BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF ELECTRONIC FILING

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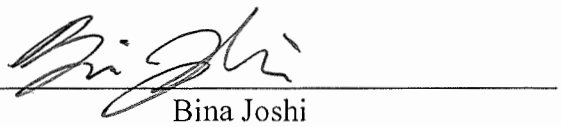
PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board, the attached **RESPONDENT MIDWEST GENERATION, LLC'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS**, copies of which are herewith served upon you.

Dated: March 28, 2014

MIDWEST GENERATION, LLC,



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

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Sierra Club ignores the substance and implications of its claims, fails to address arguments fatal to its claims, mischaracterizes the law, offers old and irrelevant Board decisions, and tries to hide behind its vague allegations in a failed effort to preserve its claims. Sierra Club's Memorandum in Response to Midwest Generation, LLC's ("MWG") Motion to Dismiss ("Response Brief" or "SC Br.") makes clear that Sierra Club is trying to enforce the unenforceable, to pursue claims without pleading necessary elements and without joining necessary parties, and to request relief the Board cannot grant through an enforcement action. Further, Sierra Club's Complaint raises constitutional due process concerns. The Complaint should be dismissed.

Sierra Club asks the Board to treat the 2010 1-hour Sulfur Dioxide National Ambient Air Quality Standard ("1-hr SO_2 NAAQS") as a self-executing standard that applies directly to individual sources and that citizen groups can enforce against any individual source. In doing so, it misconstrues the law and ignores the legal and practical consequences of the relief it seeks. Sierra Club asserts that a NAAQS is enforceable against emission sources immediately upon promulgation. (*See, e.g.*, SC Br., p. 1 ("[A]s 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."); Compl., ¶¶ 28, 29, 32 and 34.). Under Sierra Club's proposed paradigm, immediately upon adoption of a NAAQS, all operators of sources in Illinois should know which areas are not in attainment, whether their sources are contributing to that nonattainment, and how much each individual source must reduce its emissions, if at all, for an area to come into attainment in light of emission impacts from all sources in that area. If an operator lacks the clairvoyance or means to predict these things or to instantaneously reduce emissions from its source immediately upon adoption of the NAAQS, then in Sierra Club's view those emissions violate the law. This is absurd. The Clean Air Act ("CAA") and the Illinois Environmental

Protection Act (the "Act") prescribe an orderly, well-established process for implementing a new or revised NAAQS for good reason—these statutes allow the State to decide which sources to regulate and to what extent and ensure that operators of sources know in advance of a compliance deadline what emissions are prohibited. Sierra Club's claims would upend that process and deprive the State and source operators of those rights.

Sierra Club would have the Board believe it has asserted straightforward claims under Section 9(a) of the Act and 35 Ill. Adm. Code § 201.141. The asserted claims, however, are not the types of claims contemplated by §§ 9(a) and 201.141. Sierra Club fails to allege nuisance conditions, including actual injury or harm, as required under the air pollution prohibition in § 9(a). Sierra Club additionally fails to demonstrate how its private claim for preventing the attainment or maintenance of a NAAQS may be brought under § 201.141.

Even if a claim for violating a NAAQS could be brought directly against MWG for emissions from its Stations,[1] that claim would be premature here. As Sierra Club admits, attainment of the 1-hr SO_2 NAAQS is not required in Illinois until October 2018. (SC Br., p. 18.) Yet, Sierra Club asks the Board to require MWG to ensure immediate attainment. Sierra Club further asks the Board to penalize MWG for allegedly causing nonattainment since 2010, eight years before the attainment deadline, irrespective of whether the Stations are located in or impact an area designated as nonattainment. This is illogical. Additionally, Sierra Club utterly fails to plead the required 3-year average of monitored data—or any monitoring results, for that matter—that would be necessary to determine that any of the MWG Stations is causing or contributing to nonattainment of the 1-hr SO_2 NAAQS. Instead, Sierra Club relies upon irrelevant and undisclosed modeling.

[1] References to the "Stations" in this brief refer to MWG's Powerton, Joliet, Waukegan, and Will County Stations, which are the subject of the Complaint.

Ultimately, regardless of how Sierra Club may try to frame its claims and its requested relief, it is asking for relief the Board cannot grant and it fails to state a claim. For each of the reasons explained in MWG's Memorandum in Support of Its Motion to Dismiss ("MWG's Brief" or "MWG Br.") and this Reply Brief, Plaintiffs' claims must be dismissed as frivolous pursuant to 35 Ill. Adm. Code §§ 101.500-.506 and 103.212.

I. DESPITE ITS BEST EFFORTS AT AVOIDANCE, SIERRA CLUB CANNOT HIDE FROM THE TRUE NATURE OF ITS CLAIMS.

Sierra Club tries mightily to disguise it claims as straight-forward violations of §§ 9(a) and 201.141. But it cannot hide that these claims are nothing more than an attempt to directly enforce NAAQS against MWG in an effort to short-circuit the well-established NAAQS implementation process. Sierra Club's novel interpretation of Illinois law would deprive Midwest Generation of fair notice, raising constitutional due process concerns. Its claims should be rejected.

A. Sierra Club Impermissibly Attempts to Directly Enforce the NAAQS Against MWG and to Circumvent the Well-Established Regulatory Scheme to Implement NAAQS.

Sierra Club incorrectly asserts that it is not trying to directly enforce the NAAQS and that it is not asking the Board to make a nonattainment determination and is not undermining the Illinois Environmental Protection Agency's ("IEPA") authority and ongoing effort to develop regulations, including source-specific reduction requirements, to implement the NAAQS. 415 ILCS § 5/4; (SC Br., pp. 8-17.) Instead, Sierra Club argues that it is only separately and independently enforcing §§ 9(a) and 201.141. (SC Br., pp. 8-17.) Looking through its artful rhetoric and smokescreen arguments, however, demonstrates otherwise. A predicate allegation for both of its claims is that emissions from the MWG Stations cause NAAQS violations. In Count I, Sierra Club claims that MWG "causes or tends to cause air pollution in violation of Section 9(a)" by "caus[ing], threaten[ing], or allow[ing] emissions that, either alone or in combination with SO_2 emissions from other sources, cause ambient air

quality to exceed the 1-hour SO_2 NAAQS." (Compl. ¶ 32.) Similarly, in Count II, Sierra Club claims that MWG is in violation of § 201.141 by "emitting or threatening to emit SO_2 into the environment in amounts that, either alone or in combination with contaminants from other sources, prevent the attainment or maintenance of the 1-hour SO_2 NAAQS" and that this alleged violation of § 201.141 is, in turn, a violation of § 9(a). (Compl. ¶ 34.) Thus, both counts in the Complaint are predicated upon the theory that it is a violation of Illinois law to emit SO_2 from a source that is either in a nonattainment area in Illinois or from which SO_2 could impact such a nonattainment area. Naturally, even were that true—and it is not—Sierra Club would first need to prove that nonattainment exists.

Accordingly, Sierra Club is improperly asking the Board to determine that areas of the State are in nonattainment of the 1-hour SO_2 NAAQS[2] and, as a result, to selectively impose upon one company emission limitations Sierra Club claims are necessary and appropriate to cause, or help to cause,[3] attainment. Without a threshold determination of nonattainment, Sierra Club cannot establish that emissions from the Stations cause nonattainment or prevent attainment—a threshold predicate to its claims. IEPA is engaged in an ongoing effort to identify which sources contribute to nonattainment, which of those sources to regulate, and to what extent—a process that will result in the adoption and submittal to the United States Environmental Protection Agency ("USEPA") of a State Implementation Plan ("SIP") no later than April 6, 2015, designed to attain the 1-hr SO_2 NAAQS. *See* 1-hr SO_2 Designations, 78 Fed. Reg. at 47193. But Sierra Club asks the Board to single out one company, find that

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[2] Subsequent to the filing of Sierra Club's Complaint, two areas in Illinois were designated nonattainment, effective October 4, 2013. Air Quality Designations for the 2010 Sulfur Dioxide (SO2) Primary National Ambient Air Quality Standard, 78 Fed. Reg. 47191 (Aug. 5, 2013) ("1-hr SO_2 Designations"). Only two of the Stations, Powerton and Will County, are in areas designated nonattainment. *Id.* at 47199.

[3] As discussed further below, Sierra Club is quite vague and inconsistent about the alleged impact of MWG's emissions versus other source contributions.

its plants are causing or contributing to nonattainment, and impose emission limits on those plants regardless of the results of IEPA's ongoing assessment and regulatory choices, and penalize that company for its past emissions that exceeded levels that Sierra Club now proposes as limits.

Sierra Club argues repeatedly in its Response Brief that MWG is making a federal preemption argument, that such preemption does not exist in this case, and that all Sierra Club is trying to do is enforce a more stringent state law. This misstates MWG's argument as well as Sierra Club's Complaint and requested relief. MWG is not arguing preemption. Rather, MWG is arguing that Sierra Club is asking the Board in this case to intrude upon the roles and authority of USEPA and IEPA and is misconstruing state law (*i.e.*, §§ 9(a) and 201.141).[4] The Board has no authority to do so. If Sierra Club is allowed to force its own determinations about nonattainment, which sources to regulate, and to what extent, it would undermine USEPA's and IEPA's exclusive roles in the regulatory process. IEPA's orderly planning and implementation, not to mention source compliance plans, would be at the mercy of Sierra Club (or any other third party that decided to bring this type of suit), which could cherry pick through enforcement actions which sources must reduce emissions and by how much. This is unfair to the both the operators of the targeted sources and to IEPA.

[4] Under a process that has been in place for 40 years, USEPA, with input from IEPA, makes nonattainment determinations, then IEPA identifies which sources to regulate and to what extent to achieve and maintain attainment, after which IEPA proposes its choices to the Board for adoption in a rule. 42 U.S.C. §§ 7407, 7502; 415 ILCS 5/4. *See also*, Letter from Laurel L. Kroack, Chief, IEPA, Bureau of Air to Cheryl A. Newton, Director, USEPA, Office of the Air and Radiation Division regarding 1-hour SO_2 NAAQS designations for Illinois (June, 2, 2011) available at http: //www.epa.gov/so2designations/recletters/R5_IL_rec_wtechanalysis.pdf (making designation recommendations to USEPA regarding the 1-hour SO_2 NAAQS based on monitoring); 42 U.S.C. §§ 7410, 7514 (providing states and local governments with the authority to develop SIPs to bring nonattainment areas into attainment); 415 ILCS § 5/4(b), (j), (l) (providing IEPA with the duty to represent Illinois "in any and all matters pertaining to plans . . . relating to environmental protection" and designating IEPA as the "air pollution agency for the state for all purposes of the Clean Air Act"); 415 ILCS § 5/28.5 (providing that IEPA must propose to the Board rules that are required under the CAA).

Moreover, while Sierra Club argues that a limit can be set as part of this enforcement proceeding independent of any limit that is established as part of the Illinois SIP process, any limit that is set as part of this enforcement action will necessarily impact IEPA's evaluation and development of the Illinois SIP because it will necessarily impact SO_2 emissions in Illinois. The result is uncertainty for both IEPA and sources regarding what SO_2 emission limits will be set, for whom, by whom, and when.

In MWG's Brief, it points out a statement by Sierra Club from a judicial proceeding where Sierra Club admits that "Sierra Club does not, and cannot, ask this Court to order particular designations for particular areas, to order [US]EPA to follow a particular methodology in determining the appropriate designations, or to dictate procedures for implementing the standard." *Sierra Club v. McCarthy*, Plaintiffs' Response in Opposition to States' Motions to Intervene, Case No. 13-3953, (N.D. Cal. Oct. 28, 2013). Tellingly, Sierra Club fails in its Response Brief to address the portion of its prior statement where it noted that it "cannot . . . dictate procedures for implementing the standard" and fails to address MWG's assertion that "[j]ust as Sierra Club has acknowledged that it cannot ask a federal court . . . to dictate procedures for implementing a NAAQS, it cannot ask the Board to do so." (MWG Br. at 25.) By bringing this action, Sierra Club is trying to dictate procedures for implementing the 1-hr SO_2 NAAQS.

One key aspect of the NAAQS implementation process is that states are provided several years to achieve attainment with a new NAAQS. In this case, attainment is not due until 2018. 1-hr SO_2 Designations, 78 Fed. Reg. at 47193. Under Sierra Club's theory, however, every source that Sierra Club determines contributes to nonattainment is in violation of § 201.141, and thus § 9(a) of the Act, from the first day a NAAQS is adopted, in this case 2010. Sierra Club does not, because it cannot, explain how a source can "prevent attainment" under 201.141 prior to the date when attainment is due. Even assuming that a

claim can be asserted in an enforcement action for "preventing attainment," such an action could not arise until 2018—eight years later than Sierra Club asserts in this action.[5]

Sierra Club's premature attempt to enforce the 1-hour SO_2 NAAQS raises a number of additional significant timing, notice, and coordination concerns. There is an obvious potential for a proliferation of lawsuits under these circumstances seeking relief with respect to the same emissions that the state is in the very process of addressing through rulemaking, creating inefficiency, burden, and concerns for consistency.[6] Sierra Club's claims also create significant constitutional due process concerns that Sierra Club flippantly dismisses, as discussed in more detail in the next section.

Ultimately, Sierra Club's claims are really a complaint about the NAAQS development, attainment area designation, and related SIP rulemaking process—an orderly process that leads to attainment planning decisions and then rules that impose limits on sources designed to allow the State to attain the NAAQS and the sources to comply with new rules by a predictable date in the future. See 415 ILCS § 5/28.5; 35 Ill. Adm. Code § 102.108; 42 U.S.C. § 7410; 35 Ill. Adm. Code Part 102. Sierra Club can participate in such rulemakings, voice its views, and appeal any rule with which it disagrees. 35 Ill. Adm. Code §§ 102.702, .706. Sierra Club also can challenge, and in fact has challenged, the timing of

[5] Naturally, IEPA can develop source-specific emission limits that could require reductions sooner than 2018 and that would bring all areas of the State into attainment prior to 2018; however, to date, it has not proposed and the Board has not finalized any such limits.

[6] In addition to the potential for suits to be brought against any number of sources the very minute a new ambient air standard is promulgated, the theory behind Sierra Club's claims could also open the door to suits against the State. After all, if a source can be sued for "allowing . . . emissions that cause ambient air quality to exceed the 1-hour SO_2 NAAQS" (Compl. ¶ 32.), then why couldn't the State, a "person" under § 3.315 of the Act, be sued the minute a new NAAQS is promulgated for not immediately implementing a plan to bring nonattaining areas of the State into attainment with the NAAQS? By Sierra Club's logic, there would be no need to allow the time necessary and provided under law to determine what areas are in nonattainment or what systematic reductions are necessary to bring those areas into attainment.

USEPA's NAAQS decisions and actions. *See, e.g., Sierra Club v. U.S. Envtl. Prot. Agency*, Case No. 13-1262 (D.C. Cir. Oct. 3, 2013); *Sierra Club v. McCarthy*, Case No. 13-3953 (N.D. Cal. Aug. 26, 2013). Sierra Club should not be allowed, however, to usurp that process and effectively create new rules through enforcement. Sierra Club is obviously frustrated by slower NAAQS regulatory action than it would like. (*See* SC Br., p.1.) But Sierra Club's frustration with the regulators and the regulatory process cannot justify an enforcement action against MWG for violating a standard (the 1-hour SO_2 NAAQS) that imposes no emission limits upon the Stations, that cannot be directly enforced, and that need not be attained by the State until 2018. Its claims should be dismissed.

B. Sierra Club's Claims Impermissibly Attempt to Create Violations Without Fair Notice.

Sierra Club tries to obfuscate the serious constitutional issues its claims raise. The Board should refrain from adopting the rule and statutory interpretation urged by Sierra Club because that interpretation is unconstitutional.

In its Response Brief, Sierra Club argues that MWG had fair notice of its claims, when MWG clearly did not. An operator of a source cannot know at the time of adoption of a NAAQS what areas will be determined to be nonattainment, what level of emissions its source contributes as compared to other sources, what emission limits the State may ultimately impose on which sources to bring all areas of the State into attainment, whether a citizen group will file suit in connection with emissions from its source, or, if such a suit were successful, what emission limitations would be developed and imposed through that enforcement action. The emission limits claimed by Sierra Club do not exist—they are unknown and unknowable—until and unless created by the Board in this action. Yet, Sierra Club wants penalties and other relief imposed upon Midwest Generation based upon alleged exceedances starting in 2010 of emission limits that, even today, do not exist. Sierra Club

blithely asserts that the Board should not be concerned about fair notice, (SC Br., pp. 40-42.), but it is hard to imagine a clearer lack of fair notice.

The issue here is not, as Sierra Club asserts, whether MWG was aware that the NAAQS or §§ 9(a) and 201.141 existed. MWG needed to have notice of more—of what was expected of it—to satisfy fair notice requirements.

> [I]n the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property, particularly when the interpretation is so far from a reasonable person's understanding of the regulations that they could not have fairly informed [the regulated party] of the agency's perspective.

United States v. Chrysler Corp., 158 F.3d 1350, (D.C. Cir. 1998) (internal quotes omitted). Here, Sierra Club claims that MWG should have complied since 2010 with the "Necessary Limits" that Sierra Club proposes in its Complaint. MWG clearly lacked any notice of those "Necessary Limits." When USEPA adopted the 1-hr SO_2 NAAQS, no nonattainment designations had been made, MWG did not know and could not have known the relative emission contributions of sources in those not-as-yet-determined nonattainment areas, and MWG certainly could not have known what emission rates for its Stations might be imposed some day in the future to help bring such not-as-yet-determined nonattainment areas into attainment. Nonetheless, in Sierra Club's view, the "Necessary Limits" it proposes through this action should be applied retroactively and serve as the basis for penalties and injunctive relief.

Not surprisingly, such retroactive imposition of liability based upon unknown and unknowable emission standards would violate constitutional principles, including due process principles commonly referred to as "fair notice" requirements. *See, e.g., F.C.C. v. Fox Television Stations, Inc.*, 132 S.Ct. 2307 (2012) ("A fundamental principle in our legal system is that laws which regulate entities must give fair notice of conduct that is forbidden or required."); *United States v. Cinergy*, 623 F.3d 455, 458 (7th Cir. 2010) (holding defendant

did not have fair notice of CAA claim when defendant's "conduct complie[d] with a State Implementation Plan that [US]EPA ha[d] approved"). As the D.C. Circuit has explained, "the due process clause . . . prevents the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir.1986). MWG did not have the constitutionally required notice of Sierra Club's novel interpretation of Illinois law.

Sierra Club asserts that MWG's fair notice argument can apply only to penalties and not to injunctive relief. Sierra Club is wrong and its argument misses the mark. The very court that Sierra Club cites to for this proposition later held that injunctive relief that would result in the "expenditure of significant amounts of money, deprives [a party] of property no less than a fine" and, thus, equally requires fair notice. *See United States v. Chrysler Corp.*, 158 F.3d 1350, 1354-55 (D.C. Cir. 1998) (holding recall of vehicles was a "sufficiently grave sanction such that the duty to provide notice is triggered") (internal quotation omitted). Here, requiring MWG to reduce emissions, potentially at great cost, and enjoining MWG from conducting its very business (*i.e.*, operating its Stations, which provide electricity for the people of the Illinois), are each a "sufficiently grave sanction" to give rise to a fair notice requirement for the injunctive relief sought by Sierra Club, in addition to the fair notice concerns raised by the requested monetary penalties.[7] More fundamentally, however, focusing on whether the claims are only partially or completely barred by the absence of fair notice obscures the point. Sierra Club is asking the Board to adopt a legal interpretation that creates a constitutional infirmity. If there were otherwise any doubt about whether the Board should accept Sierra Club's view of the law, the fact that such a view creates any

[7] The Complaint asks for a Board order requiring MWG to "cease and desist," "limit," and reduce SO_2 emissions. Complying with such relief could require MWG to install expensive pollution controls and, at least until controls were installed, potentially stop or severely reduce operations in the short-term, which would of course result in the loss of revenue to MWG in addition to the costs to install controls.

constitutional infirmity is a compelling reason to reject that view. *See, e.g., Gray-Bey v. United States*, 201 F.3d 866, 869 (7th Cir. 2000) (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 506-07 (1979)) ("[C]ourts must if they can interpret statutes to avoid constitutional problems."); *In re Application for Judgment and Sale of Delinquent Properties for Tax Year 1989*, 656 N.E.2d 1049 (Ill. 1995) ("[S]tatutes will be construed to avoid an unconstitutional result.") (internal citation omitted).

Sierra Club unbelievably suggests that the fundamental right to fair notice might not apply to an enforcement action in Illinois. (SC Br., p. 41.) This is not true. The right to fair notice regarding what conduct is prohibited before a sanction can be imposed and compliance can be required is a constitutional due process right under both the United States Constitution and the Constitution of the State of Illinois. U.S. Const. amend. XIV, § 1; Ill Const., art. I, § 2. *See also, People v. Anderson*, 591 N.E.2d 461, 467 (Ill. 1992) (allowing argument that statute was unconstitutionally vague in violation of due process under the federal and Illinois constitutions and noting that in assessing such a claim "[o]ur first inquiry is to ascertain whether defendants were given fair warning," which involves determining whether "a person of ordinary intelligence [had] a reasonable opportunity to know what conduct is lawful and what conduct is unlawful"); *Harken v. City of Chicago*, 713 N.E.2d 753, 762 (Ill. App. Ct. 1999) (noting that Illinois follows the United States Supreme Court in cases where constitutional provisions and issues are similar and that, to the extent that the federal and state due process clauses are not coextensive, the Illinois Constitution provides broader rights of due process than the United States Constitution).

The regulated community, as a matter of due process and fundamental fairness, is entitled to fair notice of applicable requirements. The community should be able to reasonably ascertain applicable standards from established rules; otherwise, adequate compliance planning is impossible. This is particularly true of power plants, which are

subject to a multitude of requirements and at which installation of pollution controls activities can take several years and cost millions of dollars. The Board should reject Sierra Club's invitation to interpret Illinois law in a manner that creates fundamental fairness, compliance planning, and constitutional problems. Its claims should be dismissed.

II. EVEN IF SIERRA CLUB COULD BRING A CLAIM FOR VIOLATION OF THE NAAQS, SIERRA CLUB FAILED TO PLEAD AN ADEQUATE CLAIM UNDER §§ 9(a) OR 201.141.

Not only are Sierra Club's claims precluded because they raise constitutional concerns and ask the Board to make determinations and impose relief that the Board lacks authority to make or impose, but Sierra Club's claims also fail because they fail to state a claim. Its claims are premature and lack necessary elements. Sierra Club proffers arguments based on irrelevant and distinguishable cases—and even on bare allegations from unrelated enforcement proceedings. Despite its effort, Sierra Club cannot salvage its claims. They should be rejected.

A. Sierra Club's Claims Are Premature and Improperly Rely on Modeled Air Quality While Ignoring Monitored Air Quality.

Sierra Club's claims are premature. As noted above, Sierra Club seeks to compel attainment of the 1-hr SO_2 NAAQS now, even though the State is not required to demonstrate attainment until 2018. 1-hr SO_2 Designations, 78 Fed. Reg. at 47193. Sierra Club does not and cannot explain how MWG could be liable for "preventing attainment" under § 201.141 or causing "air pollution" under § 9(a) based upon alleged nonattainment before the date the State is required to come into compliance with the NAAQS. Of course, IEPA is even now developing the emission limitations necessary to bring about attainment by the required date. Sierra Club's true complaint is about the length of time provided the State to achieve attainment. (SC Br., p.1.) But that complaint should be directed to those who write rules and statutes, and it is not a valid basis to twist the meaning of existing statutes and rules. Notably, as MWG has pointed out, an IEPA official testifying in the public hearing

concerning MWG's Combined Pollutant Standard Variance stated that emissions from the Stations at levels allowed under the variance do not "jeopardize[]" or "impact" the State's "obligations for the 2010 [1-hour] SO_2 NAAQS." Transcript of January 29, 2013 Hearing at 137, *Midwest Generation, LLC v. IEPA*, PCB 13-24 (Feb. 8, 2013). Through this action, Sierra Club impermissibly seeks to rewrite the statute that provides the allowed timeframes for compliance with the 1-hour SO_2 NAAQS.

Sierra Club also improperly relies on modeling to support its claims. Under existing law, however, NAAQS attainment and nonattainment determinations must be based on monitored data not modeling. (*See* MWG Br., pp. 32-34.) The 1-hr SO_2 NAAQS rule does not say anything about modeling. 40 C.F.R. § 50.17. The only mention of modeling comes from the rule's preamble, which the D.C. Circuit has explained is not part of the rule itself and does "not create obligations from which legal consequences will flow." *Nat'l Envtl. Dev. Ass'ns Clean Air Project v. U.S. Envtl. Prot. Agency*, 686 F.3d 803, 807-09 (D.C. Cir. 2012). Modeling is simply irrelevant to NAAQS attainment and nonattainment determinations at this time. A key element of each of Sierra Club's claims is the assertion that emissions from the MWG Stations cause nonattainment, or "prevent" attainment. (Compl. ¶¶ 32, 34.) Because Sierra Club relies solely on modeling and pleads no monitoring data results demonstrating nonattainment to support its claims, its claims must fail.

Additionally, Sierra Club's Complaint and Response Brief ignore a key element of the 1-hour SO_2 Standard, specifically that an exceedance of the standard is based upon an average of three years of certified and quality-assured monitoring data. 40 C.F.R. § 50.17. Again, Sierra Club has pled no exceedance of monitored data, let alone that monitored data established an exceedance over a three-year averaging period. The Complaint and Response Brief fail to address the three-year averaging portion of the standard and in no way assert or allege that the Stations are contributing to a violation of the 1-hr SO_2 NAAQS as measured

over a three-year average. Rather, Sierra Club's claims are premised on modeling of permitted limits (*i.e.*, the levels of emissions allowed, not the actual emissions) and on modeling of only one year of actual data. (*See* Compl. ¶¶ 22, 25, 28.) In short, while Sierra Club claims that the MWG Stations have caused a NAAQS exceedance, and this is a core element of each count in the Complaint, Sierra Club has used the wrong data.

Quite simply, Sierra Club has failed to plead that the 1-hr SO_2 NAAQS was not, or will not be, timely attained, let alone that MWG is responsible for any such nonattainment under the applicable rules. Its claims should be dismissed.

B. The Only Authority Sierra Club Offers to Support Its Claims Is Irrelevant and Distinguishable.

Despite its repeated assertion that there is precedent for this type of action, Sierra Club does not offer any meaningful precedent from the last 40 years to support its assertion that a citizen group can directly enforce a NAAQS or establish that an alleged NAAQS exceedance is prohibited "air pollution" that is independently actionable in an enforcement case. Instead, Sierra Club misconstrues and misapplies very old Board precedent in a failed effort to argue that a NAAQS "violation" constitutes prohibited air pollution and is today an independently enforceable violation of §§ 9(a) and 201.141. Not only does Sierra Club ignore the very different regulatory context for the Board statements upon which it relies, but Sierra Club also omits discussion of language that directly contradicts its asserted interpretation of these Board statements. Finally, Sierra Club resorts to citing allegations from a more recent, clearly distinguishable case that was resolved through a settlement and resulted in no adjudicated decision.

Sierra Club relies heavily on two very old and plainly distinguishable Board decisions, *IEPA v. City of Springfield*, PCB 70-9 (May 12, 1971) and *IEPA v. Commonwealth Edison Co.*, PCB 70-4 (Feb. 17, 1971). Neither supports Sierra Club's claims. As Sierra Club admits in its Response Brief, *Commonwealth Edison* contains only dicta and, in fact,

resulted in a dismissal of a § 9(a) claim of air pollution on the basis that petitioner's complaint was not specific enough to provide respondent with fair warning regarding the nature of the § 9(a) claim. PCB 70-4, slip op. at 1-210 to 11. Additionally, the asserted claims in both *City of Springfield* and *Commonwealth Edison* were brought over 40 years ago, before any SO_2 NAAQS was adopted and before Illinois promulgated any SO_2 emission standards. National Primary and Secondary Ambient Air Quality Standards, 36 Fed. Reg. 8186 (Aug. 30, 1971) (promulgating first primary NAAQS for SO_2 in 1971); *In re Emission Standards*, R 71-23 (Apr. 13, 1972) (adopting first plan to attain and maintain the SO_2 NAAQS in Illinois in 1972). Thus, both cases were decided in the absence of any federal or state standards or rules governing SO_2 emissions. *See In re Emission Standards*, R 71-23, slip op. at 4-301 (citing to *City of Springfield* for the proposition that "substances not covered by numerical standards may not be emitted so as to cause a nuisance, since no code of rules could ever provide numerical standards for all contaminants")(emphasis added). Further, unlike Sierra club's claims here, *City of Springfield* involved allegations of nuisance, such as neighbors being able to "smell" and "taste" sulfur from the plant's emissions. PCB 70-9, slip op. at 1-578 to 579.

Since these decisions issued, the NAAQS implementation process has thoroughly developed and a host of rules have been adopted that impose SO_2 emission limits on Illinois sources. It is not surprising that, in 1971, in the absence of established emission standards, the Board allowed actions to proceed with respect to emissions at levels that were determined in fact to be "injurious to human, plant or animal life," such as those that would support a nuisance claim. *See Commonwealth Edison Co.*, PCB 70-4; *City of Springfield*, PCB 70-9. The Board itself recognized in the preamble to the 1972 rulemaking that a nuisance claim is permissible with respect to emissions that are not subject to established emission standards. *See In re Emission Standards*, R 71-23, slip op. at 4-301. Later adopted rules were designed

to address just that type of threat. *See, e.g., id.* The present Complaint is brought at a time when NAAQS-based SO_2 standards exist in Illinois and the plants at issue are subject to a multitude of emission limits. (*See, e.g.*, MWG Br., pp. 4, 6.) There is no need to create an additional remedy. In any event, unlike these earlier Board cases, Sierra Club's Complaint lacks any allegations of actual harm or nuisance caused by MWG. (*See generally*, Compl.)

Sierra Club's effort to rely upon the language from the Board's order in the rulemaking for what is now § 201.141 fairs no better. *In re Emission Standards*, R 71-23, slip op. at 4-301 to 302. That language does not support its claims. And key language from this rulemaking that Sierra Club failed to mention contradicts its arguments.

First, the rulemaking discussed the prohibition against "air pollution" in §§ 9(a) and 201.141 and states that the intention of this prohibition is to address nuisance conditions.[8] The Board explained that the prohibition against air pollution "means that substances not covered by numerical standards may not be emitted so as to cause a nuisance, since no code of rules could ever provide numerical standards for all contaminants." *Id.* at 4-301 (emphasis added). The Board then further explained that, even when numerical limits do exist, "under special circumstances of geography, meteorology, or configuration, emissions meeting the standards may cause a nuisance, and that the statute flatly forbids." *Id.* (emphasis added). These statements support the view that air pollution, in the context of nuisance and actual harm, sometimes can be a cognizable claim. The elements of a nuisance claim are well understood and provide context to language that is otherwise so general and vague as to be unenforceable. Outside that context, as the 7th Circuit explained, the prohibition against air pollution in § 9(a) turns into a "broad, hortatory statement" providing "little more than the

[8] While Sierra Club does not allege a violation of the "cause or tend to cause air pollution" prong of § 201.141, that prong "restates the statutory prohibition against air pollution," R 71-23, slip op. at 4-301, and so is probative of the Board's interpretation at that time (over 40 years ago) of the Statutory prohibition.

commandment 'thou shall not pollute.'" *McEvoy v. IEI Barge Servs., Inc.*, 622 F.3d 671, 678 (7th Cir. 2010) (noting that if plaintiffs were to "proceed as if all 'emissions' were also 'pollution,'" it would make § 9(a) absurd; "otherwise, every time a person exhales carbon dioxide or sneezes she would be 'polluting' the air.").[9]

Sierra Club's Complaint does not include the nuisance allegations necessary to give rise to a claim under the prohibition against air pollution portion § 9(a). Indeed, while Sierra Club selectively quotes from the 1972 order, Sierra Club fails in its Response to mention these key Board statements in its extended argument about why it believes it need not plead a nuisance or any actual harm.

Next, the rulemaking discussed the addition to § 201.141 of the prohibition against preventing the attainment or maintenance of any ambient air quality standard. The Board stated, "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." *In re Emission Standards*, R 71-23, slip op. at 4-301. Significantly, this regulation was adopted as part of the same rulemaking that adopted Illinois' regulations included in its first plan to implement the NAAQS for various pollutants, including SO_2. *Id.* at 4-329 to 337, 4-243 to 278. The timing of the adoption of this provision and the rulemaking language suggest that the State is charged with developing the emission standards to prevent nonattainment, and to the extent an action may be brought under § 201.141 for preventing the attainment or maintenance of a NAAQS, such a suit must be directed to failure to act in

[9] Sierra Club argues there are two separate categories of air pollution in 415 ILCS § 5/3.115 and that nuisance conditions are required only for suits brought under the second category (interference with the enjoyment of life or property). (*See* SC Br., pp. 32-36.) However, as explained above, case law and the § 201.141 rulemaking clearly support the conclusion that an allegation of nuisance conditions is necessary for any claim of air pollution to be brought in the absence of a violation of a numerical limit. In fact, Sierra Club does not cite to a single case in which a complaint has been brought and a case allowed to proceed based on an allegation of "air pollution" under § 9(a) or § 201.141 in the absence of both nuisance conditions and a violation of numerical limits established in regulations or permits.

accordance with or to interfere with the Illinois SIP. The subsequent 40 years of practice in Illinois support this view. The Board's explanation of its reasoning for adopting this provision further stated, "Because even the tightest emission standards cannot assure that emissions are clean enough to breathe, the unlimited proliferation of sources in a relatively small area could result in violations of the air quality standards even if each source met its emission standard." *Id.* This language suggests that the provision was trying to address "unlimited proliferation of sources" that could result in the violation of a NAAQS in an area that would otherwise be in compliance. Clearly, that is not what is happening or alleged with respect to the Stations. Additionally, after this rulemaking, the New Source Review program was adopted in 1977 under the Clean Air Act to directly address and prevent the proliferation of new sources so as to prevent the attainment or maintenance of a NAAQS. *See* Clean Air Act Amendments of 1977, 91 Stat. 685, P.L. 95-95.

Finally, the Board's discussion of this provision stated that "it is essential that whatever measures are necessary, subject to proof regarding economic reasonableness in the particular case, be taken to ensure that air quality standards are met," and in the next sentence noted that under certain circumstances "enforcement action may be undertaken." *Id.* at 4-302. Sierra Club quotes this language, but it focuses only on the last sentence and fails to understand or blatantly ignores the context and implications of these statements. These two statements, in back-to-back sentences, must be read together. When these sentences are properly construed, it is clear that the Board did not authorize an enforcement action whenever someone claims that such an action is necessary to "to ensure air quality standards." Instead, enforcement is "subject to proof regarding economic reasonableness in the particular case."[10]

[10] In this case, what Sierra Club argues establishes liability (exceedance of the "Necessary Limits") is also part of what Sierra Club seeks through enforcement (imposition of the "Necessary Limits"). As is clear from the Board's rulemaking, a necessary predicate to such

Of course, these statements were made more than 40 years ago, and it is not at all clear that the stated concerns at that time remain true today given the improvements to air quality and the proliferation of emission standards through the orderly NAAQS development and related SIP rulemaking processes since that time. Nor is it clear that the Board statements addressed private citizen actions, as opposed to state actions. Indeed, in adopting this language, the Board cited to "a corresponding provision respecting water quality standards," where enforcement was allowed only by IEPA. *In re Effluent Standards*, R 70-8, slip op. at 3-405 and 3-425 (Jan 6. 1972) (discussing and promulgating rule 402). In any event, to the extent a claim may still be brought when emission rule compliance is not enough, it is clear that any claim of "air pollution" must plead and satisfy the elements of a nuisance claim.

In an attempt to find support for its claims, Sierra Club also misplaces its reliance upon the actions against H. Kramer & Co. initiated by the Illinois Attorney General ("IL AG") and USEPA. These government allegations have no precedential value and, in any event, do not support Sierra Club's claims.

The IL AG complaint and USEPA Notice of Violation ("NOV") cited by Sierra Club (SC Br., Exhibits 1, 2.) are merely allegations. Such allegations do not establish the law and

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enforcement—even if these statements Sierra Club relies upon are relevant today—is for the Necessary Limits to be reasonable. Notably, reasonableness of action is a core element of any nuisance claim. *See, e.g. City of Chicago v. Commonwealth Edison Co.*, 321 N.E.2d 412, 418 (Ill. App. Ct. 1974) ("public nuisance is an unreasonable interference with a right common to the general public"); *Woods v. Khan*, 420 N.E.2d 1028, 1030 (1981) (holding that action must be substantial and either negligent or intentional and unreasonable to constitute a private nuisance and that an action is not unreasonable unless the gravity of the harm done to plaintiffs outweighs the utility of the defendants' business); *Gardner v. Int'l Shoe Co.*, 49 N.E.2d 328, 335 (Ill. App. Ct. 1943) *aff'd,* 386 Ill. 418, 54 N.E.2d 482 (1944) (citing 39 American Jurisprudence p. 280, §2) ("The term nuisance is applied to that class of wrongs which arise from the unreasonable, unwarrantable or unlawful use by a person of his own property and produces such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage.") To the extent these statements have any relevance today, the statements imply that nuisance conditions are necessary for such an action, which is consistent with the Board's earlier reference to nuisance claims, discussed above.

may, of course, be rejected by the Board. *See Citizens Against Ruining the Env't v. Envtl. Prot. Agency*, 35 F.3d 670 (7th Cir. 2008) (holding that contested allegations could not serve as a basis for demonstrating CAA violations). *See also*, *United States v. Midwest Generation, LLC*, 720 F.3d 644 (7th Cir. 2012) (7th Circuit upheld dismissal of complaint where government issued NOV for alleged CAA violations and asserted those same violations in a complaint). Neither the IL AG complaint nor the USEPA NOV ever resulted in a decision on the merits. The complaint resulted in an Agreed Preliminary Interim Injunction Order that never reached a decision on the merits, and the NOV eventually resulted in a Consent Decree, which was joined by the State of Illinois and under which H. Kramer & Co. denied liability to the United States and the State. *See* Agreed Preliminary Interim Injunction Order, *People v. H. Kramer & Co.*, No. 11-30560 (Ill. Cir. Ct. Sept. 2, 2011); Consent Decree, *United States v. H. Kramer & Co.,* No. 13-cv-771 (N.D. Ill. Jan. 31, 2013). The *H. Kramer & Co.* complaint and NOV are irrelevant.

Even assuming that the allegations should be considered here, the *H. Kramer & Co.* actions are distinguishable from the current action. They were filed by government agencies, asserted different claims in a different forum, and emerged from a very different fact pattern involving an alleged nuisance and emergency situation.

The allegations in the *H. Kramer & Co.* actions are very different from the allegations made by Sierra Club here. For example, the IL AG's complaint alleged actual harm based on the use of monitored data fingerprinted to an actual source. *See, e.g.*, Verified Complaint for Injunctive Relief and Civil Penalties at ¶¶ 16-17, 26, 31, 37-38, *People v. H. Kramer & Co.*, No. 11-30569 (Ill. Cir. Ct. Aug. 24, 2011) ("Verified Complaint") (alleging that lead from the H. Kramer facility caused "irritation and discomfort," "irritat[ion] [of] eyes, nose and throat," "difficulty in breathing" and "headaches" among other things and that lead emissions "unreasonably interfered with, and continue to unreasonably interfere with, the enjoyment of

life or property of citizens near the Facility" and alleging emissions measured at monitors could be traced to H. Kramer facility); Notice of Violation at ¶¶ 12-14, *In re H. Kramer & Co.*, EPA-5-11-IL-11 (Apr. 20, 2011) (alleging emissions at monitors could be traced to H. Kramer facility). In contrast, Sierra Club's Complaint fails to plead any actual injury to any human, plant, or animal life or any unreasonable interference with enjoyment of life or property as a result of emissions from MWG's Stations. Instead, Sierra Club's Complaint simply assumes injury to human health exists based upon a theoretical NAAQS exceedance determined through modeling that cannot be used to establish a NAAQS exceedance, as discussed above. Even if the modeling were relevant, the mere exceedance of a NAAQS by itself does not establish harm because a NAAQS is set to protect human health with an "adequate margin of safety." 42 U.S.C. § 7409(b)(1). Thus, alleging a NAAQS exceedance does not allege harm. Both the IL AG complaint and USEPA NOV against H. Kramer & Co. were based on over a year of actual monitored ambient air data collected from monitors the agencies placed at two nearby schools. Verified Complaint at ¶¶ 18-24, 27, *H. Kramer & Co.*, No. 11-30569; Notice of Violation at ¶¶ 11-14, *In re H. Kramer & Co.*, EPA-5-11-IL-11. Specifically, the alleged violations were based on a three-month rolling average of the lead concentrations measured at the monitors. Verified Complaint at ¶ 20, *H. Kramer & Co.*, No. 11-30569; Notice of Violation at ¶¶ 12-13, *In re H. Kramer & Co.*, EPA-5-11-IL-11. Both also alleged actual assessments that linked the observed exceedances at the monitors to the respondent and the claims of harm. *See, e.g.* Verified Complaint at ¶ 26, *H. Kramer & Co.*, No. 11-30569; Notice of Violation at ¶ 14, *In re H. Kramer & Co.*, EPA-5-11-IL-11.

In contrast, Sierra Club's Complaint does not include allegations of any actual monitored violations based on the applicable standard fingerprinted to a source. Instead, Sierra Club includes only vague allegations of theoretical exceedances based on modeling, not actual monitored data. Sierra Club blatantly disregards the elements of the NAAQS at

issue and the necessary use of monitored data to establish an exceedance.[11] Under Sierra Club's view, a theoretical, modeled NAAQS exceedance, standing alone, justifies the imposition of new, strict limits upon the MWG Stations to avoid a harm that Sierra Club has not pled. Sierra Club has failed to link emissions from MWG's Stations to air quality levels or to allege that air quality levels impacted by MWG's emissions have caused any harm in the areas impacted. In fact, Sierra Club has failed to identify what areas are impacted, which means that no one—not MWG, not the Board, and apparently not even Sierra Club—can identify who may have been exposed to such air quality, let alone who was harmed by it. In contrast, the IL AG and USEPA alleged such links in the Kramer case.

In addition, both USEPA and IEPA (upon whose request the IL AG filed its complaint, *see* Verified Complaint at ¶ 1, *H. Kramer & Co.*, No. 11-30569) are regulators that can seek court action and rely upon authorities that are unavailable to private citizens such as Sierra Club. For example, Illinois relied upon § 43(a) of the Act, which allows the State, but not private citizens, to institute a civil action for an injunction "to halt any discharge or other activity causing or contributing" to a "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." 415 ILCS § 5/43(a). The monitoring upon which the allegations were based was conducted at schools where children, who may be particularly harmed through exposure to lead, were present. Verified Complaint at ¶¶ 18-23, *H. Kramer & Co.*, No. 11-30569. Thus, unlike Sierra Club's Complaint against MWG, the IL AG's complaint in *H. Kramer & Co.* was an action instituted to protect Illinois' citizens against alleged "substantial danger," was filed in state court (not before the Board), and was a state action (not a private citizen action).

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[11] Sierra Club even goes so far as to say that, in addition to ignoring monitored data, it was not required to perform modeling prior to filing its complaint. (SC Br., n.1.)

The IL AG's complaint in *H. Kramer & Co.* included a nuisance claim and for all of its claims alleged actual harms that were attributable to the respondent's emissions. *See* Verified Complaint at ¶¶ 16-17, 31, 37-38, and Count IV, *H. Kramer & Co.*, No. 11-30569. As explained in MWG's previous briefing and above, Sierra Club has failed to plead any actual harm or injury that is attributable to MWG's emissions. (*See generally*, Compl.) Instead, all Sierra Club pleads is that SO_2 at some unspecified level causes health impacts (Compl. ¶ 6), with no allegation of what that level is or whether any actual health impacts have occurred that might give rise to an actual claim under §§ 9(a) or 201.141.

Ultimately, Sierra Club's authority is easily distinguishable and does not support its claims. Accordingly, its claims should be dismissed.

C. Sierra Club Continues to Misconstrue Whether Emissions from Other Sources May Be Considered to Support Its Claim Under § 201.141.

Sierra Club continues to confuse the disjunctive nature of § 201.141 and continues to support an improper interpretation of the plain language of this provision. The Complaint alleges that emissions or threatened emissions from MWG's Stations "in combination with contaminants from other sources" prevent the attainment of the 1-hr SO_2 NAAQS in violation of § 201.141. (Compl. ¶ 34.) Section 201.141 provides:

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

35 Ill. Adm. Code § 201.141 (emphasis added). As MWG explained in its previous brief, the phrase "alone or in combination with" applies only to the first part of this rule, *i.e.*, the "cause or tend to cause air pollution" portion of the rule. The third phrase—"to prevent the attainment or maintenance of any applicable ambient air quality standard"—addresses emissions from only a single source. This is because the rule repeats "or so as" between each

distinct element, thereby compartmentalizing the prerequisites for each type of allegation. Thus, to the extent a claim against a source based upon preventing the attainment or maintenance of an applicable ambient air quality standard is allowed, that source must be the sole cause of the alleged violation. Sierra Club's Response Brief asserts that each of the Stations, except Will County would "exceed the NAAQS" even without adding background concentrations (*i.e.*, other contributors). (SC Br., p. 6.) In other words, even based on its own assessment, the Will County plant it not the sole cause of the alleged nonattainment. Therefore, Sierra Club plainly admits that it in no way has a claim concerning the Will County Station under § 201.141. More importantly, however, regardless of what Sierra Club says in its Response Brief, it cannot use that brief to amend its Complaint. *Estate of Powell ex rel. Harris v. Wunsch*, 989 N.E.2d 627, 633 (Ill. App. Ct. 2013) *appeal allowed,* 996 N.E.2d 23 (Ill. 2013) and *appeal allowed,* 996 N.E.2d 12 (Ill. 2013) (holding that a decision on a motion to dismiss may "consider only facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record.") (internal quotations omitted). The allegations in the Complaint allege that MWG's Stations prevent the attainment of the 1-hr SO_2 NAAQS "in combination with contaminants from other sources" and Sierra Club's § 201.141 claim must, therefore, fail.

D. Sierra Club's Complaint Lacks Adequate Specificity.

Sierra Club does not adequately address the failure of its Complaint to meet the pleading requirements of 415 ILCS § 5/31(c) (requiring complaint to identify "provision of Act, rule, regulation, permit, or term or condition thereof under which such person is said to be in violation and a statement of the manner in and the extent to which such person is said to violate the Act, rule, regulation, permit, or term or condition thereof.") and 35 Ill. Adm. Code § 103.204 (requiring any complaint to specify the "dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute

violations"). The Board has explained that a complaint "must be sufficiently clear and specific to allow preparation of a defense." *Lloyd A. Fry Roofing v. Pollution Control Board*, 314 N.E.2d 350, 354 (Ill. App. Ct. 1974); 35 Ill. Adm. Code § 103.204(c). Sierra Club's Response Brief essentially ignores the § 103.204 requirements and tries to assert that its facts as pled are sufficient by citing to *Sierra Club v. Midwest Generation, LLC*, PCB 13-15 (Oct. 3, 2010). However, that case did not address the pleading requirements in 35 Ill. Adm. Code § 103.204 that are at issue here. *See Sierra Club*, PCB 13-15, slip op. at 25-27. Rather, that opinion addressed whether Sierra Club had to plead as an element of its open dumping claim facts showing that ash ponds constituted open dumps. *Id.* at 8, 25-27. Sierra Club continues to say that MWG is asking that Sierra Club plead more than what the Board has required in the past. In support of this statement, Sierra Club mis-cites to pages 10-11 of the *Sierra Club*, PCB 13-15, order for a quote that does not appear in that order. That quote appears to come from an unrelated Board decision, *Schilling v. Hill*, PCB 10-100, slip op. at 10 (Nov. 4, 2010). (SC Br., p. 31.) Regardless, the *Schilling* case is also distinguishable. That case related to water claims for contamination of a pond where "complainants would be hard pressed . . . to provide exact dates for when pollution occurred in their pond," because the activities causing the pollution and the time the pollution actually entered complainants' property "are likely to differ." Unlike the present case, in *Schilling*, complainants' pleading identified actual, not theoretical, instances of violation, pointed to the location where the alleged pollution occurred (*i.e.*, on complainants property, in their pond), and pointed to actual consequences (*i.e.*, harm) arising from the alleged violations (*e.g.*, death of aquatic life, flooding, silting, an inundation of complainants' property among other consequences). *Id.* at 2-3, 10-11. Similarly, while it ultimately was not at issue in the *Sierra Club* decision discussed above, complainant in *Sierra Club*, PCB 13-15, pled "the extent of contamination by date, pollution and monitoring well." PCB 13-15, slip op. at 11. As explained below,

Sierra Club's Complaint against MWG does not rise to the level of pleading required by the Act and the Board's rules.

Sierra Club tries to ignore or diminish the deficiencies in its pleading. For example, Sierra Club asserts that it does not need to identify the locations of the nonattainment it alleges in its Complaint because the "location of the violation" is the stacks at the Stations. (SC Br., p. 30.) However, Sierra Club is alleging a violation of preventing ambient air quality, not a violation of emissions at the point of discharge from the Stations' stacks. "Ambient air means that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50.1(e); 35 Ill. Adm. Code § 201.102 ("that portion of the atmosphere external to buildings comprising emission sources"). Thus, Sierra Club needs to plead not only where the alleged emissions are coming from, but also the ultimate fact of where the alleged violation of ambient air quality is taking place. Absent that, MWG cannot prepare a defense to refute those supposed allegations. As another example of its deficient pleading, Sierra Club fails to address that its claims are based on theoretical violations that "could" occur based on some nebulous modeling. (*See, e.g.*, Compl. ¶ 22.)

For all of these reasons, as well as those set forth in MWG's Brief, Sierra Club's Complaint does not adequately plead claims under §§ 9(a) or 201.141 and must be dismissed.

III. SIERRA CLUB MISCONSTRUES ILLINOIS JOINDER LAW.

Sierra Club misconstrues Illinois law in its Response Brief to avoid the fundamental due process principle that joinder of certain necessary parties to an action is required and an order entered in the absence of such parties is null and void. *See, e.g. Moore v. McDaniel*, 362 N.E.2d 382, 386 (Ill. App. Ct. 1977); *Safeway Ins. Co. v. Harvey*, 343 N.E.2d 679, 682 (Ill. App. Ct. 1976). When there is failure to join such parties, a case must be dismissed. *See Ragsdale v. Superior Oil Co.*, 237 N.E.2d 492, 494-495 (Ill. 1968). Perhaps because it could find no way to distinguish this case, Sierra Club misconstrues the Court's holding in

Ragsdale. (SC Br., p. 22.) The decision clearly upholds the judgment of the circuit court, which "held that all of the mineral leasehold owners were necessary and indispensable parties and dismissed on th[e] ground" of those parties not being named. *Ragsdale*, 237 N.E.2d at 494. The Board's joinder rules suggest there are instances where joinder is mandatory, but the rules do not enumerate those circumstances. *See* 35 Ill. Adm. Code 101.403(b). In this instance, relying on the Illinois Code of Civil procedure and case law interpreting those rules is appropriate. *See* 35 Ill. Adm. Code § 101.100(b) (Board may look to Illinois Code of Civil Procedure for guidance where Board's procedural rules are silent); *In re Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130*, R 00-20 (Dec. 21, 2000) (noting Board's joinder rules closely mirror Illinois joinder rules).

Sierra Club cites to a federal case to argue that the necessary joinder in this case is discretionary rather than required. (SC Br., p. 20.) However, Illinois law clearly commands the opposite conclusion. Illinois courts have enumerated three reasons to consider a party "necessary" such that a lawsuit ought not to proceed in the party's absence: (1) to protect an interest which the absentee has in the subject matter of the controversy which would be materially affected by a judgment entered in his absence; (2) to protect the interests of those who are before the court; or (3) to enable the court to make a complete determination of the controversy. *Holzer v. Motorola Lighting, Inc.*, 693 N.E.2d 446, 452 (Ill. App. Ct. 1998). If a party falls within either of the first two categories, joinder is mandatory. *Id.* at 452-56. Joinder of parties that fall into the third category is "desirable" but "should not operate to foreclose the plaintiffs' right to a forum, at least where a better one is not clearly available." *Id.* (*citing Safeco Ins. Co. of Illinois*, 606 N.E.2d 379, 382 (Ill. App. Ct. 1992) (citing 735 ILCS 5/2-406(a) (West 1994))). These categories mirror the Board's categories under 35 Ill. Adm. Code § 101.403. Thus, joinder is clearly required here in the presence of the first two categories. Additionally, as discussed above, Plaintiff has a better forum in which to bring its

present concerns, by public participation in the SIP process; accordingly, joinder is should be required in this instance even under the third category.

Illinois law does not follow the same linguistic distinction between "necessary" and "indispensable parties" as federal law. Illinois case law recognizes that federal law distinguishes between necessary and indispensable parties. *Safeco Ins. Co. of Illinois*, 606 N.E.2d at 381 (*citing Shields v. Barrow*, 58 U.S. 130 (1855)). However, "Illinois never adopted the term 'indispensable party,' using only the term 'necessary' in referring to the joinder of a party." *Id.* The Illinois Code of Civil Procedure uses the term "necessary" in discussing the joinder of required defendants without whom a matter may not proceed (*i.e.*, those that would be called "indispensable" in the federal court context). *Id.* Consequently, the legal effect of a judgment rendered without jurisdiction over a "necessary party" whose presence is required under Illinois law is the same as the result for failure to join an indispensable party under federal law—the order is null and void. *See Zurich Ins. Co. v. Baxter Int'l Inc. ("Zurich I")*, 655 N.E.2d 1173, 1178 (Ill. App. Ct. 1995); *Safeway Ins. Co.*, 343 N.E.2d at 682. *See, e.g.*, *Tri-Mor Bowl, Inc. v. Brunswick Corp.*, 51 Ill. App. 3d 743, 9 Ill. Dec. 430, 366 N.E.2d 941 (Ill. App. Ct. 1977) (reversing the circuit court and finding the decision null and void for failing to join a necessary party). Semantics aside, even the federal case Sierra Club cites notes that if a court cannot "in equity and good conscience, proceed without [a] party . . . the court must dismiss the case." *Eljer Indus., Inc. v. Aetna Casualty & Surety Co.*, No. 93-4320, 1994 U.S. Dist. LEXIS 6167, *8 (May 9, 1994).

Joinder of IEPA, USEPA and various emission sources is required before the Board can proceed with this case. IEPA must be joined because its interests in its ongoing SO_2 SIP development, including rulemaking efforts, may be impacted by this action, including because IEPA is independently assessing what emission limitations should be imposed on which MWG Stations—the very relief sought in this action—and other emission sources.

USEPA has a clear and significant interest in nonattainment determinations, such as those being sought from the Board here. And other emission sources are necessary parties because if they are not joined, the MWG Stations may bear a disproportionate share of the attainment burden in this state and emission limits on other sources may not fairly reflect their contribution.

Such joinder, however, is not feasible. First, the doctrine of sovereign immunity precludes joinder of USEPA in this state proceeding. *See, e.g., Sauget v. IEPA*, PCB 86-63 (June 5, 1986). Second, the joinder of other affected emission sources is not feasible. Identifying all of the emission sources, including mobile sources, that contribute to any identified nonattainment would be very difficult, if not impossible for Sierra Club. This should be no surprise because that is precisely the analysis IEPA is presently undertaking through the well-established NAAQS implementation process.

Sierra Club asserts that joinder of other sources is not required, relying upon other cases heard by the Board without joinder of additional contributing pollution sources. (SC Br., p. 24.) Of the three cases upon with Sierra club relies, only one even mentions the presence of other pollution sources. *Marblehead Lime Co. v. Pollution Control Board*, 355 N.E.2d 607, 612 (Ill. App. Ct. 1976). One citation is to a complaint that has not yet reached final disposition before the Board, Complaint, *People v. Alpena Vision Resources, LLC*, PCB 13-16, and that complaint along with the third case, *People v. IBP, Inc.*, 723 N.E.2d 370 (Ill. App. Ct. 1999), do not mention other potentially contributing pollution sources. Moreover, all three cases are based on § 9(a) or 201.141 "air pollution" claims; none deals with an allegation that a source caused or contributed to a NAAQS exceedance or prevented the attainment or maintenance of a NAAQS under § 201.141 or interfered with an ongoing regulatory process that will impact multiple sources.

Sierra Club further cites to *Zurich I* for the proposition that, under Illinois law, joinder is not required if doing so would destroy a court's jurisdiction or if a party is not amenable to the court's jurisdiction. (SC Br., p.22.) However, Sierra Club ignores that the Illinois Supreme Court rejected that portion of *Zurich I* on appeal: "[T]he appellate court's discussion of necessary parties in mass-tort litigation cannot stand and is of no precedential value." *Zurich Ins. Co. v. Baxter Int'l, Inc.*, 670 N.E.2d 664 (Ill. 1996). Rather, the only exception to the necessary party rule appears to be the "doctrine of representation," which allows a court to retain jurisdiction over remaining parties when a necessary party cannot be joined if (1) joinder is practically impossible and (2) others can adequately protect the interests of the absent party. *Oglesby v. Springfield Marine Bank*, 52 N.E.2d 1000, 1004-05 (Ill. 1944); *Crum & Forster Specialty Ins. Co.*, 873 N.E.2d 964, 974-75 (Ill. App. Ct. 2007); *United Nat. Ins. Co. v. Luckey*, 2011 WL 8106401, at *4-5 n.5 (Ill. Cir. Ct. 2011). Here, joinder is practically impossible, but Sierra Club in no way has the same interests as or can adequately protect the interests of other sources, IEPA, or USEPA.

Because Sierra Club cannot join the necessary parties, this case must be dismissed.

CONCLUSION

Sierra Club's response mischaracterizes the true substance of its claims and ignores the significant legal and practical implications of those claims. Sierra Club's obfuscation cannot hide the fact that it is impermissibly attempting to directly enforce the 1-hr SO_2 NAAQS and, if allowed to do so, would interfere with the clear regulatory roles of USEPA and IEPA. Further, the asserted claims are constitutionally infirm. Even if these types of claims could in the right case be legitimate and even if the Board had authority to grant the relief requested, as asserted here the claims fail because necessary parties are not joined and the claims are premature, lack necessary elements, and fail to state a cause of action under §§ 9(a) and 201.141. For these and other reasons discussed in Midwest Generation, LLC's

Memorandum in Support of its Motion to Dismiss and this Reply in Support of Midwest Generation, LLC's Motion to Dismiss, MWG respectfully requests that this Board dismiss the Complaint.

Respectfully submitted,

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Dated: March 28, 2014

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 28th day of March, 2014, I have served electronically the attached **RESPONDENT MIDWEST GENERATION, LLC'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS**, upon the following persons:

John Therriault, Assistant Clerk
Bradley Halloran, Hearing Officer
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and by first class mail, postage affixed, upon:

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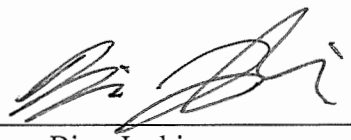

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