. (*Id.*)[1] In other words, MWG causes or threatens to cause emissions that violate the SO_2 NAAQS whether or not pollution from other sources is considered.

Lastly, Sierra Club's Complaint sets forth the emission rates that represent the highest emissions that can occur from MWG's plants without causing or threatening "air pollution"—that is, concentrations that exceed the NAAQS. (Compl. ¶ 28.) MWG mischaracterizes those emission rates as numeric standards forming the basis of Sierra Club's claims, which MWG somehow characterizes as separate from the existing standards in 415 ILCS 5/9(a) and 35 Ill. Admin. Code § 201.141. (MWG Br. at 14, 29, 32-34.) However, these rates are simply a factual contention: emissions above the rates identified as "Necessary Limits" in the Complaint prevent, or tend to prevent, the maintenance of the health-based NAAQS. Thus, emissions at rates greater than those values violate the prohibitions in 415 ILCS 5/9(a) and 35 Ill. Admin. Code § 201.141. Similarly, Sierra Club contends that those rates also represent the rates that the Board should order MWG to cease and desist from exceeding pursuant to 415 ILCS 5/33.[2]

As plead in the Complaint—and as the evidence at hearing will show—the MWG plants must restrict their SO_2 emissions below currently applicable limits and

[1] This analysis is based on established methodology which calculates a limit based on the ratio between modeled impacts with a known emission rate and the maximum impact that would comply with the NAAQS. *See e.g.*, 76 Fed. Reg. 69,052 (Nov. 7, 2011) (establishing 1-hour SO2 emission rates for Portland Generating Station in Pennsylvania based on same methodology); *GenOn REMA, LLC v. EPA*, 722 F.3d 513 (3rd Cir. 2013) (upholding methodology). Sierra Club performed this analysis prior to filing its complaint even though it is not required at the pleadings stage; MWG can air its disputes with the methodology in the discovery phase.

[2] This is why they are labeled as "Necessary Limits"—not because they represent the applicable legal standard separate and apart from 415 ILCS 5/9(a) and 35 Ill. Admin. Code § 201.141.

below historic emission rates to avoid causing or threatening to cause concentrations in the ambient air that violate health-based standards.

II. MWG SEEKS THE DRASTIC REMEDY OF DISMISSAL BASED ON AN INCORRECT PREMISE ABOUT THE VIOLATIONS ALLEGED IN THIS ENFORCEMENT ACTION AND THE BOARD'S AUTHORITY TO REMEDY AIR POLLUTION IN THIS STATE.

A citizen complaint is not to be dismissed as frivolous unless the complaint fails to present "allegations which, if proven, may result in finding of violations of the Environmental Protection Act." *Int'l Union v. Caterpillar, Inc*., PCB 94-240, Order at 4 (Nov. 3, 1994). MWG argues that the Board should not get to the merits, and Sierra Club and the Board should ignore violations of the Environmental Protection Act, because other proceedings related to sulfur dioxide pollution from MWG's plants are ongoing under different legal standards and authorities. But MWG's motion mischaracterizes Sierra Club's claims which, properly framed, are firmly based in law the Board has authority to enforce.

A. **MWG's Motion Seeks to Dismiss Claims Sierra Club is Not Actually Making**.

At bottom, MWG's entire Motion to Dismiss is premised on an incorrect representation that this citizen enforcement action is asking the Board to "determine where nonattainment exists following the rules USEPA had adopted," "to make nonattainment designations… and to determine that the Stations are causing or contribution to those areas that have been designated nonattainment," pursuant to 42 U.S.C. §§ 7407, 7502 and 415 ILCS 5/4. (MWG Br. at 16.) This, MWG argues, the Board cannot do because those specific tasks have been assigned to the U.S. EPA and the

IEPA. MWG misapprehends (or correctly apprehends but misleads about[3]) the basis for the Complaint. Because MWG's premise is wrong, its arguments fail and its motion should be denied.

Contrary to MWG's arguments, the Complaint does not seek to enforce or apply the procedures for designating nonattainment areas or developing nonattainment state implementation plans for such nonattainment areas set forth in 42 U.S.C. §§ 7407 and 7502 and 415 ILCS § 5/4. (MWG Br. at 16-17.) It does not ask the Board to "determine where nonattainment exists following the rules U.S. EPA has adopted," to "make nonattainment designations," or to apply 415 ILCS 5/4 to determine the MWG plant's contributions to such areas once so-designated. (MWG Br. at 16.) Rather, Sierra Club seeks to enforce the separate and independently applicable and enforceable prohibitions in 415 ILCS 5/9(a) and 35 Ill. Admin. Code § 201.141. (Compl. ¶¶ 31-34.) There can be no reasonable dispute that the Board has authority to enforce those legal requirements.

Therefore, MWG's argument is actually that the Board's authority to enforce the prohibitions in 415 ILCS 5/9(a) and 35 Ill. Admin. Code § 201.141 has somehow been pre-empted by the Clean Air Act or repealed by implication by other state procedures. That there is no basis for such an argument is demonstrated clearly by the Board's early

[3] The fact that the actual pleadings in this case do not track MWG's line of argument is apparent in MWG's brief, where it obfuscates Sierra Club's actual allegations in order to make its argument. *See e.g.,* MWG Br. at 14 ("Sierra Club, *in effect*, attempts to enforce the 1-hour SO_2 NAAQS directly…" (emphasis added)), 16 ("The Complaint *essentially* asks…" (emphasis added)), 24 ("Sierra Club's Complaint would, *in essence*…"), 29 ("*At heart*, both of these counts are based on…"), 31 (arguing against what MWG projects to be Sierra Club's "true intent" rather than what is pled). Far from summarizing Sierra Club's arguments, the use of such terms signals a prelude to misrepresentation of Sierra Club's arguments.

and repeated enforcement of the same provisions despite concurrent implementation of separate Clean Air Act provisions for nonattainment designations and implementation plan development.

B. The Standards Sought to Be Enforced Here, 415 ILCS 5/9(a) and 35 Ill. Admin. Code § 201.141, are Not Preempted By The Federal Clean Air Act.

MWG spends significant space in its brief laying out the procedures under the federal Clean Air Act for designating nonattainment areas and developing state implementation plans for designated areas, and the history of that process for sulfur dioxide. (MWG Br. at 4-10, 18-19, 22-23.) It then argues that applying 415 ILCS 5/9(a) and 35 Ill. Admin. Code 201.141 would "usurp" this federal process, MWG Br at 15, because "only USEPA can designate nonattainment areas," only Illinois EPA can propose nonattainment area boundaries to USEPA for designation, and "[t]here is no statute granting the Board the authority to make a nonattainment designation." (MWG Br. at 17.) Thus, MWG concludes, "[o]nly USEPA, with input from IEPA, has the authority to determine nonattainment… [and] only IEPA has the authority to determine which sources are contributing to that nonattainment." (MWG Br. at 19-20.) But, the nonattainment designation process and subsequent nonattainment plan development process is not the basis for Sierra Club's Complaint, is not a prerequisite for enforcing the laws actually forming the basis for the Complaint, and is not the sole authority for controlling air pollution.

The federal Clean Air Act is a floor for protecting the public from air pollution; states are free to regulate air pollution beyond the bare floor provided by the Clean Air Act. The Clean Air Act specifically provides that

> [Except for certain regulations for mobile sources,] nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

42 U.S.C. § 7416; *see also* 42 U.S.C. § 7604(e) (nothing in the citizen suit provision of the federal Clean Air Act preempts rights of any person to seek enforcement or any other relief under state law).

Courts have also recognized that the federal Clean Air Act does not preempt states from providing increased air pollution protections for their citizens through standards and procedures beyond the floor provided by federal law. The Sixth Circuit found a Michigan law providing an enforcement action against a defendant that "has or is likely to pollute, impair or destroy the air, water, or other natural resources," but lacks "precise standards," is not preempted by the federal Clean Air Act. *Her Majesty the Queen of Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 337, 342-43 (6th Cir. 1989). Rather, state law is preempted "*only to the extent that state law is not as strict as emission limitations established in the federal statute*." *Id*. at 342 (emphasis original). The Third Circuit recently reiterated this understanding in *Bell v. Cheswick Generating*

Station, 734 F.3d 188 (3rd Cir. 2013). In *Bell*, the Third Circuit found no preemption by the Clean Air Act of state common law providing heightened air pollution protections from pollution sources in that state. *Id*. at 196-97; *see also Natural Resources Defense Council v. Poet Biorefining North Manchester LLC*, 987 N.E.2d 531 (Ind.Ct.App. 2013) ("Federal law does not prevent a state from having a broader or more stringent regulatory program than is required by federal law").

Illinois chose to provide protections from air pollution beyond the bare minimum provided by the Clean Air Act. Through 415 ILCS 5/9(a) and 35 Ill. Admin. Code § 201.141, the Illinois legislature and this Board proactively prohibited emissions that cause or threaten concentrations of pollution in the air to exceed safe levels—without the need for first establishing plant-specific numeric limits in a federal Clean Air Act implementation plan. MWG provides no basis in the law for ignoring these heightened protections and, instead, allowing air pollution protections in Illinois to fall to the federal floor.

Contrary to MWG's arguments, the federal nonattainment designation and implementation plan process is not the sole authority for preventing sulfur dioxide air pollution and does not preempt the Board's authority and obligation to enforce 415 ILCS § 5/9(a) and 35 Ill. Admin. Code § 201.141 or SO_2 pollution. Rather, the Board's rules explicitly recognize that an enforcement action such as this one may be appropriate where other regulations are insufficient to ensure compliance with air quality standards by a particular facility:

> Rule 102 also incorporates the important additional provision, inherent in the idea of air quality standards, that emissions shall not prevent the attainment or maintenance of any ambient air quality standard... As we recently stressed in adopting corresponding provisions respecting water quality standards… compliance with the emission standards is a minimum; it is essential that whatever measures are necessary, subject to proof regarding economic reasonableness in the particular case, be taken to ensure that the air quality standards are met. Under this provision [35 Ill. Admin. Code § 201.141] enforcement action may be undertaken against an emission source even if it is in compliance with numerical emission standards, if such compliance is insufficient to assure the air is of satisfactory quality.

In re Emission Standards, Opinion of the Board and 2-3, PCB #R 71-23 (April 13, 1972). Moreover, both the Illinois Attorney General and the U.S. EPA have relied on the same provision to ensure that emissions from an Illinois facility do not cause or threaten violation of the new lead NAAQS, without the need to wait for an implementation plan with specific numeric limits to be developed, submitted, and approved by U.S. EPA. *See* Verified Complaint for Injunctive Relief and Civil Penalties, Count II, *People v. H. Kramer & Co.*, Case 11CH30569 (Cook Co. Cir. Ct.) (attached as Exhibit 1); *In re H. Kramer & Co.*, Notice of Violation EPA 5-11-IL-11 (April 20, 2011) (attached as Exhibit 2).

Because Illinois law provides protections against air pollution beyond the state implementation plan provisions and process in the federal Clean Air Act, this Board has both the authority and duty to enforce the additional protections provided by Illinois law. It is thus not a matter of "ignor[ing] IEPA's authority [and] overrid[ing] the SIP process" as MWG argues. (MWG Br. at 22.) Again, MWG provides no legal support for its premise that this Board's authority under 415 ILCS 5/9(a) and 31 and the federal

Clean Air Act nonattainment designation and implementation plan process are mutually exclusive.

C. There Is No Repeal Of 415 ILCS 5/9(a), 33 and 35 Ill. Admin. Code § 201.141 By Implication.

MWG also argues that the Board lacks authority to prevent air pollution from MWG's power plants in an enforcement case because "[o]nly IEPA, not the Board, has statutory authority for developing plans to achieve compliance with NAAQS in Illinois." (MWG Br. at 20-21 (citing 415 ILCS 5/4(b), (j), (l), 5/28.5).) While the cases and statutes MWG cites fail to support this argument[4], it is also irrelevant because Sierra Club's Complaint does not ask the Board to develop a state implementation plan for submission to U.S. EPA. Rather, it asks the Board to apply existing law to the MWG plants' emissions, find those emissions to violate existing law, and order appropriate action to eliminate those unlawful emissions pursuant to 415 ILCS 5/31 and 33. Compl. pp. 1, 10-11; *see also Int'l Union*, *supra*, at 5 (holding that an enforcement action before the Board is not duplicative of parallel investigations and actions by IEPA).

[4] The federal statute and caselaw MWG cites say, at most, that states have primary responsibility for ensuring air quality protections, subject to U.S. EPA oversight. (MWG Br. at 20-21 (citing 42 U.S.C. §§ 7407(a), 7410, 7515; *Coal. For Clean Air v. S. Cal. Edison Co.*, 971 F.2d 219, 233 (9th Cir. 1992); *Luminant Gen. Co. v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012); *Hall v. EPA*, 273 F.3d 1146, 1153 (9th Cir. 2001); *Save our Health Org. v. Recomp of Minn. Inc.*, 37 F.3d 1334 (8th Cir. 1994)). Of course, none of the cases state that *within* the State of Illinois, the IEPA and not this Board, has sole and exclusive responsibility for ensuring clean air. The state statutes MWG cites note only the undisputed fact that IEPA has some role in developing state implementation plans for submission to USEPA. (MWG Br. at 21 (citing 415 ILCS §§ 5/4, 5/28.5).) In fact, if anything, the state statutes MWG cites note this Board's superior role to IEPA in developing rules to propose to USEPA as part of the state implementation plan process. *See e.g.* 415 ILCS 5/28.5 (IEPA *proposes* rules and the Board decides whether to approve regulations intended for the state implementation plan); (MWG Br. at 21 (noting that 415 ILCS 5/5, 28.5 and 35 Ill. Admin. Code Part 102 give final rulemaking authority to the Board)).

There is no dispute that the plain language of 415 ILCS 5/31(d) and 33 provide the Board with authority to hold a hearing and order MWG to cease causing or threatening air pollution or violation of an applicable rule. While MWG clearly wishes that the Board lacked this authority, or that the Clean Air Act's separate timelines controlled to the exclusion of MWG's other obligations under existing law, MWG Br. at 37-38, it provides no legal authority that withdraws the Board's authority to enforce 415 ILCS 5/9(a) and 35 Ill. Admin. Code § 201.141, or that subjugates it to IEPA's separate authority in 415 ILCS 5/4(b), (j) and (l) to develop implementation plans for submission to U.S. EPA to also protect air quality.

To the contrary, the established law is that an enforcement action for causing air pollution may be brought before the Board even if Illinois EPA has already developed an implementation plan and a source is complying with those numeric limitations. The Board held in *Moody v. Flintkote Company*:

> Quite separate and distinct from the consideration of violations of the rules and regulations governing the operation of [respondent's] plant is the consideration of whether [respondent] violated the Environmental Protection Act. It is entirely clear from a reading of the Act that a person can be guilty of a violation of the basic prohibitions set forth in the Act even though he is complying with the regulations which are applicable to his particular emission or discharge source. For the Act specifically provides that any person is prohibited from discharging contaminants into the atmosphere which "cause or tend to cause air pollution… or… violate the regulations or standards adopted by the Board under the Act."… There are many situations where even though a person is complying with the regulations, he still could cause "air pollution", and we have so held in a case previously decided by the Board, EPA v. Sothern Asphalt Company, Inc., PCB 71-31, dated June 9, 1971.

PCB 7-36, Opinion at 9 (Sept. 2, 1971) (emphasis original); *see also Ill. Envtl. Protection Agency v. Aurora Metal Co.*, PCB 72-392, Opinion and Order at 2 (May 24, 1973) (holding that proof of compliance with numeric standards is a prima facie defense but not sufficient to avoid finding of violation of § 9(a)); *In re Emission Standards*, PCB R 71-23, Opinion at 4-302 ("enforcement action may be undertaken against an emission source even if it is in compliance with numerical emission standards, if such compliance is insufficient to assure that the air is of satisfactory quality"). Regardless whether a more specific numerical emission limit may be promulgated under the Clean Air Act to address SO_2, the applicable ambient air standard is enforceable under the Illinois Environmental Protection Act.

MWG fails to cite any legal authority for its argument that only a future emission rate limit developed through future rulemaking and included in the Illinois implementation plan by U.S. EPA—and not 415 ILCS 5/9(a) and 35 Ill. Admin. Code § 201.141-- can be the basis for an enforcement action. (MWG Br. at 23.) Such a showing would require MWG to demonstrate that it is impossible for Illinois EPA and U.S. EPA to undertake their obligations under the federal Clean Air Act and for the Board to simultaneously exercise its authority to enforce existing Illinois law under the Illinois Environmental Protection Act. *Spaulding School Dist. v. Waukegan City School Dist.*, 164 N.E.2d 63, 66-67 (Ill. 1960). MWG does not even attempt to show that compliance with both is impossible. In fact, this Board's prior decisions enforcing the Environmental Protection Act notwithstanding more specific implementation plan regulations belie MWG's argument.

One of the first cases before the Board parallels this case. In *Environmental Protection Agency v. City of Springfield*, the Board found the respondent's coal-fired power plant in violation of § 9(a) due to sulfur dioxide emissions that—based on pollution dispersion projections—threatened to cause air pollution concentrations in excess of the then-pending NAAQS. Opinion and Order at 8-9, PCB 70-9 (May 12, 1971). The Board rejected the argument that specific numeric limits for sulfur dioxide are required before a violation of § 9(a)'s prohibition on causing or threatening air pollution. *Id*. at 8. As the Board noted:

> [N]o regulation or standard on sulfur dioxide emissions, or emission reduction exits at this time. This does not mean, however, that the City is given free rein to emit as much sulfur dioxide as it chooses. Sulfur dioxide is a contaminant as defined by the statute, and if it is emitted in such concentrations so as to be injurious to human, plant or animal life, to health or to property, its emissions can violate section 9(a) of the Act.

Id. The Board found a violation notwithstanding the fact that the U.S. EPA was still in the process of developing and implementing the first NAAQS for sulfur dioxide. *Id*. (referring to EPA's Air Quality Criteria), 9 ("Even though a standard for sulfur dioxide does not presently exist, there is no question in the mind of this Board that sulfur dioxide emissions from the Lakeside and Dallman plants are significant enough to be deemed air pollution within the meaning of the Environmental Protection Act."); *see also Envtl. Prot. Agency v. Commonwealth Edison Co*., PCB # 70-4 at 5 (Feb. 18, 1971) (holding that "[o]f course sulfur dioxide emissions may under certain circumstances

violate § 9(a) of the Act even though no specific emission regulations governing that contaminant are yet in force")).[5]

The Board has ample authority to hear this matter.

D. The Federal Clean Air Act's Timelines for State Obligations Do Not Alter The Obligations of Pollution Sources In Illinois To Avoid Emissions That Violate 415 ILCS 5/9 and Existing Regulations.

MWG also argues that because Illinois is not required to develop a state implementation plan that meets the 1-hour SO_2 NAAQS until October 4, 2018, MWG cannot now be in violation of existing standards including 35 Ill. Admin. Code § 201.141. (MWG Br. at 40.) MWG again misstates the law. The October 4, 2018, date it alludes to does not apply to MWG. That date applies only to the State of Illinois when developing a nonattainment state implementation plan for submission to the U.S. EPA. 42 U.S.C. §§ 7502(a)(2)(A), 7514a; 78 Fed. Reg. 47191 (Aug. 5, 2013).[6] MWG points to no law converting this federal requirement into an exemption for pollution sources like MWG's plant from existing obligations under Illinois law.

E. Sierra Club's Federal Court Litigation To Enforce U.S. EPA's Obligations Under Federal Law is Irrelevant to Whether This Board Has Authority To Enforce Illinois Pollution Limits Applicable to MWG Against MWG Under Illinois Law.

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[5] The Board ultimately did not allow claims based on sulfur dioxide in the *Commonwealth Edison* case, however, because IEPA had not pled it in the complaint. *Id*. at 5. But based on the Board's dicta in that case, if IEPA had pled the claim, the Board would have allowed it.

[6] Even for states developing implementation plans, they must achieve compliance with the NAAQS "as expeditiously as practicable," with the five-year period MWG refers to as the absolute last minute for compliance. 42U.S.C. § 7502(a)(2)(A). So, even if the federal deadlines for states applied to pollution sources under existing Illinois law, it is not true that "the ambient air in Illinois is not required to meet [the NAAQS] until October 4, 2018." (MWG Br. at 38.) Rather, it must meet the NAAQS as soon as practicable, but at the latest in 2018.

In addition to its mistakes about what this case is about, MWG also misapprehends the relevance (or lack thereof) of unrelated litigation between the Sierra Club and the U.S. EPA. (MWG Br. at 24-25.) Those lawsuits against U.S. EPA seek to compel compliance by U.S. EPA with statutory obligations applicable to the federal agency under a federal process. They are unrelated to the separate legal obligation applicable to MWG not to "[c]ause or threaten or allow the discharge or emission of [sulfur dioxide] into the environment… so as to cause or tend to cause air pollution in Illinois…" or to "prevent the attainment or maintenance of any applicable ambient air quality standard." 415 ILCS 5/9(a); 35 Ill. Admin. Code § 201.141.

While it is true—as far as it goes—that the federal district courts cannot order U.S. EPA to follow a particular methodology when determining nonattainment designations under the Clean Air Act, MWG Br. at 25, it is *also true* that this Board can compel a facility to control its emissions to cease violations of 415 ILCS 5/9(a) and 35 Ill. Admin. Code § 201.141. 415 ILCS 5/33. MWG's assertion that "[j]ust as Sierra Club has acknowledged that it cannot ask a federal court to designate areas as nonattainment… it cannot ask the Board to do so" does not address the claims in this case, which ask the Board to enforce 415 ILCS 5/9(a) and 35 Ill. Admin. Code § 201.141 and not to "designate areas as nonattainment." MWG fails to explain, much less provide support for, its premise that U.S. EPA's obligations under the federal Clean Air Act preclude an enforcement action to compel MWG's compliance with the separate anti-pollution obligations under state law at issue in this case.

III. JOINDER OF ADDITIONAL PARTIES IS NOT NECESSARY AND, EVEN IF NECESSARY, CANNOT BE USED TO DEFEAT THE BOARD'S JURISDICTION.

MWG next argues that the Board must join all other sulfur dioxide emitters as parties in order to decide this case. (MWG Br. at 25-26.) It also argues that the Board must join the U.S. EPA and Illinois EPA. (*Id*. at 27.) MWG's motion fails to identify any legal authority requiring dismissal for failure to join a party, or even for when a party must be—as opposed to *may* be--joined. Furthermore, the arguments MWG makes regarding joinder again misconstrue what this case is about.

A. MWG Misinterprets Permissive Joinder Cases.

The Board's procedural rules provide for permissive joinder by allowing that the Board "*may add* a person as a party to any adjudicatory proceeding if" the person meets one of three conditions. 35 Ill. Admin. Code § 101.403(a) (emphasis added). Additionally, the rule provides that the Board will not dismiss the proceeding for "nonjoinder of persons who must be added to allow the Board to decide an action on the merits without first providing a reasonable opportunity to add the persons as parties." 35 Ill. Admin. Code § 101.403(b); *see also* 35 Ill. Admin. Code § 101.206(c) ("Misjoinder and nonjoinder of parties with respect to enforcement proceedings are governed by 35 Ill. Adm. Code 101.403(b)."). Section 101.403(b) suggests that there are mandatory joinder rules, but that dismissal is not appropriate for failure to join a necessary party without providing an opportunity to join that party. *See Eljer Indus. V. Aetna Cas. & Sur. Co.*, Case No. 93-C-4320, 1994 U.S. Dist. LEXIS 6167, *27 (N.D. Ill. May 10, 1994) (attached as Exhibit 3) (finding that under the nearly identical joinder rule in

the Illinois Code of Civil Procedures, 735 ILCS 5/2-405(a), joinder of defendants "is permissive even where the person has an interest in the controversy or is necessary for the complete determination of the question before the court."). But neither the rules, nor MWG's briefing, identifies the standard for when joinder is necessary; that is, when a person usually must be added as a party.

The Pollution Control Board cases cited by MWG either support a permissive interpretation of joinder or are inapposite as a basis for dismissal of an action for failing to join a respondent. (*See* MWG's Br. at 25-26). In *Gerber v. Moushon*, PCB 03-96 (Order dated May 15, 2003), a nuisance noise case, the Board granted the request by the complainant to add two parties who owned the property leased by the original respondent because they could potentially control the noise created by their lessee, but denied the request to add other respondents (who presumably could have been noisemakers themselves) as too remote to be added as parties. Order at pp. 6-8. The case does not support dismissal for not adding parties, but provides some guidance of when a complainant *may* add parties. In *UAW v. Caterpillar, Inc.*, PCB 94-240 (Order dated November 3, 1994), a hazardous waste case, the Board—*sua sponte*—requested the Environmental Protection Agency to participate in the case and conduct an investigation into the matter under the Board's statutory authority to make such a request. Order at p. 5 (citing 415 ILCS 5/30 ("The Agency shall cause investigations to be made upon the request of the Board")). Again, the case provides no grounds to dismiss for the Agency not having been joined. Finally, *McIntosh, Ltd. V. IEPA*, PCB 88-81 (Order dated May 5, 1988), provides no analysis of joinder, and has no bearing here.

B. Illinois Law Does Not Compel Joinder In This Case.

Although discussion of the applicable law is absent in MWG's brief, Illinois courts have laid out the test for determining whether a party is necessary to a lawsuit: "A necessary party is one who has an interest in the subject matter of the suit which may be materially affected by a judgment entered in the person's absence." *Safanda v. Zoning Bd. of Appeals*, 203 Ill. App. 3d 687, 692 (App. Ct. 1990) (internal quotation omitted). A necessary party must usually be joined; however, joinder is not required when joining a party or multiple parties "would destroy the jurisdiction of the court or the party is not amenable to the court's jurisdiction." *Id*. *See also Zurich Ins. Co. v. Baxter Int'l*, 275 Ill. App. 3d 30, 38 (Ill. App. 1995) (noting that in mass-tort declaratory judgment actions, the Illinois Supreme Court asserted jurisdiction over the merits even though not all potential parties were joined).

The only case cited by MWG purporting to support dismissal when joining all necessary parties is infeasible, *Ragsdale v. Superior Oil Co*., does not actually support the dismissal of a case if all potential *defendants* are not named (*see* MWG's Br. at p. 28 (citing 40 Ill. 2d 68, 237 N.E. 2d 492 (Ill. 1968)). Rather, that trespass action was dismissed because the *plaintiff* was not the proper party, as he did not prove he had title to the property at issue, *Ragsdale*, 40 Ill. 2d at 72. In other words, directly contrary to MWG's arguments here that dismissal is appropriate without joinder of all potential defendants, Illinois law provides that joinder is not necessary if failure to join would require dismissal.

Here, all other emitters of sulfur dioxide, the U.S. EPA and the IEPA are not necessary parties. But, even if they were, they need not be joined because such joinder would divest the Board of jurisdiction over this matter. Thus, rather than the impossibility of naming all imaginable sources as a basis to dismiss the lawsuit as urged by MWG, the impossibility of doing so is a basis for proceeding with the currently named parties only.

There is no basis for MWG's argument that "[t]he Board cannot provide relief related to the alleged [violations] without joining those other sources" that may also contribute to air pollution. (MWG Br. at 26-27.) The Environmental Protection Act references pollution from other sources, but that does not make all other sources "necessary parties." The Act is clear that a single facility can violate § 9(a) by emitting pollution in high enough concentrations that the emitted pollution contributes to air pollution or a violation of a Board rule. 415 ILCS § 5/9(a). The Act merely notes that the violating facility need not be the sole source of pollution for its pollution discharges to violate the Act. *See id*. (prohibiting any person from causing discharge so as to cause air pollution "either alone or in combination with contaminants from other sources…"); 35 Ill. Admin. Code § 201.141 (prohibiting air pollution emissions in amounts that, "either alone or in combination with contaminants from other sources" cause air pollution); *Marblehead Lime Co. v. Pollution Control Bd*., 355 N.E.2d 607, 612 (Ill.Ct.App. 1976) (upholding Board's finding of violation of § 9(a) despite contribution of pollution from other sources); *see also* 5 ILCS 5/12(a) (prohibiting discharge causing water pollution "either alone or in combination with matter from other sources…"); 35 Ill.

Admin. Code § 304.105. By noting that a pollution source need not be the sole source of pollution, and that its emissions are prohibited if they will cause air pollution when added to the background concentrations, the Act does not require that each possible pollution source be joined in a single enforcement action. Rather, the prohibition applies—and is enforceable against—each individual pollution source. 415 ILCS 5/9(a) ("No person shall… [c]ause or threaten or allow the discharge or emission of any contaminant…").

Sierra Club has not been able to find (and MWG fails to cite) any case enforcing the Act's prohibitions on causing pollution "either alone or in combination with contaminants from other source" that requires every other possible source of pollution to be joined as a necessary party.[7] Such a holding would apply equally to the Illinois EPA and Attorney General and would effectively stop all enforcement. Yet, the Board has repeatedly heard enforcement cases for violations of the same standards without requiring joinder of other pollution sources on the speculation that they may also contribute to air pollution. *See e.g., People v. Alpena Vision Resources, LLC*, PCB 13-16, Complaint at ¶ 33 (Oct. 4, 2012) (alleging violations of § 9(a) due to dust and malodors

[7] To the extent that the evidence produced by MWG at hearing shows that a portion of the necessary reductions in emissions to meet health-based standards when MWG's emissions are added to background concentrations should be apportioned to the sources of the background calculations, and wants to argue that fairness requires that it provide only part of the necessary reduction, MWG Br. at 27, the Board can consider such evidence and arguments when determining the necessary relief in this case. 415 ILCS § 5/33(b), (c). It is not necessary to first join any such (unidentified) pollution sources as parties to this case and to order all possible pollution sources into compliance in a single proceeding. Moreover, the MWG plants cause or threaten to cause violations of the health-based SO_2 standard even without any contribution from other sources. (Compl. ¶¶ 22 (providing impacts from only MWG's plants without contribution from any other facility), 26 (providing both with and without background contribution from other sources).)

without joining all potential sources of dust and malodors in the vicinity); *People ex rel. Ryan v. IBP, Inc.*, 723 N.E.2d 370 (Ill. Ct. App., Dec. 30, 1999) (state filed enforcement action against beef slaughtering and processing facility for causing odors in violation of § 9(a) without joining every other possible source of odors in the community); *Marblehead Lime*, 355 N.E.2d at 611-12 (enforcement of § 9(a) against lime kiln, without joining other particulate matter sources in the area, including salt company, steel mill, and other industrial sources).

Finally, even if MWG were somehow right that all contributors must be named, that still would not require dismissal of this case. MWG is the operator and either the lessee or the owner of the properties at issue. (Compl. ¶ 3.) Sierra Club is seeking an order for MWG to reduce its emissions below the level that causes violations of exiting law. (Compl. p. 11 ¶ 5.) Notably, MWG violates the Act even without considering pollution from any other source. The MWG plants' emissions—by themselves—cause and threaten to cause air pollution in excess of health based standards. (Compl. ¶¶ 22, 24, 26.) When background concentrations are added to the pollution from MWG's plants, it only exacerbates the problem. Moreover, MWG fails to identify any other source that contributes sulfur dioxide pollution that would contribute to ambient concentrations at the same time and location as MWG's pollution. It only speculates that there may be some.

MWG's motion based on joinder is unfounded.

C. Because (Again), Sierra Club Is Not Asking For Attainment Designations Under The Federal Clean Air Act In This Case, Joinder Of IEPA and USEPA Is Not Necessary.

MWG's argument that Illinois EPA and U.S. EPA are necessary parties in this case is premised on the incorrect assumption that the relief requested in this case is whether areas should be designated as a nonattainment pursuant to 42 U.S.C. § 7407. (MWG Br. at 27.) As noted several times above, that is not what this case is about. This case is about whether MWG's emissions have, and continue to, exceed the rates prohibited by existing Illinois law in 415 ILCS 5/9(a) and 35 Ill. Admin. Code § 201.141. That claim is specifically enforceable through 415 ILCS 5/31(d) and is not contingent on, or a derivative of, the separate proceedings before the Illinois EPA and U.S. EPA to designate nonattainment areas and develop implementation plans for those areas.

To the extent that MWG also argues that joinder of Illinois EPA is necessary because an order from this Board requiring MWG to reduce its SO_2 emissions could "directly conflict with IEPA's plan to bring Illinois nonattainment areas into attainment," MWG Br. at 27, MWG provides no basis for this illogical argument. There is no conflict to limits that reduce air pollution: if one is stricter than another but the first is met, then so is the second. In fact, it is not uncommon for power plants like MWG's to be subject to numerous overlapping limits for the same pollutant. *See e.g.*, 35 Ill. Admin. Code § 214.141 (limiting SO_2 emissions to 1.8 lb/MMBtu); 42 U.S.C. § 7651b(g) (additional requirement to hold sufficient Acid Rain program allowances for SO_2 emissions); 40 C.F.R. Pt. 63, Subpt. UUUUU Table 2 (allowing use of 0.20 lb/MMBtu SO_2 emission limit for compliance with acid gas limits). Where multiple limits apply, a facility is required to comply with each one. But that does not create a "conflict" between the limits.

MWG's arguments regarding joinder are not based on existing law. Moreover, lack of joinder of parties that cannot be joined cannot be the basis for dismissal in Illinois. For both of these reasons, MWG's motion is not well taken and should be denied.

IV. MWG'S ARGUMENT THAT 415 ILCS 5/9(a) AND 35 ILL. ADMIN. CODE § 201.141 ARE NOT ENFORCEABLE BEFORE THE BOARD RELIES ON INAPPOSITE FEDERAL CASES AND IS BELIED BY ESTABLISHED LAW AND HISTORY.

MWG's next attempt to dismiss Sierra Club's Complaint is yet another mischaracterization of the Complaint.

MWG asserts that Sierra Club is attempting to enforce the NAAQS directly, instead of enforcing a requirement directly applicable to MWG. (MWG Br. at 29-34.) MWG cites a Federal Register preamble discussing the federal operating permit program and federal cases applying 42 U.S.C. § 7604. However, those federal laws are not the basis for this Board's jurisdiction in this case. Unlike the federal Clean Air Act, the Illinois Environmental Protection Act and this Board's regulations make the obligations not to emit pollution in amounts that cause air pollution and threaten violations of the NAAQS directly applicable to individual facilities. 415 ILCS 5/9(a); 35 Ill. Admin. Code § 201.141. Those obligations are then enforceable through a citizen enforcement action before this Board pursuant to 415 ILCS 5/31(d), which provides that "any person may file with the Board a complaint… against any person allegedly violating this Act [or] any rule or regulation adopted under this Act…." There is no dispute that § 9(a) is part of the Act. Nor is there a dispute that 35 Ill. Admin. Code §

201.141 is a rule or regulation adopted under the Act. Therefore, under the Illinois law that applies to this case, Sierra Club's enforcement action is appropriate.

Moreover, the Board explicitly stated that an enforcement action may be brought for violations of the NAAQS when it promulgated 35 Ill. Admin. Code § 201.141:

> [I]t is essential that whatever measures are necessary, subject to proof regarding economic reasonableness in the particular case, be taken to ensure that the air quality standards are met. Under [35 Ill. Admin. Code § 201.141] enforcement action may be undertaken against an emission source… to assure that the air is of satisfactory quality.

In re Emission Standards, PCB R 71-23, Opinion at 4-302 (April 13, 1972). Indeed, the Board has enforced the Illinois Environmental Protection Act specifically by applying the EPA's then-draft NAAQS for SO_2 to assess whether a power plant's emissions threatened to cause air pollution. *City of Springfield*, *supra*, at 8-9. The U.S. EPA and Illinois Attorney General have likewise enforced § 9(a) and 35 Ill. Admin. Code § 201.141 against a facility for causing violations of the lead NAAQS. *See* Verified Complaint for Injunctive Relief and Civil Penalties, Count II, *People v. H. Kramer & Co.*, Case 11CH30569 (Cook Co. Cir. Ct.) (Exhibit 1); *In re H. Kramer & Co.*, Notice of Violation EPA 5-11-IL-11 (April 20, 2011) (Exhibit 2).

MWG cites federal cases finding that NAAQS are not directly enforceable "emission standard or limitation" under the Clean Air Act's citizen suit provision that are not applicable here. (*See* MWG Br. at 30-31; 42 U.S.C. § 7604(f)). The basis for this lawsuit is not the citizen suit provision in the federal Clean Air Act, but rather 415 ILCS 5/31(d), which allows a citizen to file a complaint with the Board "against any person allegedly violating [the Environmental Protection Act]" or "any rule or regulation

adopted under [the] Act." Sierra Club's complaint seeks to enforce § 9(a) of the Act and § 201.141 of the rules adopted under the Act. Thus, even assuming that 415 ILCS 5/9(a) or 35 Ill. Admin. Code § 201.141 would not be enforceable in federal court through a federal Clean Air Act claim does not control the scope of the Board's jurisdiction in 415 ILCS 5/31(d), which explicitly allows enforcement in this action. The cases cited by MWG interpreting federal court jurisdiction under 42 U.S.C. § 7604 are inapposite. (MWG Br. at 31.)

This Board has jurisdiction to hear this case and to order necessary actions to avoid violations by MWG in the future.

V. MWG'S ATTACK ON SIERRA CLUB'S DISPERSION MODELING EVIDENCE IS BOTH PREMATURE AND MISGUIDED.

MWG next protests that Sierra Club's Complaint did not provide all of the details that MWG would like about the computer dispersion modeling Sierra Club conducted. (MWG Br. at 32-34.) It cites a laundry list of evidence it claims should have been included in the Complaint: details about whether the modeling corresponds to a three year average of the 99th percentile of hourly maximum values, (*id*. at 33), monitoring results and the extent to which Sierra Club considered such information (*id*. at 34), and information about "where" the violations[8] occurred—apparently seeking a

[8] Repeating its attempt to reframe this case from one based on MWG's SO_2 emissions that violate 415 ILCS 5/9(a) and 35 Ill. Admin. Code § 201.141, MWG argues that the Complaint "alleges that the Stations are contributing to nonattainment, but it does not specify where this alleged nonattainment is taking place." (MWG Br. at 43.) But, once again, this case is about the violations occurring when MWG causes emissions from its plants, when those emissions are in amounts that cause or threaten to cause air pollution. 415 ILCS 5/9(a) (prohibiting "caus[ing] or threaten[ing] or allow[ing] the discharge or emission…" that cause air pollution or violate a Board rule). Sierra Club is not requesting that the Board impose a "nonattainment" area designation, as MWG repeatedly mischaracterizes the case.

detailed plume map or similar evidence—as well as "how [model result] numbers were derived," "what data was used," and other details from Sierra Club's analysis (*id*. at 43-44.) In fact, MWG goes so far as to suggest that Sierra Club should have attached its computer dispersion modeling files to the Complaint itself. (MWG Br. at 44.)

None of the details MWG purports to be missing are required in a Complaint. The place to test such evidence is at hearing. At this stage, Sierra Club is only required to plead the *ultimate facts* that support a claim pursuant to the Act. The Complaint further identifies the location of the violation as the stacks at MWG's coal-fired power plants. (Compl. ¶¶ 3-5, 24-26.) Contrary to MWG's characterization of the claims as causing a "nonattainment area," which MWG argues requires pleading the precise location of the nonattainment area, MWG Br. at 44, the location of the violation is at the MWG plants where emissions are caused, threatened, or allowed. While the impacts on ambient air define when emissions are too great (that is, they cause "air pollution"), the statute prohibits the act of *emitting* the pollutant into the air—it is not specific to any geographically defined area downwind of the emission point. 415 ILCS 5/9(a) (prohibiting causing, threatening, or allowing emissions); 35 Ill. Admin. Code § 201.141 (same). And, Sierra Club identified the rates above which MWG "cause[s] or threaten[s]" discharges that exceed the health-based NAAQS. (Compl. ¶¶ 28, 32, 34.) To relieve any doubt, Sierra Club also identified the plant, the date, and the time for as many such occurrences as there was data available at the time of the Complaint. (Compl. ¶ 29 and Appx. A.) This goes well beyond the minimum pleading requirements in 35 Ill. Admin. Code § 103.204(c).

As with its other attempts to attack the Complaint, MWG's arguments regarding the sufficiency of the pleadings evidence its misunderstanding of the applicable law. While Illinois law requires fact pleading, that requirement applies to pleading the "ultimate facts," not the evidence that supports the facts. *People v. College Hills Corp.*, 435 N.E.2d 463, 467 (Ill. 1982) ("a civil complaint in Illinois is required to plead the ultimate facts which give rise to the cause of action."). That is, Sierra Club is required to plead the fact that satisfies each element of the claim: that MWG causes or threatens or allows emissions from its coal-fired power plants; that those emission contain sulfur dioxide, a pollutant; and that the emissions caused, threatened or allowed are in amounts that "cause or tend to cause" ambient concentrations exceeding levels needed to protect human health (Claims 1 and 2), or levels set in the NAAQS (Claim 2). 415 ILCS 5/9(a); 35 Ill. Admin. Code § 201.141. There can be no serious dispute that the Complaint here pleads those facts that, if proven, establish a violation. *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, slip op. at 26 (Oct. 3, 2013). This is well beyond what the Board has found sufficient in the past. *Id*. at 10-11 ("In a citizen enforcement action, a complaint can adequately allege pollution without having to give exact dates and times upon which the contaminants caused pollution, and the exact names of the contaminants" and finding a range of dates, activities and contaminants to be sufficient).

The details of *how* dispersion models (or any other ultimate method of proof) are conducted goes to the weight of evidence to prove the ultimate facts. Sierra Club is not required to plead the evidence it will ultimately rely on, nor other general evidence that

may or may not be considered, such a monitoring data. *Sierra Club*, PCB 13-15, slip op. at 25 ("Of course, a complainant need not set out evidence to state a claim." *Citing Schilling v. Hill*, PCB 10-100, slip op. at 7 (Nov. 4, 2010), *in turn citing People v. Carriage Way West Inc.*, 430 N.E.2d 1005, 1008-09 (1981) (complaint need only contain ultimate facts, not "the evidentiary facts tending to prove such ultimate facts")); *Shaw v. Ortell*, 484 N.E.2d 780 (Ill.App.Ct. 1984) ("a complaint should not be dismissed for failure to state a claim unless it appears that no set of facts could be proved under pleadings which would entitle plaintiff to relief"); *Sierra Club v. City of Wood River*, PCB 98-43, slip op. at 2 (Nov. 6, 1997) (a petition is not required "to plead all facts specifically in the petition, but to set out ultimate facts which support his cause of action").

MWG's argument that the Complaint does not contain sufficient pleadings is without merit and the motion should be denied.

VI. MWG'S ARGUMENT THAT 415 ILCS 5/9(a) ONLY PROHIBITS NUISANCES CONFLICTS WITH THE PLAIN STATUTORY LANGUAGE AS WELL AS THIS BOARD'S RULES AND DECISIONS.

MWG's next argument is that actions to enforce 415 ILCS 5/9(a) can only be based on an allegation of nuisance conditions. (MWG Br. at 35.) In a weak attempt to support its argument, MWG cites several cases that allowed an enforcement action based on nuisance conditions, but *none* that disallowed an enforcement case *not* based on a nuisance allegation. (*Id.* (citing *Arendovich v. Koppers Co., Inc.*, PSC 88-127 (Sept. 8, 1988); *EPA v. Aurora Metal Co., Faskure Div.*, PCB 72-392 (May 24, 1973); *EPA v. City of Springfield*, PCB 70-9 (May 12, 1971).) MWG fails to appreciate that by allowing enforcement actions under 415 ILCS 5/9(a) for nuisance conditions, the Board did not

limit actions under 415 ILCS 5/9(a) to *only* those based on nuisance conditions. Neither the statute nor any case supports such an interpretation.

A. A Claim For Causing or Threatening Air Pollution Can Be Based on Either Air Pollution Concentrations That Threaten Health or Concentrations That Cause A Nuisance.

The legal premise for MWG's argument that Sierra Club fails to state a claim pursuant to 415 ILCS § 5/9(a) is that "such actions are allowed only when premised on nuisance conditions, which Sierra Club has not alleged here." (MWG Br. at 35.) It is unclear exactly what MWG means by "nuisance conditions," but presumably MWG means an alleged interference with enjoyment of property. *See* BLACKS LAW DICTIONARY 1094 (7th Ed. 1999) (defining private nuisance); *see also Dobbs v. Wiggins*, 401 Ill. App. 3d 367, 377, 929 N.E.2d 30 (Ct. App. 2010).

However, the statute is clear that a claim pursuant to 415 ILCS 5/9(a) for causing air pollution can be based on either of the two categories of air pollution:

(1) "the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant or animal life [or] health…"; or

(2) "in sufficient quantities and of such duration as to… unreasonably interfere with the enjoyment of life or property."

415 ILCS 5/3.115 (defining "Air pollution").

To the extent that MWG attempts to re-define "air pollution" to include only the second category, neither the statute nor case law supports MWG. As the court in *Marblehead Lime* stated, the definition of "air pollution" lists two types:

> One is the presence of contaminants in the atmosphere in sufficient amounts… as to injurious to human, plant or animal life, to health, or to

> property. The second category is the presence of contaminants in such amounts… as to unreasonably interfere with the enjoyment of life and property.

355 N.E.2d at 611; *see also Incinerator Inc. v. Pollution Control Board*, 319 N.E.2d 794, 796-97 (Ill. 1974); *Sangamo Constr. Co. v. Pollution Control Board*, 328 N.E.2d 571, (Ill.App.Ct. 1975) ("The legislature has defined two types of 'air pollution'… One is the presence of contaminants in the atmosphere in sufficient amounts, characteristics and duration as to unreasonable interfere with the enjoyment of life or property… Another type of 'air pollution'… is the presence of contaminants injurious to human, plant or animal life…").

The cases and rulemakings cited by MWG note only that a claim for unlawful air pollution *may* be based on a nuisance condition. However, none provides that a claim for unlawful air pollution under 415 ILCS 5/9(a) *may only* be based on nuisance conditions, or cannot be based on air pollution concentrations that are harmful to human or animal health. In the first case cited by MGW, *Arendovich v. Kooper Company*, the Board allowed a claim alleging a violation of § 9(a) and 35 Ill. Admin. Code § 201.141 for odor emissions that interfered with use and enjoyment of life or property. PCB 88-127, Interim Order and Opinion (Feb. 8, 1990). In that case, the complainants had not alleged a threat of harm to health, so the Board only had an opportunity to apply the second option within the definition of "air pollution": unreasonable interference with life or property. *Id*. at 2 ("Since the complainants have not alleged any injury to health or to property they have the burden of proving that the alleged air pollution caused an unreasonable interference with their enjoyment of life or

property."). Contrary to MWG's arguments, the Board did not hold in *Arendovich* that only the second option within the definition of air pollution is enforceable.

Also contrary to MWG's arguments, the Board's decision in *Illinois Environmental Protection Agency v. City of Springfield*, PCB 70-9, did not conclude that the respondent in that case violated § 9(a) based solely on nuisances caused by sulfur dioxide emissions. Rather, the Board found that the respondent had violated § 9(a) based on *both types* of air pollution (i.e., both (1) risk to human, plant and animal health and (2) unreasonable interference with life or property).

> The level of air quality attributable to the City's plant, if it persists for even a short time, is *well beyond the level at which health effects*, damage to property and effects on vegetation have been seen. The sulfur concentrations then *are not only injurious to plant and animal life*, but unreasonably interfere with the life [sic] of the neighbors. The neighbors can smell it, they can taste it. Even though a standard for sulfur dioxide does not presently exist, there is no question in the mind of this Board that sulfur emissions from the Lakeside and Dallman plants are significant enough to be deemed air pollution within the meaning of the Environmental Protection Act.

PCB 70-9, Opinion at 9 (May 12, 1971) (emphasis added).

The Board's rule codifying the prohibition on causing or threatening "air pollution" did not prohibit *only* causing nuisance conditions. Rather, it codified the broad prohibition on causing nuisance conditions *in addition to* causing ambient air concentrations that violate ambient air quality standards:

> As we have held, the statutory prohibition [against air pollution] is directly enforceable without regard to the regulations. It 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 numeric standards for all contaminants…

> Rule 102 [now 35 Ill. Admin. Code § 201.141] also incorporates the important additional provision, inherent in the idea of air quality standards, that emissions shall not prevent the attainment or maintenance of any ambient air quality standard. Such a provision is required by federal regulations for the approval of any implementation plan, as the very purpose of the plan is to assure that the air quality standards are met… As we recently stressed in adopting the corresponding provision respecting water quality standards… compliance with the emission standards is a minimum; it is essential that whatever measures are necessary, subject to proof regarding economic reasonableness in the particular case, be taken to ensure that the air quality standards are met. Under this provision enforcement action may be undertaken against an emission source even if it is in compliance with numerical emission standards, if such compliance is insufficient to assure that the air is of satisfactory quality.

In re Emission Standards, PCB R 72-23, Opinion of the Board at 4-301 to 302 (April 13, 1972). Thus is it clear in the Board's rulemaking for 35 Ill. Admin. Code § 201.141, that the Board intended to allow an enforcement action directly against a facility that was threatening or causing violations of the air quality standards, which the Board noted are set "based on expert assessment of health and other adverse effects…" *Id*. There is no mention in the rulemaking of a limitation on enforcing the statutory prohibition, or allowing enforcement of only air pollution that causes nuisance conditions, to the exclusion of impacts on human, plant and animal health.

In short, nowhere in 415 ILCS 5/9(a), 35 Ill. Admin. Code § 201.141, or this Board's precedent is there any support for MWG's argument that "the 'cause or tend to cause air pollution' prohibition of § 9(a) is clearly intended to apply only when nuisance conditions are created." (MWG Br. at 36.) Rather, the law is clear that an enforcement action can be based on either threats to health (human, plant, or animal) or on an unreasonable interference with life or property.

B. The Federal Caselaw MWG Cites Is Inapposite.

The federal caselaw MWG cites also fails to support MWG's argument. The Seventh Circuit's interpretation of 35 Ill. Admin. Code § 201.141 cited by MWG did not address the issue MWG cites it for; much less provide a holding supporting MWG's arguments. (MWG Br. at 36, *citing McEvoy v. IEI Barge Servs.*, 622 F.3d 671, 668 (7th Cir. 2010)).

The Seventh Circuit in *McEvoy* was determining whether the "unreasonably interfere with" provision within the definition of "air pollution" met the federal Clean Air Act's definition of an "emission standard or limitation" within 42 U.S.C. § 7604(a)(1). 622 F.3d at 668. The court was not addressing the broader question of whether it can be applied to a facility generally, or whether the prohibition on air pollution can be enforced in a claim filed with this Board through 415 ILCS 5/31. This Board's precedents, including those discussed above, confirm 35 Ill. Admin. Code § 201.141 can be enforced through a Board enforcement action. Furthermore, where § 9(a) and 35 Ill. Admin. Code § 201.141 are enforced based on the known numeric values by which NAAQS are expressed (as opposed to general nuisance conditions), the Seventh Circuit's concern about defining a violation with "greater specificity" is inapplicable even for cases proceeding in federal district court pursuant to 42 U.S.C. § 7604.

Sierra Club's Complaint pleads a claim for unlawful air pollution in violation of 415 ILCS 5/9(a) due to the emissions from MWG's plants that cause or threaten a concentration so "as to be injurious to human, plant, or animal life [and] to health." 415 ILCS 5/3.115; Compl. ¶¶ 8, 14-15, 20. Similarly, Sierra Club plead a violation of 35 Ill.

Admin. Code § 201.141 because MWG emits sulfur dioxide in amounts that cause or threaten concentrations injurious to human, plant or animal life and that prevent the attainment and maintenance of the 1-hour SO_2 NAAQS. 35 Ill. Admin. Code § 201.141; Compl. ¶¶ 16-20. These are enforceable pursuant to 415 ILCS 5/31(d).

MWG's motion seeking to apply cases interpreting inapplicable federal law lacks merit and must be denied.

VII. MWG'S SO_2 EMISSIONS VIOLATE 35 ILL. ADMIN. CODE § 201.141 REGARDLESS OF WHETHER BACKGROUND POLLUTION IS INCLUDED OR EXCLUDED FROM THE ANALYSIS.

MWG next argues that only the emissions from its plants can be considered when determining if the SO_2 emissions from those plants violate 35 Ill. Admin. Code § 201.141. (MWG Br. at 40.) It claims the reference in 35 Ill. Admin. Code § 201.141 to a facility's contaminant emissions "either alone or in combination with contaminants from other sources" only qualifies the first type of violation of the regulation, causing or tending to cause air pollution, and does not qualify the third type of violation, preventing the attainment or maintenance of any applicable ambient air quality standard. (MWG Br. at 39.)

MWG's argument fails for at least three reasons. First, as the Board noted in both the *City of Springfield* case and when creating Rule 201.141, the NAAQS are health-based standards, so violation of them is evidence of a violation of the first type of prohibited pollution in § 201.141. *In re Emission Standards, supra*, Opinion at 4-301 to 302 ("The air quality standards themselves are based on expert assessment of health and other adverse effects of given levels of pollution…"); *City of Springfield*, PCB 70-9, slip op. at 8-

9 (applying the then-pending original SO_2 NAAQS levels to determine whether the emissions from a plant are "beyond the level at which health effects, damage to property and effects on vegetation have been seen" and therefore cause "air pollution"). So even if the phrase "either alone or in combination with" applies only to the prohibition on causing "air pollution," Sierra Club plead a claim under that provision in § 201.141. (Compl. ¶¶ 6, 14, 19, 34.)

Second, the Board should be allowed to consider the background concentrations of pollution when determining whether a facility's emissions or threatened emissions "prevent the attainment or maintenance of any applicable ambient air quality standard" in the third prohibition in § 201.141. The health protections intended by the rule would be substantially diminished if the Board could not prevent NAAQS violations caused by several plants, even where no one plant alone was causing the violation. The Board should reject MWG's unsupported arguments that would restrict the Board's authority to adequately protect the public.

Third, Sierra Club plead a claim based on the prohibition on causing or threatening emissions that prevent attainment or maintenance of the NAAQS in § 201.141. MWG acknowledges that the *threat*—not just the *cause*—of emissions that prevent maintenance of ambient air quality standards is prohibited under § 201.141. (*See* MWG Br. at 39.). Background concentrations should be considered, as a factual matter, to understand the extent of the threat. Moreover, the Complaint notes that MWG's allowed and experienced emission rates result in violations of the NAAQS even without considering background pollution contributed from other sources. (Compl. ¶¶

26 (providing concentrations both with and without background), 34 (stating that MWG's emissions "either alone or in combination with contaminants from other sources, prevent the attainment or maintenance of the 1-hour SO_2 NAAQS.").)

Therefore even assuming, *arguendo*, that Sierra Club had only plead a violation of § 201.141 based on preventing attainment or maintenance, and further assuming that no background pollution can be considered in that analysis, Sierra Club has still sufficiently plead a claim for violations of § 201.141.

VIII. MWG'S FAIR NOTICE ARGUMENTS LACK MERIT.

As noted above, MWG's repeated claim that Sierra Club is trying to implement NAAQS and designate non-attainment areas is wrong. Sierra Club seeks only to enforce the existing, separate, and independently applicable and enforceable prohibitions in 415 ILCS 5/9(a) and 35 Ill. Admin. Code § 201.141. Thus, MWG's assertion that it lacks "fair notice" that it has violated Illinois law by causing or threatening to cause air pollution or to prevent the attainment or maintenance of the SO_2 NAAQS is based on a faulty premise. (*See* MWG Br. at 41-42). MWG further fails to even provide sufficient support for its affirmative defense of fair notice such that it could be used as a basis to dismiss a complaint at the pleadings stage. And even if MWG could support such a defense, it only applies to penalties.

The fair notice doctrine mandates that before a defendant can be subject to criminal or civil penalties for a violation of a regulation, it must have fair notice of the standards to which it is expected to conform. *U.S. v. Cinergy Corp.*, 495 F. Supp. 2d 892, 900 (S.D. Ind. 2007). Fair notice is provided "[i]f, by reviewing the regulations and other

public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform." *General Elec. Co. v. U.S. E.P.A.*, 53 F.3d 1324, 1329 (D.C. Cir. 1995). MWG cites no Illinois law recognizing this defense.

Here, assuming the fair notice defense even applies in a state enforcement action, MWG has the burden to show that it could not have anticipated that its emissions of sulfur dioxide could "cause or tend to cause air pollution in Illinois . . . or to prevent the attainment or maintenance of any applicable ambient air standard." 415 ILCS 5/9(a); 35 Ill. Admin. Code § 201.121. *See also Nat'l Parks v. TVA*, 618 F. Supp. 2d 815, 832 (E.D. Tenn. 2004) (denying defendant's motion for summary judgment on fair notice grounds). Yet, other than its misdirected argument that Sierra Club is really trying to set a nonattainment areas or create new ambient air quality standard, MWG does not even attempt to meet its burden to show that the decades-old regulations set by the state agency do not provide fair notice. The plain language of 35 Ill. Admin. Code § 201.141 prohibits emissions that prevent attainment or maintenance of an applicable air quality standard, and there is no dispute by MWG that the 1-hour SO_2 NAAQS is an applicable air quality standard. MWG need only read the regulation to have notice of what is prohibited.

Moreover, as cited above, the State has enforced these provisions in the past. *See e.g.*, *In re Emission Standards*, PCB R 71-23, Opinion at 4-302 (April 13, 1972); *City of Springfield*, *supra*, at 8-9; Verified Complaint for Injunctive Relief and Civil Penalties, Count II, *People v. H. Kramer & Co.*, Case 11CH30569 (Cook Co. Cir. Ct.) (Exhibit 1).

Those cases were available for MWG to read; thus, it cannot demonstrate that it lacked fair notice.

Finally, even assuming the MWG had attempted to meet its burden, the defense would apply only to the penalties, and thus would not be grounds for dismissing this entire case. The notion of "fair notice" derives from constitutional protections of due process before sanctions can be imposed that deprive parties of property. *General Elec.*, 53 F.3d at 1328-29 ("Due process requires that parties receive fair notice before being deprived of property.") Thus, even if the "fair notice" doctrine were to apply, the case should go forward based on other non-penalty relief the Board could award as necessary to avoid the future environmental harms from MWG's emissions.

CONCLUSION

For the foregoing reasons, none of MWG's various arguments can support its motion to dismiss. The Board should reject MWG's attempts to avoid the controlling law through unsupported arguments and deny MWG's motion. The Complaint should be accepted and a hearing date set.

Dated this 14th day of March, 2014.

Respectfully submitted,

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Attorneys for Sierra Club

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:

SIERRA CLUB, Complainant, v. MIDWEST GENERATION, LLC, Respondent	)))))))))	**PCB No. 13-27** **(Citizens Enforcement – Air)**

EXHIBIT 1

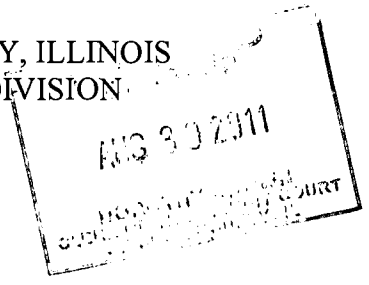
State v H. Kramer & Co.

Case No. 11-CH-30569

Verified Complaint

Atty. No. 99000

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION



PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois,

Plaintiff,

v.

H. KRAMER & CO., an Illinois corporation,

Defendant.

No. 11CH30569

VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES

Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, complains of Defendant, H. KRAMER & CO., an Illinois corporation, as follows:

COUNT I

SUBSTANTIAL DANGER TO THE ENVIRONMENT, PUBLIC HEALTH AND WELFARE

1. This Count is brought on behalf of the People of the State of Illinois, *ex rel.* Lisa Madigan, Attorney General of the State of Illinois, on her own motion, and at the request of the Illinois Environmental Protection Agency ("Illinois EPA").

2. The Illinois EPA is an administrative agency of the State of Illinois, created by Section 4 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/4 (2010), and charged, *inter alia*, with the duty of enforcing the Act.

3. Count I is brought pursuant to Section 43(a) of the Act, 415 ILCS 5/43(a)(2010), and is an action to restrain a substantial danger to human health and the environment.

4. At all times relevant to this Verified Complaint, Defendant H. KRAMER & CO. ("H. Kramer"), was and is an Illinois corporation in good standing and registered to do business in the State of Illinois.

5. Defendant H. Kramer owns and operates a secondary copper smelter located at 1345 West 21st Street, Chicago, Cook County, Illinois ("Facility"). The Facility is located in a predominantly residential area and within one-quarter mile of two schools.

6. At the Facility, Defendant H. Kramer operates, among other things, two rotary furnaces. Through these production processes, H. Kramer emits lead.

7. The rotary furnaces are connected to four (4) baghouses that act as emission control units for the Rotary Furnaces. The baghouses (collectively, the "Baghouses") function as follows:

(a) Baghouse #2 ("Baghouse #2") controls front-end particulate matter emissions from a 35-ton rotary furnace # 1 ("Rotary Furnace #1") and a 60-ton rotary furnace #2 ("Rotary Furnace #2") (collectively, the "Rotary Furnaces");

(b) Baghouse #6 ("Baghouse #6") controls front-end particulate matter emissions from the Rotary Furnaces;

(c) Baghouse #5 controls back-end particulate matter emissions from the Rotary Furnaces; and

(d) Baghouse #1 controls back-end particulate matter emissions from the Rotary Furnaces.

8. The Rotary Furnaces are filled with scrap metals, which are heated until melted. The melted metal alloy is poured into bricks and cooled. Throughout this process, lead is emitted from the Rotary Furnaces to which the Baghouses are connected. The Baghouses aid in the capture of lead.

9. The Clean Air Act, 42 U.S.C. §§7401 *et seq.*, sets National Ambient Air Quality Standards ("NAAQS") for a limited number of pollutants that endanger public health or welfare, and are emitted by stationary sources. 42 U.S.C §7408(a)(1).

10. Section 109(b)(1) of the Clean Air Act instructs the United States Environmental Protection Agency ("USEPA") to set primary ambient air quality standards so as to protect the public health with an "adequate margin of safety." 42 U.S.C §7409(b)(1).

11. In 1978, the USEPA set a primary NAAQS for lead at 1.5 micrograms of lead per cubic meter of air ("$\mu g/m^3$"). 43 Fed. Reg. 46246 (October 5, 1978).

12. Pursuant to Sections 108 and 109 of the Clean Air Act, 42 U.S.C. §§7408 and 7409, USEPA revised the NAAQS for lead on November 12, 2008. 73 Fed. Reg. 67052 (2008). The revised lead NAAQS became effective on January 12, 2009.

13. The revised primary (health-based) and secondary (welfare-based) NAAQS for lead and its compounds currently in effect are 0.15 $\mu g/m^3$, arithmetic mean concentration over a 3-month period. See 40 C.F.R. § 50.16.

14. Lead has no known beneficial function in the body, and when present in the body in sufficient concentrations it attacks the blood, kidneys, and central nervous and other systems and can cause anemia, kidney damage, brain damage, and in extreme cases, death. When emitted into the air, lead can be inhaled or ingested. Lead is rapidly absorbed into the bloodstream and can affect organs and neurological function. Exposure to lead is particularly dangerous for vulnerable populations, such as children. Lead is a persistent pollutant, that if emitted into the air can end up in water or soil, and can re-entrain over time.

15. USEPA revised the primary NAAQS for lead in 2009 in order to "provide increased protection for children and other at-risk populations against an array of adverse health

effects, most notably including neurological effects in children, including neurocognitive and neurobehavioral effects." 73 Fed. Reg. 66965 (November 12, 2008). In EPA's Rationale for Final Decisions on the Primary Lead Standard, USEPA noted the compelling evidence of a significant impact from lead exposures on children and adults. See 73 Fed Reg. 66970-86.

16. From a date prior to 2010, citizens living near the Facility or visiting the area near the Facility have complained of a lingering, dense smoke in the atmosphere in a several block area around the Facility.

17. Citizens have described the smoke and its effects as follows:

a. It has a metallic or chemical odor or taste;

b. It irritates their eyes, nose and throat as they breathe;

c. It causes them to cough, causes difficulty in breathing or causes headaches;

d. The smell permeates their hair and clothing;

e. Their automobiles and the exterior windows of their homes are coated with a soot or powdery film;

f. A black powdery residue enters their homes and is deposited onto interior window sills, into curtains and onto carpets;

g. To avoid the effects of the smoke, they avoid using their yards; and

h. When walking in the neighborhood, they walk out of their way to avoid passing by the Facility, particularly when the smoke is present in the air.

18. On January 20, 2010, in response to the citizen complaints described in paragraphs 16 and 17, above, the Illinois EPA installed and began operating a Total Suspended Particulate ("TSP") ambient air quality monitor ("Monitor") on the roof of the Manuel Perez Jr. Elementary School ("Perez School"), located at 1241 West 19th Street, in Chicago, Cook County, Illinois, two (2) blocks northeast of the Facility.

19. In 2010, the Perez School Monitor recorded 11 instances in which lead concentration in the air exceeded the NAAQS for lead of 0.15 $\mu g/m^3$, including two instances where the lead concentration was approximately nine (9) to ten (10) times the NAAQS:

Date	**Prevailing Wind Direction, Average Wind Speed (mph)**	**Ambient Air Concentration of Lead in Total Suspended Particulate (TSP) Monitor ($\mu g/m^3$)**
April 2, 2010	S/SW, 17	1.40
May 2, 2010	SW/W, 6	0.26
June 1, 2010	S/SW, 4	0.16
June 25, 2010	S/SW, 5	0.17
July 19, 2010	SW, 4	0.21
August 30, 2010	S/SW, 9	0.90
September 23, 2010	S/SW, 12	0.62
October 29, 2010	W/SW, 8	0.21
November 22, 2010	SW, 8	0.23
December 10, 2010	S/SW, 6	1.53
December 28, 2010	SW, 7	0.77

20. On February 9, 2011, Illinois EPA determined that as a result of the exceedances on October 29, 2010, November 22, 2010, December 10, 2010 and December 28, 2010, the 3-month average concentration of lead as measured by the monitor at the Perez School was 0.24 $\mu g/m^3$, in excess of the lead NAAQS.

21. In 2011, the Perez School Monitor recorded three instances in which lead concentration in the air was higher than 0.15 $\mu g/m^3$:

Date	Prevailing Wind Direction and Average Wind Speed	Ambient Air Concentration of Lead in TSP Monitor ($\mu g/m^3$)
January 3, 2011	SW, 6	1.09
March 16, 2011	W/SW, 6	0.24
June 8, 2011	SW, 8	0.25

22. On March 2, 2011, Illinois EPA determined that as a result of the exceedances on November 22, 2010, December 10, 2010, December 28, 2010 and January 3, 2011, the three-month average concentration of lead as measured by the monitor at the Perez School was 0.29 $\mu g/m^3$, in excess of the lead NAAQS.

23. On or before March 13, 2011, the Illinois EPA installed and began operating a second TSP Monitor on the roof of the Benito Juarez High School ("Juarez School), which is located two (2) blocks southwest of the Facility and four (4) blocks southwest of Perez School.

24. On March 16 and 17, 2011, Illinois EPA inspected the Facility.

25. During the March 16 and March 17, 2011 Illinois EPA inspection, Illinois EPA collected samples of fine dust ("fines") for laboratory analysis from:

(a) Baghouse #1, which controls back-end particulate matter emissions from the Rotary Furnaces; and

(b) Baghouse #2, which controls front-end particulate matter emissions from the Rotary Furnaces; and

(c) Baghouse #6, which controls front-end particulate matter emissions from the Rotary Furnaces; and

(d) Baghouse #5, which controls back-end particulate matter from the Rotary Furnaces.

26. The fines collected during the March 17, 2011 Illinois EPA inspection were analyzed by an Illinois EPA-certified laboratory for comparison with the TSP Monitor filters at the Perez School Monitor. Laboratory analysis of the fines indicated the presence of metals, including lead, in the fines, that were consistent with analysis of the filters for the Perez School

TSP Monitor. Specifically, the baghouse samples had a cadmium-to-lead ratio similar to that in the particulates in the Perez School Monitor filters, indicating that H. Kramer is a contributor to the lead exceedances and the NAAQS violations at the Perez School Monitor.

27. In 2011, the Juarez School Monitor recorded one instance in which lead concentration in the air was higher than 0.15 $\mu g/m^3$:

Date	**Prevailing Wind Direction and Average Wind Speed**	**Ambient Air Concentration of Lead in TSP Monitor ($\mu g/m^3$)**
April 15, 2011	E, 13	0.16

28. In 2009, Defendant H. Kramer reported to the U.S. Environmental Protection Agency that it released 250 pounds of lead into the environment from its Facility.

29. Section 43(a) of the Act, 415 ILCS 5/43(a) (2010), provides, in pertinent part, as follows:

> (a) In circumstances of substantial danger to the environment or to the public health of persons or to the welfare of persons where such danger is to the livelihood of such persons, the State's Attorney or Attorney General, upon request of the Agency or on his own motion, may institute a civil action for an immediate injunction to halt any discharge or other activity causing or contributing to the danger or to require such other action as may be necessary. The court may issue an ex parte order and shall schedule a hearing on the matter not later than 3 working days from the date of injunction.

30. From at least April 2, 2010 through the date of filing of this Verified Complaint, lead has been emitted from the facility into the environment so as to exceed or violate the NAAQS for lead. By its actions, Defendant H. Kramer has discharged a contaminant into the environment so as to prevent the attainment or maintenance of an applicable ambient air quality standard.

31. From at least January 2010, emissions of lead from the Facility, which is located in close proximity to residences and schools, has caused adverse physical impacts to citizens in the vicinity of the Facility, as described in paragraphs 16 and 17, above.

32. Due to the dangerous nature of lead and its potentially harmful effects on human health and the environment, lead emissions from the Facility have created circumstances of substantial danger to the environment and to the public health and welfare.

33. Without a determination as to the cause or causes of the lead emissions from the Facility, and without the implementation of measures to prevent further such lead emissions, Defendant H. Kramer's continuing operation of the Facility creates circumstances of substantial danger to the environment and to public health and welfare, which continue unabated.

34. By creating circumstances of substantial danger to the environment and to public health and welfare, Defendant H. Kramer has acted in direct contravention of the requirements of the Act.

35. Plaintiff is without an adequate remedy at law. Plaintiff will be irreparably injured and violations of the relevant environmental statutes and regulations will continue or reoccur unless and until this Court grants equitable relief in the form of preliminary and, after trial, permanent injunctive relief.

WHEREFORE, Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that this Court grant an immediate and preliminary injunction in favor of Plaintiff and against Defendant, H. KRAMER & CO.:

1. Finding that Defendant H. Kramer & Co. has created and is maintaining a substantial danger to the environment and to public health and welfare;

2. Ordering Defendant to immediately cease and desist from discharging lead from the Facility in amounts that exceed statutory or regulatory standards, or that cause or may cause adverse impacts to the health of citizens in the vicinity of the Facility, or that cause or may cause adverse impacts to the environment;

3. Ordering Defendant, H. KRAMER & CO., to immediately undertake all necessary corrective action that will result in a final and permanent abatement of violations of Section 43(a) of the Act, 415 ILCS 5/43(a) (2010), including but not limited to:

a. Ordering Defendant to immediately cease and desist from discharging lead from the Facility in amounts that exceed statutory or regulatory standards, or that cause or may cause adverse impacts to the health of citizens in the vicinity of the Facility, or that cause or may cause adverse impacts to the environment;

b. Ordering Defendant to perform an investigation of the root cause or causes of the excess lead emissions that occurred at the Facility from at least April 2010 through the date of filing of this Verified Complaint; and

c. Ordering Defendant to develop and implement measures, subject to review and approval by Plaintiff, that will reduce future lead emissions from the Facility to levels that comply with statutory and regulatory standards and that will not cause adverse impacts to the health of citizens in the vicinity of the Facility or adverse impacts to the environment;

4. Assessing a civil penalty pursuant to Section 42(a) of the Act, 415 ILCS 5/42(a) (2010), against Defendant of Fifty Thousand Dollars ($50,000.00) for each violation of the Act

and pertinent regulations, and an additional penalty of Ten Thousand Dollars ($10,000.00) for each day of violation;

5. Assessing all costs against Defendant, including attorney, expert witness, and consultant fees expended by the State in its pursuit of this action pursuant to 415 ILCS 5/42(f) (2010);

6. Assessing against Defendant all costs expended by the State in overseeing Defendant's response to the excess discharges of lead from the Facility; and

7. Granting such other relief as this Court deems equitable and just.

COUNT II

AIR POLLUTION

1. This Count is brought on behalf of the PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Sections 42(d) and (e) of the Act, 415 ILCS 5/42(d) and (e) (2010).

2-28. Plaintiff realleges and incorporates by reference herein paragraphs 1 and 2 and paragraphs 4 through 26 of Count I as Paragraphs 2 through 28 of this Count II.

29. Section 9(a) of the Act, 415 ILCS 5/9(a) (2010), 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 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.

30. Section 3.315 of the Act, 415 ILCS 5/3.315 (2010), provides the following definition:

> "PERSON" is any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns.

31. Defendant H. Kramer is a "person," as that term is defined by Section 3.315 of the Act, 415 ILCS 5/3.315 (2010).

32. Section 3.165 of the Act, 415 ILCS 5/3.165 (2010), provides the following definition:

> "CONTAMINANT" is any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.

33. Section 3.115 of the Act, 415 ILCS 5/3.115 (2010), provides the following definition:

> "AIR POLLUTION" is the presence in the atmosphere of one or more 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.

34. Section 201.141 of the Illinois Pollution Control Board ("Board") Air Pollution Regulations, 35 Ill. Adm. Code 201.141, provides as follows:

> No person shall cause or threaten or allow the discharge of 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. Lead is a "contaminant," as that term is defined by Section 3.165 of the Act, 415 ILCS 5/3.165 (2010).

36. Lead is a "criteria pollutant" listed under Section 108 of the Clean Air Act, 42 U.S.C. 7408(a) (2010). USEPA has established protective standards for criteria pollutants to

protect the health and welfare of people, plants, and animals, and to protect the most sensitive populations.

37. From at least January 2010 and on additional dates before January 2010 best known to Defendant, emissions of lead from the Facility have caused irritation and discomfort to citizens in the vicinity of the Facility, who have complained that the emissions has a metallic or chemical odor or taste; irritates their eyes, nose and throat as they breathe; and causes them to cough, causes difficulty in breathing or causes headaches.

38. In addition, citizens in the vicinity of the Facility have complained that the smell of the permeates their hair and clothing; their automobiles and the exterior windows of their homes are coated with a soot or powdery film; a black powdery residue enters their homes and is deposited onto interior window sills, into curtains and onto carpets; to avoid the effects of the smoke, they avoid using their yards; and when walking in the neighborhood, they walk out of their way to avoid passing by the Facility, particularly when the smoke is present in the air.

39. Due to the dangerous nature of lead and its potentially harmful effects on human health and the environment, lead emissions from the Facility have caused or have threatened to cause injury to human, plant, or animal life, to health, or to property, and constitute air pollution as that term is defined in Section 3.115 of the Act, 415 ILCS 5/3.115 (2010).

40. Lead emissions from the Facility have unreasonably interfered with, and continue to unreasonably interfere with, the enjoyment of life or property of citizens near the Facility and constitute air pollution as that term is defined in Section 3.115 of the Act, 415 ILCS 5/3.115 (2010).

41. By causing, threatening or allowing the discharge of lead, a contaminant and a criteria pollutant, into the environment so as to cause or tend to cause air pollution, Defendant H. Kramer has violated and continues to violate Section 9(a) of the Act, 415 ILCS 5/9(a) (2010), and Section 201.141 of the Board Air Pollution Regulations, 35 Ill. Adm. Code 201.141.

42. From at least April 2010 through the date of filing of this Verified Complaint, lead has been emitted from the Facility into the environment so as to exceed or violate the NAAQS for lead. By its actions, Defendant H. Kramer has discharged a contaminant into the environment so as to prevent the attainment or maintenance of an applicable ambient air quality standard, and has violated and continues to violate Section 201.141 of the Board Air Pollution Regulations, 35 Ill. Adm. Code 201.141.

43. By violating a regulation or standard adopted by the Board under the Act, Defendant H. Kramer violated Section 9(a) of the Act, 415 ILCS 5/9(a) (2010).

44. Plaintiff is without an adequate remedy at law. Plaintiff will be irreparably injured and violations of the relevant environmental statutes and regulations will continue or reoccur unless and until this Court grants equitable relief in the form of preliminary and, after trial, permanent injunctive relief.

WHEREFORE, Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that this Court grant an immediate and preliminary injunction and, after trial, a permanent injunction in favor of Plaintiff and against Defendant, H. KRAMER & CO.:

1. Finding that Defendant, H. KRAMER & CO., has violated Section 9(a) of the Act, 415 ILCS 5/9(a) (2010), and Section 201.141 of the Board Air Pollution Regulations, 35 Ill. Adm. Code 201.141;

2. Enjoining Defendant, H. KRAMER & CO., from further violations of Section 9(a) of the Act, 415 ILCS 5/9(a) (2010), and Section 201.141 of the Board Air Pollution Regulations, 35 Ill. Adm. Code 201.141;

3. Ordering Defendant, H. KRAMER & CO., to immediately undertake all necessary corrective action that will result in a final and permanent abatement of violations of Section 9(a) of the Act, 415 ILCS 5/9(a) (2010), and Section 201.141 of the Board Air Pollution Regulations, 35 Ill. Adm. Code 201.141, including but not limited to:

a. Ordering Defendant to immediately cease and desist from discharging lead from the Facility in amounts that exceed statutory or regulatory standards, or that cause or may cause adverse impacts to the health of citizens in the vicinity of the Facility, or that cause or may cause adverse impacts to the environment;

b. Ordering Defendant to perform an investigation of the root cause or causes of the excess lead emissions that occurred at the Facility from at least April 2010 through the date of filing of this Verified Complaint; and

c. Ordering Defendant to develop and implement measures, subject to review and approval by Plaintiff, that will reduce future lead emissions from the Facility to levels that comply with statutory and regulatory standards and that will not cause adverse impacts to the health of citizens in the vicinity of the Facility or adverse impacts to the environment;

4. Assessing a civil penalty pursuant to Section 42(a) of the Act, 415 ILCS 5/42(a) (2010), against Defendant, H. KRAMER & CO., of Fifty Thousand Dollars ($50,000.00) for

each violation of the Act and pertinent regulations, and an additional penalty of Ten Thousand Dollars ($10,000.00) for each day of violation;

5. Assessing all costs against Defendant, H. KRAMER & CO., including attorney, expert witness, and consultant fees expended by the State in its pursuit of this action pursuant to 415 ILCS 5/42(f) (2010);

6. Assessing against Defendant all costs expended by the State in overseeing Defendant's response to the excess discharges of lead from the Facility; and

7. Granting such other relief as this Court deems equitable and just.

COUNT III

COMMON LAW PUBLIC NUISANCE

1. This count is brought on behalf of the PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, on her own motion. The Attorney General is the chief legal officer of the State of Illinois having the powers and duties prescribed by the law, ILL. CONST. Article V, Section 15 (1970). This count is brought pursuant to the power of the Attorney General to institute an action on behalf of the People of the State of Illinois to abate a public nuisance and to protect the health, safety and welfare of the People of the State of Illinois.

2-31. Plaintiff realleges and incorporates by reference herein paragraphs 1 and 2 and paragraphs 4 through 28 of Count I and paragraphs 32, 35 and 36 of Count II as paragraphs 2 through 31 of this Count III.

32. From April 2, 2010 through the date of filing of this Verified Complaint, the Facility emitted lead into the environment so as to cause exceedances or violations of the

NAAQS for lead in at least thirteen (13) instances. A comparison of lead particles collected from the Baghouses at the Facility and from the Perez School TSP Monitor filter indicates that the Facility is a source of the lead emissions.

33. From at least January 2010 and on additional dates before January 2010 best known to Defendant, citizens near the Facility have complained of a lingering, dense smoke in the atmosphere in a several block area around the Facility.

34. Citizens have described the smoke and its effects as follows:

a. It has a metallic or chemical odor or taste;

b. It irritates their eyes, nose and throat as they breathe;

c. It causes them to cough, causes difficulty in breathing or causes headaches;

d. The smell permeates their hair and clothing;

e. Their automobiles and the exterior windows of their homes are coated with a soot or powdery film;

f. A black powdery residue enters their homes and is deposited onto interior window sills, into curtains and onto carpets;

g. To avoid the effects of the smoke, they avoid using their yards; and

h. When walking in the neighborhood, they walk out of their way to avoid passing by the Facility, particularly when the smoke is present in the air.

35. The high ambient lead concentrations in the atmosphere near the Facility create a clear concern for human health and the environment. Lead can cause damage to the blood, kidneys, and central nervous and other systems and can cause anemia, kidney damage, brain

damage, and in extreme cases, death. When emitted into the air, lead can be inhaled or ingested. Lead is rapidly absorbed into the bloodstream and can affect organs and neurological function. Exposure to lead is particularly dangerous for vulnerable populations, such as children. Lead is a persistent pollutant, that if emitted into the air can end up in water or soil, and can re-entrain over time. Because of the Facility's proximity to residences and schools, emissions of lead from the Facility pose a serious health risk to children and adult populations, and can adversely impact the environment.

36. As a consequence of its actions as alleged herein, Defendant H. Kramer has created and maintained a public nuisance at common law.

37. Plaintiff is without an adequate remedy at law. Plaintiff will be irreparably injured, and violations of the applicable and pertinent environmental statutes and regulations will continue unless and until this court grants equitable relief in the form of preliminary and, after trial, permanent injunctive relief.

WHEREFORE, Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that this Court enter an order granting a preliminary injunction and, after trial, a permanent injunction in favor of Plaintiff and against Defendant, H. KRAMER & CO.:

1. Finding that Defendant's actions alleged herein constituted a common law public nuisance;

2. Enjoining Defendant from further acts constituting a common law public nuisance;

3. Ordering Defendant, H. KRAMER & CO., to immediately undertake all necessary corrective action that will result in a final and permanent abatement of the common law public nuisance, including but not limited to:

a. Ordering Defendant to immediately cease and desist from discharging lead from the Facility in amounts that exceed applicable statutory or regulatory standards, that cause or may cause adverse impacts to the health of citizens in the vicinity of the Facility, or that cause or may cause adverse impacts to the environment;

b. Ordering Defendant to perform an investigation of the root cause or causes of the excess lead emissions that occurred at the Facility from at least April 2010 through the date of filing of this Verified Complaint; and

c. Ordering Defendant to develop and implement measures, subject to review and approval by Plaintiff, that will reduce future lead emissions from the Facility to levels that comply with statutory and regulatory standards and that will not cause adverse impacts to the health of citizens in the vicinity of the Facility or adverse impacts to the environment;

4. Assessing all costs against Defendant, H. KRAMER & CO., including attorney, expert witness, and consultant fees expended by the State in its pursuit of this action pursuant to 415 ILCS 5/42(f) (2010);

5. Assessing against Defendant all costs expended by the State in overseeing Defendant's response to the excess discharges of lead from the Facility; and

6. Granting such other relief as this Court deems equitable and just.

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN, Attorney
General of the State of Illinois,

MATTHEW J. DUNN, Chief
Environmental Enforcement/
Asbestos Litigation Division

By: _____
ROSEMARIE CAZEAU, Chief
Environmental Bureau
Assistant Attorney General

Of Counsel:
KRYSTYNA BEDNARCZYK
REBECCA A. BURLINGHAM
Assistant Attorneys General
Environmental Bureau
69 West Washington Street, 18th Floor
Chicago, Illinois 60602
Ph: (312) 814-1511
Ph: (312) 814-3776

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

VERIFICATION

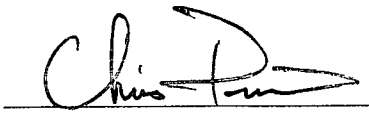
I, Chris Price, being first duly sworn on oath, state:

1. At all times relevant to the foregoing Verified Complaint for Injunctive Relief and Civil Penalties, I have been employed by the Bureau of Air, Division of Air Pollution Control, Air Monitoring Section, Illinois Environmental Protection Agency ("Illinois EPA"), Springfield Office.

2. As a part of my employment with the Illinois EPA, my duties include supervising the Ambient Air Monitoring Data Sub-unit, reviewing air monitoring data received by the Illinois EPA and participating in final validation of air monitoring data.

3. I have read the foregoing Verified Complaint for Injunctive Relief and Civil Penalties, and I am aware of the contents thereof.

4. The factual matters relating to the National Ambient Air Quality Standards (NAAQS) for lead, and relating to total suspended particulate ("TSP") monitoring conducted by the Illinois EPA at the Manuel Perez Jr. Elementary School, 1241 West 19th Street, Chicago, Cook County, Illinois, from January 2010 through the present date, and TSP monitoring conducted by the Illinois EPA at the Benito Juarez High School, 2150 South Laflin Street, Chicago, Cook County, Illinois, from March 2011 through the present date, including the results of such monitoring, set forth in the Verified Complaint for Injunctive Relief and Civil Penalties are true and correct in substance and in fact, to the best of my knowledge and belief.



Chris Price

SUBSCRIBED AND SWORN
to before me this 24 th day of
August, 2011.

Cynthia L. Wolfe
NOTARY PUBLIC

OFFICIAL SEAL
CYNTHIA L. WOLFE
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 10-2-2011

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

VERIFICATION

I, Gopi Ramanathan, being first duly sworn on oath, state:

1. At all times relevant to the foregoing Verified Complaint for Injunctive Relief and Civil Penalties, I have been employed by the Bureau of Air, Division of Air Pollution Control, Field Operations Section, Illinois Environmental Protection Agency ("Illinois EPA"), Des Plaines Regional Office.

2. As a part of my employment with the Illinois EPA, my duties include inspections of industrial facilities to determine compliance with state and federal environmental laws and regulations.

3. I have read the foregoing Verified Complaint for Injunctive Relief and Civil Penalties, and I am aware of the contents thereof.

4. The factual matters relating to the H. Kramer facility located at 1345 West 21st Street, Chicago, Cook County, Illinois, and facility equipment and processes, set forth in the Verified Complaint for Injunctive Relief and Civil Penalties are true and correct in substance and in fact, to the best of my knowledge and belief.

Gopi Ramanathan

SUBSCRIBED AND SWORN
to before me this 21st day of
April, 2011.

NOTARY PUBLIC

OFFICIAL SEAL
JOY L. HAM
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 11-16-2014

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:

SIERRA CLUB,	)	
	)	
Complainant,	)	
	)	
v.	)	**PCB No. 13-27**
	)	**(Citizens Enforcement – Air)**
MIDWEST GENERATION, LLC,	)	
	)	
Respondent	)	

EXHIBIT 2

Letter to Howard Chapman, Jr., President, H. Kramer & Co., from Cheryl L. Newton, Director, Air and Radiation Division, U.S. EPA, (Notice of Violation), dated April 20, 2011

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

APR 20 2011

REPLY TO THE ATTENTION OF:

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Howard Chapman Jr., President
H. Kramer & Co.
1345 West 21st Street
Chicago, Illinois 60608

Re: Notice of Violation
H. Kramer & Co.
Chicago, Illinois

Dear Mr. Chapman:

The U.S. Environmental Protection Agency is issuing the enclosed Notice of Violation (NOV) to H. Kramer & Co. (Kramer). The NOV is being issued under Section 113(a)(1) of the Clean Air Act, 42 U.S.C. § 7413(a)(1). We find that you are in violation of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, and the Illinois State Implementation Plan, at your Chicago, Illinois facility.

Section 113 of the Clean Air Act gives us several enforcement options. These options include issuing an administrative compliance order, issuing an administrative penalty order, and bringing a judicial civil or criminal action.

We are offering you an opportunity to confer with us about the violations alleged in the NOV. The conference will give you the opportunity to present information on the specific findings of violation, the efforts you have taken to comply, and the steps you will take to prevent future violations.

Please plan for your facility's technical and management personnel to attend the conference to discuss compliance measures and commitments. You may have an attorney represent you at this conference.

The technical contacts in this matter are Kushal Som and Dakota Prentice. You may call either Kushal Som at (312) 353-5792 or Dakota Prentice at (312) 886-6761 to request a conference. You should make the request as soon as possible, but no later than 10 calendar days after you

receive this letter. We should hold any conference within 30 calendar days of your receipt of this letter.

Sincerely,

Cheryl L. Newton
Director
Air and Radiation Division

Enclosure

cc: Ray Pilapil, Manager
Compliance and Systems Management Section
Illinois Environmental Protection Agency

Todd R. Wiener
McDermott Will & Emery LLP

United States Environmental Protection Agency
Region 5

IN THE MATTER OF:	)	**NOTICE OF VIOLATION**
	)	
H. Kramer & Co.	)	**EPA-5-11-IL-11**
Chicago, Illinois	)	
	)	
	)	
Proceedings Pursuant to Section 113(a)(1)	)	
of the Clean Air Act,	)	
42 U.S.C. § 7413(a)(1)	)	

NOTICE OF VIOLATION

The U. S. Environmental Protection Agency (EPA) is issuing this Notice of Violation under Section 113(a)(1) of the Clean Air Act (CAA), 42 U.S.C. § 7413(a)(1). EPA finds that H. Kramer & Co. (Kramer) in Chicago, Illinois, is in violation of the CAA, 42 U.S.C. §§ 7401 *et seq.*, and the Illinois State Implementation Plan (SIP) as follows:

Statutory and Regulatory Authority

1. The CAA, 42 U.S.C §§ 7401, *et seq.*, and the regulations promulgated thereunder, establish a statutory and regulatory scheme designed to protect and enhance the quality of the nation's air so as to promote the public health and welfare and the productive capacity of its population.

National Ambient Air Quality Standards

2. Pursuant to Sections 108 and 109 of the CAA, 42 U.S.C. §§ 7408 and 7409, EPA revised the National Ambient Air Quality Standards (NAAQS) for lead on November 12, 2008. 73 Fed. Reg. 67052 (2008). The revised national primary and secondary ambient air quality standards for lead and its compounds are 0.15 micrograms per cubic meter ($\mu g/m^3$), arithmetic mean concentration over a 3-month period. *See* 40 C.F.R. § 50.16. EPA revised the primary NAAQS for lead to provide increased protection for children and other at-risk populations against an array of adverse health effects, most notably including neurological effects in children. EPA revised the secondary standard to be identical to the revised primary standard.

Illinois SIP

3. On May 31, 1972, EPA approved Illinois Pollution Control Board (IPCB) Rules 101 and 102 as part of the federally enforceable SIP for the State of Illinois. 37 Fed. Reg. 10842. IPCB Rule 101 has been recodified at 35 Illinois Administrative Code (Ill. Admin. Code) § 201.102. IPCB Rule 102 has been recodified at 35 Ill. Admin. Code § 201.141.

4. The Illinois SIP at 35 Ill. Admin. Code § 201.141 provides, in pertinent part, that 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 prevent the attainment or maintenance of any applicable ambient air quality standard.

5. The Illinois SIP at 35 Ill. Admin. Code § 201.102 defines "Ambient Air Quality Standard" as those standards promulgated from time to time by the IPCB or by the EPA.

6. The Illinois SIP at 35 Ill. Admin. Code § 201.102 defines "Air Pollution" 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.

Factual Background

7. Kramer owns and operates a secondary copper smelting facility located at 1345 West 21st Street in Chicago, Illinois (the Facility). The Facility includes one 35 ton rotary furnace (Rotary Furnace #1), one 60 ton rotary furnace (Rotary Furnace #2), three coreless electric induction furnaces, and two channel furnaces.

8. Rotary Furnace #1 and Rotary Furnace #2 produce the copper alloys, brass and bronze ingots.

9. The two rotary furnaces, three electric induction furnaces, and two channel furnaces are emission sources. Emissions from these furnaces include lead.

10. To control air pollution emissions, Kramer operates five baghouses of varying capacity for the two rotary furnaces (Baghouse Nos. 1, 2, 5, and 6) and three electric induction furnaces (Baghouse No. 4). The emissions from the two channel furnaces are controlled by a venturi scrubber and mist eliminator, in series.

11. To determine compliance with the revised NAAQS for lead, the Illinois Environmental Protection Agency, with assistance from EPA, placed an air monitor on the roof of the Perez Elementary School located at 1241 West 19th Street in Chicago, Illinois. The location was chosen to monitor and capture metals emitted from the Facility.

12. Based on a three month rolling average from October through December of 2010, EPA determined that the revised NAAQS for lead had been exceeded at the air monitor located at the Perez Elementary School. The three month rolling average lead concentration at the monitor was 0.241 $\mu g/m^3$.

13. Based on a three month rolling average from November 2010 through January 2011, EPA determined that the revised NAAQS for lead had been exceeded at the air monitor located at the Perez Elementary School. The three month rolling average lead concentration at the monitor was 0.294 $\mu g/m^3$.

14. The highest concentrations of lead from October 2010 through January 2011 occurred when there was a southerly/southwesterly wind direction (as recorded at the nearest meteorological station in Alsip, Illinois). The Kramer Facility is located southwest of the air monitor.

Violations

15. Kramer caused or allowed the emission of lead into the air so as, either alone or in combination with contaminants from other sources, to cause air pollution in Illinois and /or to prevent the attainment or maintenance of the revised NAAQS for lead in violation of the Illinois SIP at 35 Ill. Admin. Code § 201.141.

4/20/11
Date

Cheryl L. Newton
Director
Air and Radiation Division

CERTIFICATE OF MAILING

I, Betty Williams, do hereby certify that a Notice of Violation of the Clean Air Act was sent by Certified Mail, Return Receipt Requested, to:

Howard Chapman Jr., President
H. Kramer & Co.
1345 West 21st Street
Chicago, Illinois 60608

I also certify that I sent copies of the NOV by first class mail to:

Ray Pilapil, Manager
Bureau of Air
Compliance and Enforcement Section
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Springfield, Illinois 62702

Todd R. Wiener, Esq.
McDermott Will & Emery LLP
227 West Monroe Street
Chicago, Illinois 60606

on the 28th day of April, 2011.

Betty Williams

Betty Williams, Secretary
AECAS (IL/IN)

CERTIFIED MAIL RECEIPT NUMBER: 7004 1680 0000 1670 2508

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:

SIERRA CLUB,	)	
	)	
Complainant,	)	
	)	
v.	)	**PCB No. 13-27**
	)	**(Citizens Enforcement – Air)**
MIDWEST GENERATION, LLC,	)	
	)	
Respondent	)	

EXHIBIT 3

***Eljer Industries, Inc., v. Aetna Casualty & Surety Co.*, Case No. 93-C-4320, 1994 U.S. Dist. LEXIS 6167 (N.D. Ill. May 10, 2004)**

ELJER INDUSTRIES, INC., et al., Plaintiffs, v. AETNA CASUALTY & SURETY COMPANY, et al., Defendants.

No. 93 C 4320

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1994 U.S. Dist. LEXIS 6167

May 9, 1994, Decided
May 10, 1994, Docketed

JUDGES: [*1] LEFKOW, Lindberg

OPINION BY: JOAN HUMPHREY LEFKOW

OPINION

To: The Honorable George W. Lindberg

United States District Judge

REPORT AND RECOMMENDATION

Joan H. Lefkow, Executive Magistrate Judge:

This is a declaratory judgment action in which plaintiffs, Eljer Industries, Inc., Eljer Manufacturing, Inc. and United States Brass Corporation (collectively "Eljer entities"), ask the court to determine which of several excess liability insurance policies, issued by the defendant insurance companies, [1] provide coverage for claims arising out of alleged defects in a plastic hot/cold pressure plumbing system (the "Qest System"). The two count amended complaint ("complaint") seeks a declaration that each of the defendants is obligated to defend and indemnify the plaintiffs for lawsuits arising from the installation and use of the Qest System (count I). It also seeks money damages for defendants' breach of contract related to their failure to defend and indemnify plaintiffs (count II). Currently pending are the motions of ten defendants to dismiss the complaint for failure to join indispensable parties, [2] *Fed. R. Civ. P. 19*, or, in the alternative, to stay this action pending the resolution of a state **[*2]** court action involving similar parties and issues. One unnamed excess insurer, Gibraltar Casualty Company ("Gibraltar"), has also moved to intervene and to dismiss, arguing that it is an indispensable party to this litigation.

1 Plaintiffs have named eighteen insurance companies, each of which provided excess liability insurance to the Eljer entitles, they include: Aetna Casualty & Surety Company, Allstate Insurance Company, California Union Insurance Company, Constitution State Insurance Company, Employers Mutual Casualty Company, Federal Insurance Company, Granite State Insurance Company, Harbor Insurance Company, Hartford Accident & Indemnity Company, Insurance Company of North America, International Insurance Company, National Surety Corporation, National Union Fire Insurance Company of Pittsburgh, PA, The North River Insurance Company, Old Republic Insurance Company, Reliance Insurance Company of Illinois, Stonewall Insurance Company, and Zurich International, Ltd.

2 Unless otherwise indicated, the term

"defendants" refers only to the moving defendants herein, they include: Aetna Casualty & Surety Company, Allstate Insurance Company, Employers Mutual Casualty Company, Granite State Insurance Company, Harbor Insurance Company, Hartford Accident & Indemnity Company, National Surety Corporation, National Union Fire Insurance Company of Pittsburgh, PA, Old Republic Insurance Company, and Reliance Insurance Company of Illinois. If the defendants' motions are found to have merit, dismissal would be the appropriate remedy because the joinder of any of the specified unnamed, but indispensable, parties would destroy this court's diversity jurisdiction over the subject matter of this controversy.

[*3] PROCEDURE

As with any motion to dismiss, all well pleaded allegations of the complaint must be taken as true and must be construed in a light most favorable to the plaintiff. *Gomez v. Illinois State Bd. of Education, 811 F.2d 1030, 1039 (7th Cir. 1987)*. The court is not, however, bound by the plaintiffs' legal characterization of the facts. *Gomez, 811 F.2d at 1033*. Moreover, the court should not strain to find facts favoring plaintiffs, *Coates v. Illinois State Bd. of Education, 559 F.2d 445 (7th Cir. 1977)*.

FACTS

I. Cast of Characters

All three of the Eljer entities are Delaware corporations with their principal place of business in Dallas, Texas. From 1979 through 1986 United States Brass Corporation ("U.S. Brass"), a wholly owned subsidiary of Eljer Manufacturing, Inc., manufactured and sold the components of the Qest System for installation in site-built residential dwellings, such as houses, apartment buildings or condominiums. From 1975 to mid-1991, U.S. Brass also sold the system for use in mobil homes and recreational vehicles. Between 1979 and 1986, **[*4]** U.S. Brass sold approximately 860,000 systems.

As of December 31, 1992, more than 200 individual and class action lawsuits had been filed against Eljer asserting damage claims by homeowners or contractors based on alleged failures of the Qest System that had caused it to leak. [3] During 1979 through 1988, Liberty Mutual Insurance Company was U.S. Brass' primary level liability insurer. During the majority of that same period, first level excess coverage was provided by two additional insurers who are not parties to the instant action, Highlands Insurance Company (1979-81) and Travelers Indemnity Company of Illinois (1982-86). The Eljer entities, however, have several layers of excess coverage. The defendants consist of insurance carriers that provided excess liability coverage between November 1, 1978 and April 30, 1991 in various layers above the first level. Despite naming eighteen defendants, the Eljer entities failed to name all of the insurance carriers that provided excess coverage during the relevant time period. [4] Each of the unnamed carriers issued policies in excess layers underlying or shared with the defendants herein. Curiously, each carrier that the Eljer entities did **[*5]** not sue is a citizen in one of the same states as the Eljer entities and, therefore, would preclude this court's exercise of diversity jurisdiction over this matter.

3 The claims advance theories of strict liability, breach of warranty, negligence, gross negligence, misrepresentation and fraud and various state deceptive trade practice statutes.

4 The defendants specifically mention Gibraltar, First State Insurance Company, Highlands Insurance Company, Lexington Insurance Company and Royal Insurance Company as unnamed insurance companies that provided excess coverage to the Eljer entitities.

II. Related Coverage Litigation

In 1988, Eljer filed suit in this court against Liberty Mutual, seeking a declaration regarding the trigger of coverage for the Qest System claims. The two first level excess carriers were allowed to intervene. Although the district court ruled that the applicable trigger of coverage was the date the individual Qest System "leaked," *see Eljer Mfg v. Liberty Mutual Ins. Co., 773 F. Supp. 1102 (N.D. Ill. 1991)*, **[*6]** the Seventh Circuit disagreed and, in August, 1992, held that the trigger of coverage was the date the individual system was installed. *Eljer Mfg. v. Liberty Mut. Ins. Co., 972 F.2d 805 (7th Cir. 1992)*.

A few months before the Seventh Circuit's decision in *Eljer*, Gibraltar filed suit in state court seeking a declaration that the date of the "leak" was the proper trigger for coverage under Illinois law. *See Gibraltar*

Casualty v. *Eljer Mfg.*, Case No. 92 CH 2701, pending in the Circuit Court of Cook County, Illinois, Chancery Division. Hartford Accident & Indemnity Company, a defendant in the present lawsuit, intervened in the state court action and asked for a declaration that it has no duty to defend or indemnify the plaintiffs for the Qest System claims.

California Union Insurance Company, another defendant in this case, filed an action with the California state courts regarding six of its Eljer policies. This action was removed to federal court in California, transferred to this district and, recently, consolidated with the instant action on grounds of relatedness. Moreover, Eljer's co-defendants in the underlying **[*7]** damage suits have initiated actions to determine insurance coverage. *See Shell Oil Co.* v. *Aetna Cas. & Surety Co.*, No. 93 C 5168 (N.D. Ill.) and *Hoechst Celanese Corp.* v. *National Union Fire Ins. Co.*, No. 89 C-SE-35 (Del. Super. Ct.).

Finally, the defendants herein have filed another declaratory judgment action in the Circuit Court of Cook County, Illinois. *See National Surety Corporation* v. *Eljer Industries*, Case No. 93 CH 10231. According to defendants, that action joins all the insurers and insureds at issue in the present case and adds the other non-diverse carriers as well.

ANALYSIS

Rule 19 of the Federal Rules of Civil Procedure governs the resolution of defendants' motions to dismiss. Under that rule, the court conducts a two step inquiry to determine whether it is proper to dismiss an action if it is not feasible to join an interested person. *Burger King Corp. v. American National Bank & Trust Co., 119 F.R.D. 672, 674 (N.D. Ill. 1988), citing, Hansen v. Peoples Bank of Bloomington, 594 F.2d 1149, 1150 (7th Cir. 1979).* At the first level, the court **[*8]** considers whether any absent parties are "necessary," in the sense that they "should be joined as parties to the action." *Fed. R. Civ. P. 19(a)*. If the parties in question are necessary, they must be joined if feasible. At times, however, joinder is impossible. For example, the court may not have personal jurisdiction over the absent party or, as argued in this case, joinder might destroy the court's subject matter jurisdiction. Where joinder is not feasible, the court must move to the second step of the inquiry to determine whether the court can, in equity and good conscience," proceed without the party. If not, the missing party is considered "indispensable" and the court must dismiss the case. *Fed. R. Civ. P. 19(b).*

Here, defendants argue that there are at least five unnamed insurance companies that are both necessary and indispensable to this litigation. Together, the unnamed companies wrote over $ 66 million in coverage related to the matter at hand. Because their joinder would destroy diversity jurisdiction, defendants contend, *Rule 19* requires dismissal of the suit. Plaintiffs respond only with respect to Gibraltar. [5] They assert that Gibraltar is not even a "necessary" party, **[*9]** much less an "indispensable" one.

> 5 Although the Eljer entities only refer to Gibraltar in their papers opposing joinder, unless otherwise indicated, I have assumed that they would make similar arguments with respect to the other unnamed excess insurance carriers.

I. *Rule 19(a)* Analysis

Rule 19(a) sets forth three separate instances when a party should be joined as a necessary party:

> A person . . . shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations . . . .

Fed. R. Civ. P. Rule 19(a). The moving parties claim that the first **[*10]** two situations, *Rule 19(a)(1)* and *19(a)(2)(i)*, are applicable to unnamed insurance carriers which share layers of excess coverage with the named defendants or provide coverage underlying the coverage provided by a named defendant.

With respect to *Rule 19(a)(1)*, defendants argue that complete relief cannot be accorded without the presence of the unnamed parties because the court cannot properly allocate the defense or indemnity shares among the named parties. The Eljer entities do not couch their

response in terms of *Rule 19(a)(1)* standards, however, they seem to assert that complete relief is possible because each of the insurance policies at issue are separate and, therefore, there is no reason why the court cannot fully declare each defendant's obligations under its own contract without the presence of the other insurance carriers.

Although the Eljer entities are correct that every insurance contract creates separate obligations, the facts of each case must be closely examined to determine whether the various policies at issue are entirely independent of one another. Thus, for example, additional insurers have been found to be unnecessary in declaratory judgment actions where the **[*11]** facts indicated that they were no more than "other insurers." [6] *See, e.g., Casualty Indemnity Exchange v. Crete, 731 F.2d 457, 461-62 (7th Cir. 1984)*; *Brinco Mining, Ltd. v. Federal Insurance Co., 552 F. Supp. 1233, 1238-39 (D.D.C. 1982)*. The analysis, however, is more complicated where separate policies are contingent in nature. In such a situation, our court of appeals has found that additional insurers are necessary parties within the meaning of *Rule 19(a). See Evergreen Park Nursing and Convalescent Home, Inc. v. American Equitable Assur. Co., 417 F.2d 1113 (7th Cir. 1969)* (each of six fire insurance carriers was indispensable where each policy provided that the carrier would be liable for no more than the proportion of the loss that its policy bore to whole amount of coverage). In *Evergreen Park,* the court reasoned that it would have to determine whether the other five companies provided coverage in order to decide each insurer's proportional share of the loss. *Id. at 1115*.

> 6 "Other insurers" are simply those who have also issued policies covering the same subject matter as the defendants' policies and, therefore, could be held jointly and severally liable along with the defendants.

[*12] Here, the Eljer entities have several layers of liability insurance and the defendants are exclusively excess liability insurers. The Eljer entities do not dispute that coverage in each successive excess layer is contingent on coverage in underlying layers being exhausted. *See* Amended Complaint at 8 (seeking a declaration of defendants' obligations to the extent that underlying policies have been exhausted). Thus, each defendant's liability is dependent on whether the claimed loss has exceeded the coverage underlying that defendant's policy. Although the court, theoretically, could determine whether each defendant is obligated to defend and indemnify plaintiffs for Qest related claims, like *Evergreen Park*, each such determination would require the court to construe all underlying policies, even those of non-parties to this action. While the Eljer entities accurately point out that this court's interpretation of those policies would not be binding on underlying carriers who are not parties, *Rule 19(a)(1)* addresses a broader range of interests than that of finality between the parties to the action. It is also intended to further the interests of "the public in avoiding repeated **[*13]** lawsuits on the same essential subject matter." *Fed. R. Civ. P. 19*, Notes of Advisory Committee on *Rule 19(a)(1)*, as amended July 1, 1966. *See also Evergreen Park, 417 F.2d at 1115*. Where, as here, the ultimate liability of some defendants is contingent on underlying policies which are subject to parallel state court proceedings, there is a substantial risk of essentially duplicative litigation. As *Rule 19(a)(1)* counsels, such duplication of effort should be avoided. Consequently, the unnamed underlying excess insurers are necessary parties because complete relief cannot be afforded in their absence. *Fed. R. Civ. P. 19(a)(1)*.

The authority cited by the Eljer entities does not compel a different conclusion. *See Casualty Indemnity, 731 F.2d at 461-62*; *Brinco, 552 F. Supp. at 1238-39*; *Remington Arms Co. v. Liberty Mut. Ins. Co., 748 F. Supp. 1057 (D. Del. 1990)*; and *Household Manufacturing, Inc.* v. *Liberty Mutual Insurance Co.*, 1986 WL 4121 (N.D. Ill. Mar. 27, 1986). Both *Remington* and *Household* held that excess insurers are not necessary **[*14]** parties where primary insurers are the named defendants. As the court recognized in *Household*, primary insurers are obligated to their insureds up to a fixed dollar amount, regardless of any additional liability that might eventually fall to an excess insurer. *Household,* 1986 WL 4121 at *3. While a primary insurer's liability is not contingent on whether excess insurer may also be liable, the opposite is not true. As discussed above, the very nature of excess insurance contemplates that underlying insurers, whether primary or lower level excess, will be liable in the first instance and the excess carrier's obligations will only arise when the underlying carriers' liability has been exhausted.

Moreover, neither *Casualty Indemnity* nor *Brinco* involved the type of contingent insurance policies that are at issue herein. In *Casualty Indemnity,* an insurer who

wrote coverage for a specific municipal works project argued that the village's general liability insurer, Hartford Insurance Group, was a necessary party to Casualty Indemnity's action seeking a declaration that the village's notice of claim was untimely. Analyzing the case under *Rule 19(a)(2)*, the court of **[*15]** appeals noted that Hartford's only interest in the litigation arose from the "other insurance" clause in its general liability policy which would, at most, have made Casualty Indemnity jointly and severally liable with Hartford. *Casualty Indemnity, 731 F.2d at 461*. In *Brinco*, the insured sought a declaration that the defendant's primary liability policy made defendant jointly and severally liable with the plaintiff's other primary insurers. The defendant argued that the other primary insurers were indispensable parties. Noting that any of the primary insurers would be severally liable for the full amount, the court found that "other insurance" language in defendant's primary liability policy did not mandate the joinder of other primary insurers. The court conceded, however, that defendant's arguments might have "some force" if defendant's excess liability policies were at issue. *Brinco*, 552 F.2d at 1239.

The Eljer entities' attempt to distinguish *Littleton v. Commercial Union Assur. Companies, 133 F.R.D. 159 (D. Colo. 1990)*, is also unconvincing. In *Littleton*, the court found that **[*16]** complete relief could not be accorded among the insured and its excess insurers absent the joinder of the primary level insurers where the excess insurers' liability was contingent on whether the primary insurers provided coverage. The Eljer entities argue that *Littleton* is inapposite because it involves a failure to join primary insurers rather than lower level excess carriers. However, when an excess liability policy is conditioned on exhaustion of an underlying excess insurer, the underlying excess insurer is in the same position as the primary insurer in *Littleton.*

Turning next to defendants' argument that the unnamed insurers also would qualify as necessary parties under *Rule 19(a)(2)(i)*, it is necessary to consider whether the unnamed insurance companies have an interest in the subject matter of the suit and, as a practical matter, if their absence from the action may impair their ability to protect their interests. The Eljer entities argue that Gibraltar's only conceivable interest in the instant litigation is the development of adverse case law, and because it will not be bound by any judgment of this court, that interest is insufficient to make Gibraltar a necessary **[*17]** party. *Rule 19(a)*, however, does not state that the absent party must have an interest in the action; but only that it have an interest "relating to the subject matter of the action." *Burger King, 119 F.R.D. at 676*; *Rule 19(a)(2)*. Under this standard, it can hardly be disputed that the excess carriers who are not named have an interest relating to the subject matter of this suit. The suit concerns the Eljer entities' excess liability insurance coverage for Qest related claims and the unnamed persons are excess carriers who may ultimately be liable with respect to Qest related claims brought against the Eljer entities. The issue then is whether the interests of the unnamed insurance carriers could be impaired if this action proceeds without them.

The Eljer entities assert that the unnamed companies will suffer no prejudice because they will not be bound by any judgment entered against the defendants. The Supreme Court, however, has recognized that *Rule 19(a)(2)(i)* is not limited to circumstances where a person will be technically bound by a judgment. *Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 110, 88 S. Ct. 733, 738 (1968)*. **[*18]** Rather, as the rule provides, it looks to whether there will be impairment of the person's interest in a practical sense if an action proceeds in the person's absence. Here, the potential for such "practical prejudice" is evident. As the Eljer entities recognize, many of defendants' insurance policies are "form-following." That is to say, their policies simply adopt many of the terms and conditions of the underlying policies. [7] As a result, determination of coverage issues will necessarily turn on this court's construction of the underlying policies. While the underlying carriers, to the extent that they are not parties to this action, may not be precluded from relitigating the meaning of their own policies in state court, a state court may be inclined, albeit not required, to adopt an interpretation similar to that which this court decides is correct. The absent insurers, then, will have lost the opportunity to present their arguments regarding the interpretation of their policies at the time when they would be most forceful, i.e., when the interpretation of the contract terms was first litigated. *See Littleton, 133 F.R.D. at 164. But see Casualty Indemnity, 731 F.2d at 462*; **[*19]** *Remington, 748 F. Supp. at 1066.*

7 For example, Gibralter's policies provide,

> Except as may be otherwise provided by the terms and

> conditions of this policy, the insurance afforded by this policy shall follow the insuring agreements and is subject to the same terms, definitions, conditions, and exclusions, except as to any renewal agreements, as are contained in the underlying insurance . . . .

See Petition of Gibraltar Casualty Company to Intervene and Motion to Dismiss, Exhibit A at 9.

In sum, I conclude that unnamed underlying excess insurance carriers are necessary parties to this action under both *Rule 19(a)(1)* and *19 (a)(2)(i)*. [8] In light of my conclusion that necessary underlying carriers are absent from this action, it makes no difference whether the unnamed carriers are also necessary because they share layers of coverage with named defendants. [9] The absence of necessary parties whose joinder would defeat this court's diversity jurisdiction compels the court to look **[*20]** to the second level of the *Rule 19* analysis.

8 Each of the five unnamed insurance companies provides coverage, either alone or by sharing an underlying layer, that underlies one of the named defendants. *See* Exhibit A to Reply Brief of Defendants in Support of the Motion to Dismiss the Complaint of Plaintiffs, or in the Alternative, Stay These Proceedings. As a result, all five unnamed carriers are necessary parties.

9 While insurers within the same layer of coverage may, in some instances, be necessary parties, it is impossible to determine whether this case presents the requisite circumstances without the benefit of evidence, e.g., the insurance contracts, indicating whether the named defendants' policies merely impose joint and several liability among carriers within a layer of coverage or whether the separate policies are more closely tied to one another. If the carriers merely have joint and several liability within their layer of coverage, the fact that an insurer within a layer was named as a defendant would not make unnamed insurers within the same layer necessary parties. *Littleton, 133 F.R.D. at 162*.

[*21] II. *Rule 19(b)* Analysis

Rule 19(b) lists four factors, albeit non-exclusive ones, to assist the court in deciding whether necessary parties are so indispensable that the case cannot go forward in their absence. These factors include,

> first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provision in the judgment, by the shaping of relief or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. Rule 19(b).

The first factor furthers interests similar to those addressed by *Rule 19(a)(2)(i)*. *Burger King, 119 F.R.D. at 679*. Under *Rule 19(b)*, however, the court also weighs possible prejudice to the current parties as well as to the absent, but necessary, parties. In addition to the disadvantages that this case may create for the unnamed insurance carriers, it also presents the potential for prejudice to the current defendants and even **[*22]** to the plaintiffs because subsequent litigation in state courts could lead to inconsistent obligations for the parties herein. For example, this court might determine that the underlying coverages have been exhausted and, therefore, the defendants are obligated to defend the Eljer entities. If a state court should decide differently with respect to the unnamed underlying carriers, that is, that the underlying coverage is not applicable or has not been exhausted, then the defendant excess insurers are effectively confronted with differing determinations regarding their liability. Ultimately, such conflicting determinations could leave the Eljer entities short of insurance coverage despite their payment of insurance premiums. [10] *Littleton, 133 F.R.D. at 165*.

10 The Eljer entities argue that harm to their insurance coverage is of no concern to defendants. Nevertheless, the court is required, under *Rule 19(b)* to consider potential prejudice to all those who are currently parties to the action; obviously, that would include the Eljer entities. Moreover, even though the Eljer entities have implied that if Gibraltar is determined not to be liable, they

> merely have to "swallow" the amount of coverage that would have been provided by Gibraltar, they have not indicated a similar willingness to swallow the coverage provided by the other unnamed excess carriers. As noted above, the amount of coverage provided by the unnamed carriers is substantial: over $ 66 million.

[*23] Turning to the second factor, it does not appear that the potential prejudice could be alleviated short of joining the unnamed excess insurance carriers. In *Littleton,* the court noted that one possibility might be to make an initial determination of the defendants' liability but withhold judgment until the parallel state court proceedings were completed. *See id.* I agree, however, with the *Littleton* court's conclusion that this course of action would fall far short of an efficient use of judicial resources and would needlessly increase the parties' litigation expenses.

The Eljer entities suggest that prejudice could be avoided if the defendants simply impleaded the unnamed carriers as third party defendants. Even disregarding the propriety of burdening defendants with the responsibility to implead the unnamed insurance companies when defendants have no obligation to bring in these parties, the plaintiffs' impleader argument lacks merit. Like the plaintiffs in *Littleton,* the Eljer entities seek a declaration of the extent of their insurance coverage for Qest-related claims. In *Littleton,* the court noted that impleading the unnamed carriers would not bring the crucial **[*24]** question before it -- the extent of the unnamed carriers coverage -- because plaintiffs would remain unable to assert such a claim against the third party defendants. *Littleton, 133 F.R.D. at 163 n. 7, citing, Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 98 S. Ct. 2396 (1978). See also 28 U.S.C. § 1367(b)* ("the district courts shall not have supplemental jurisdiction over claims by plaintiffs against persons made parties under Rule 14 . . . when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332."). Without the presence of that claim, the court concluded that it would remain unable to definitively determine the extent of the defendant excess carriers' obligations. The reasoning of the court in *Littleton* applies with equal force herein.

The third factor identified in *Rule 19(b)* -- whether a judgment in the unnamed party's absence will be adequate -- implicates interests similar to those of *Rule 19(a)(1).* As discussed above, complete relief cannot be accorded without joining **[*25]** the unnamed excess liability insurers. As a result consideration of this factor suggests that the unnamed parties are indispensable.

Finally, the court must consider whether the Eljer entities will have access to an adequate forum if this case is dismissed from federal court. This factor implicates not only the parties' interests, but also those of the public in avoiding piecemeal litigation. *Provident Tradesmens, 390 U.S. at 111, 88 S. Ct. at 738.* Although the Eljer entities are entitled to a high degree of respect for their choice of forum, under the circumstances of this case, their choice must give way to the countervailing interest of all involved in resolving this controversy completely, consistently and efficiently. *Id.* There are already two actions pending in the Circuit Court of Cook County, Illinois, one of which names all of the Eljer entities' insurers for Qest-related claims. Although the more comprehensive of the two cases was filed after the instant suit, the other was filed at least a year before this case. It is likely that the state court would be amenable to consolidating the two cases. The advantage of resolving **[*26]** all the disputes over the Eljer entities' Qest-related insurance coverage in a single forum would appear to outweigh any disadvantage the plaintiffs may suffer as a result of having spent time and effort in this court. Consequently, a consideration of the *Rule 19(b)* factors leads to the conclusion that the unnamed underlying excess insurance carriers are indispensable to this litigation.

In a final attempt to dissuade the court from the above conclusion, the Eljer entities suggest that neither the unnamed parties nor the defendants ever argued the indispensability issue in the several related court actions. They also point out that several named defendants have not joined in the pending motions to dismiss. These arguments are not compelling. First, the earlier federal court action, *Household,* involved a determination of the Eljer entities' primary coverage. As Judge Hart concluded, the presence of excess carriers, like Gibraltar, was unnecessary to that determination. As discussed at length above, the same cannot be said when the absent parties provided underlying insurance coverage and the defendants' policies are contingent on the extent or exhaustion of that underlying coverage. **[*27]** Second, the decision not to join certain carriers in the state court cases does not necessarily indicate that the unnamed carriers would not be necessary and indispensable if the

same case had been filed in federal court. Joinder of defendants under the Illinois Code of Civil Procedure is permissive even where the person has an interest in the controversy or is necessary for the complete determination of the question before the court. *See 735 ILCS 5/2-405(a)*. Finally, the fact that some defendants herein have answered the complaint does not indicate that the unnamed parties are unnecessary. It is entirely possible that all carriers underlying the answering defendants have already been joined as parties. The record does not disclose otherwise. Alternatively, the answering defendants may have some strategic reason for preferring federal court to state court. Whatever their reason for answering the complaint, it would be inappropriate to assume that the answering defendants believe that the unnamed carriers are not necessary to this action or, if they have such a belief, that they are correct.

In short, under *Rule 19*, the five unnamed insurance carriers mentioned by the moving defendants **[*28]** are necessary and indispensable to the proper resolution of this controversy. Because their joinder would destroy this court's diversity jurisdiction, this case must be dismissed. [11]

11 In light of my conclusion with respect to defendants' motions to dismiss, it is unnecessary to consider their alternative arguments seeking a stay of this case pending completion of the state court proceedings. Dismissal of this action also renders Gibraltar's motion to intervene moot.

RECOMMENDATION

For the foregoing reasons, it is hereby recommended that defendants' motions to dismiss be granted for failure to join indispensable parties. It is further recommended that Gibraltar's petition for intervention and motion to dismiss be denied as moot.

Written objection to any finding of fact, conclusion of law, or the recommendation for disposition of this matter must be filed with the Honorable George W. Lindberg within ten days after service of this Report and Recommendation. *See Fed. R. Civ. P. 72(b)*. Failure to object **[*29]** will waive any such issue on appeal.

Respectfully submitted,

JOAN HUMPHREY LEFKOW

United States Magistrate Judge

Dated: May 9, 1994

CERTIFICATE OF SERVICE

I hereby certify that I did on March 14, 2014, send by U.S. Mail, with postage thereon fully prepaid, a true and correct copy of the following instrument entitled:

COMPLAINANT SIERRA CLUB'S MEMORANDUM IN RESPONSE TO RESPONDENT MIDWEST GENERATION, LLC'S MOTION TO DISMISS and accompanying exhibits,

TO:

Stephen J. Bonebrake
Bina Joshi
Schiff Hardin LLP
6600 Willis Tower
233 S. Wacker Drive
Chicago, IL 60606-6473

Andrew N. Sawula
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One Westminster Place
Lake Forest, IL 60045

Christopher Foley
Midwest Generation
500 W. Madison Street
Suite 2640
Chicago, IL 60661

and the same by electronic filing as authorized by the Clerk of the Illinois Pollution Control Board.

Dated: March 14, 2014

David C. Bender

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