ILLINOIS POLLUTION CONTROL BOARD
January 8, 2015

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

OPINION AND ORDER OF THE BOARD (by J.D. O'Leary):

On December 17, 2012, Sierra Club filed a two-count complaint alleging that Midwest Generation (MWG) had violated Section 9(a) of the Environmental Protection Act (Act) (415 ILCS 5 (2012)) and Section 201.141 of the Board's air pollution regulations (35 Ill. Adm. Code 201.141). Sierra Club alleges that violations occurred at four coal-fired power plants owned and operated by MWG: Joliet #9 and #29 (Joliet) in Joliet, Will and Kendall Counties; Powerton Generating Station (Powerton) in Pekin, Tazewell County; Waukegan Generating Station (Waukegan) in Waukegan, Lake County; and Will County Generating Station (Will County) in Romeoville, Will County (collectively, MWG plants).

This enforcement action was stayed for a number of months by MWG's filing of a Chapter 11 bankruptcy petition. After the automatic stay was lifted, MWG on February 18, 2014, filed a motion to dismiss the complaint as frivolous. The Board has also received Sierra Club's response and MWG's reply. For the reasons below, the Board today denies the motion to dismiss in its entirety and accepts the complaint for hearing. MWG has 60 days from the date of this order to file an answer.

Below, the Board first provides the procedural history of this case and then addresses two preliminary matters. Next, the Board summarizes Sierra Club's complaint, MWG's motion to dismiss, Sierra Club's response, MWG's reply, Sierra Club's notice of supplemental authority, and MWG's response to the notice. The Board then sets out the applicable legal framework, including background on citizens' enforcement, the standard of review of motions to dismiss, and statutory and regulatory authorities. Finally, the Board analyzes and rules upon the dismissal motion and determines whether Sierra Club's complaint can be accepted for hearing.

PROCEDURAL HISTORY

On December 17, 2012, Sierra Club filed a two-count citizen's enforcement complaint (Comp.) alleging air pollution violations of the Act and the Board's air pollution regulations by MWG. Attached to the complaint was an Appendix A entitled "Hours When Emissions Exceeded the Levels Necessary to Prevent Causing or Threatening to Case Violations of the 1-Hour SO_2 NAAQS [National Ambient Air Quality Standard]." Also accompanying the

complaint was a request by David C. Bender to appear *pro hac vice* on behalf of Sierra Club. On December 31, 2013, Sierra Club filed proof of service on MWG.

On December 19, 2012, Sierra Club filed a suggestion of bankruptcy informing the Board that MWG filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code on December 17, 2012. On January 3, 2013, MWG filed a suggestion of bankruptcy stating that Edison Mission Energy and subsidiaries and affiliates including MWG had filed for bankruptcy under Chapter 11 on December 17, 2012.

On February 7, 2013, the Board issued an order recognizing that this proceeding had been stayed by operation of federal law through the filing of MWG's Chapter 11 bankruptcy petition. The Board accordingly did not accept the complaint for hearing or rule on the request of David C. Bender to appear *pro hac vice*. The Board directed the parties to make any appropriate filings to notify the Board within 30 days after the automatic stay expires. On December 13, 2013, MWG filed a notice that the U.S. Bankruptcy Court had lifted the automatic stay for this proceeding on November 13, 2013.

On February 18, 2014, MWG filed a motion to dismiss and memorandum in support of the motion (Memo.). On March 14, 2014, Sierra Club filed its memorandum in response to the motion (Resp. Dis.). On March 28, 2014, MWG filed its reply (Reply Dis.).

On October 20, 2014, Sierra Club filed a Notice of Supplemental Authority in Response to Midwest Generation, LLC's Motion to Dismiss (Not.). On November 3, 2014, MWG filed a response to the notice of supplemental authority (Resp. Not.).

PRELIMINARY MATTERS

Pro Hac Vice Appearance

On December 17, 2012, the Board received a request from David C. Bender to appear *pro hac vice* on behalf of Sierra Club in this matter. Mr. Bender's request states that he is licensed and registered to practice before the bar of the State of Wisconsin.

The motion to appear *pro hac vice* was filed pursuant to Section 101.400(a)(3) of the Board's procedural rules (35 Ill. Adm. Code 101.400(a)(3)). Under this provision, the Board has allowed out-of-state attorneys (*i.e.*, not licensed and registered in the State of Illinois) to appear before the Board in particular proceedings if the out-of-state attorney's *pro hac vice* motion represents that the attorney is licensed and registered to practice law in another state. *Id*. The Illinois Supreme Court, however, recently overhauled the process for permitting out-of-state attorneys to appear *pro hac vice* in Illinois by amending its Rule 707. Ill. S. Ct. R. 707 (eff. July 1, 2013).

The Supreme Court's amended Rule 707 applies to cases "before an agency or administrative tribunal of the State of Illinois . . . if the representation by the out-of-state attorney constitutes the practice of law in Illinois or the agency or tribunal requires that a representative be an attorney." Ill. S. Ct. R. 707(c)(3). The Board, an agency and administrative tribunal of the

State of Illinois (415 ILCS 5/5 (2012)), has long held that its adjudicatory proceedings involve the practice of law. *See, e.g.*, Petition of Recycle Technologies, Inc. for an Adjusted Standard from 35 Ill. Adm. Code 720.131(c), AS 97-9, slip op. at 3-5 (July 10, 1997); *see also* Stone Street Partners, LLC v. City of Chicago Dept. of Admin. Hrgs., 2014 IL App (1st) 123654, ¶ 15 (City of Chicago administrative hearings, like judicial proceedings, entail admission of evidence and examination of sworn witnesses, "all of which clearly constitute the practice of law"). Further, under the Board's procedural rules, though an individual may represent himself or herself, a party other than an individual must be represented by an attorney. 35 Ill. Adm. Code 101.400(a)(2), (a)(3). The Board therefore finds that Rule 707 applies to adjudicatory proceedings before the Board.

For Mr. Bender to represent Sierra Club, he must comply with Supreme Court Rule 707. His motion to appear *pro hac vice* does not mention Rule 707. The Rule establishes a procedure by which "an eligible out-of-state attorney . . . is permitted to appear as counsel and provide legal services in the proceeding *without order of the tribunal*." Ill. S. Ct. R. 707(a) (emphasis added). Under these circumstances, the Board denies the pending *pro hac vice* motion. The Board plans to propose amendments to its procedural rules to reflect the Supreme Court's changes to Rule 707. *See* Procedural Rule Amendments to Requirements for Out-of-State Attorneys and Service of Filings: Proposed Amendments to 35 Ill. Adm. Code 101, R15-9 (Aug. 19, 2014) (reserving rulemaking docket for substantive filing). In the meantime, the Board will permit out-of-state attorneys to appear *pro hac vice* in an adjudicatory proceeding only if they comply with Rule 707.

As an out-of-state attorney seeking to represent Sierra Club, Mr. Bender may file a new appearance with the Board. An appearance must include the out-of-state attorney's representation that he or she is in, and will maintain throughout the proceeding, compliance with Rule 707. One requirement of Rule 707 is "the filing of an appearance of an active status Illinois attorney associated with the [out-of-state] attorney in the proceeding." Ill. S. Ct. R. 707(a). Therefore, each out-of-state attorney's appearance must identify the active status Illinois attorney with whom the out-of-state attorney is associated in this proceeding, as well as the date on which the active status Illinois attorney filed an appearance.

In this case, Sierra Club's filings include not only Mr. Bender's signature block but also those of Illinois attorneys who appear to be active status Illinois attorneys. A more recent filing also includes an Illinois registration number for Mr. Bender. It may be, then, that Mr. Bender has already complied with Rule 707. Nonetheless, his representation of compliance with Rule 707 is required to the extent he seeks to represent Sierra Club in this proceeding.

Sierra Club's Notice of Supplemental Authority

MWG urges the Board to "disallow and disregard" Sierra Club's notice of supplemental authority on the ground that it amounts to a "tardy brief" filed without leave. Resp. Not. at 1. MWG adds that the four court decisions the notice "purports to summarize" are "completely irrelevant" to resolution of the motion to dismiss. *Id.*

The Board notes that, as MWG maintains, the notice, submitted nearly seven months after the motion to dismiss was fully briefed, does not request leave to be filed. Nor does the notice cite any provision of the Board's procedural rules or the Illinois Code of Civil Procedure or Supreme Court Rules, to which the Board may look for guidance when the procedural rules are silent. *See* 35 Ill. Adm. Code 101.100(b). Moreover, the notice is not limited to summarizing the cited court decisions, but includes argument on the issues to which Sierra Club claims the cited cases are relevant. *See* Not. at 1-2. Under the circumstances, the Board agrees with MWG that Sierra Club should have filed a motion for leave to file the notice.

Nevertheless, the Board declines to strike or disregard the notice. The notice is brief and its arguments limited. Moreover, MWG took the opportunity to respond to the notice, and the Board will consider the response along with the notice. *See* Resp. Not. at 1-3.

The Board summarizes the notice and MWG's response to it below, after the other filings.

SUMMARY OF SIERRA CLUB'S COMPLAINT

Allegations of Violation

Sierra Club alleges that in 2010 the United States Environmental Protection Agency (USEPA) established a more stringent NAAQS for sulfur dioxide (SO_2) after determining that the existing standard was inadequate to protect human health. Comp. at 3 (¶7), citing 75 Fed. Reg. 35520 (June 22, 2010). Sierra Club reports that USEPA established a new one-hour standard of 75 parts per billion (ppb) or 196 micrograms per cubic meter ($\mu g/m^3$) of air. Comp. at 3 (¶7), citing 75 Fed. Reg. 35546-48 (June 22, 2010). Sierra Club claims that the 2010 1-hour NAAQS "seeks to prevent spikes in short term concentrations of SO_2 in the air by preventing concentrations above 75 ppb in the highest 1-hour period of the day, and determines compliance based on the 4th highest such period each year." Comp. at 4 (¶8).

Based on statutory definitions, Sierra Club alleges that "[a] violation of Section 9(a) of the Act occurs when a person either emits or threatens to emit a contaminant in a concentration that would injure human, plant or animal life or interfere with enjoyment of life or property, or when a person violates a regulation or standard adopted by rule." Comp. at 4 (¶13), citing 415 ILCS 5/9(a) (2012). Sierra Club claims that, "[b]ecause the USEPA established the 1-hour SO_2 NAAQS at a level necessary to protect human health and welfare, emissions by any person . . . that cause or threaten to cause violations of the NAAQS violate Section 9(a)." Comp. at 5 (¶14). Sierra Club further claims that "SO_2 emissions threaten to cause violations of the NAAQS when they are emitted in amounts that ambient air impact analysis, such as a computer dispersion model, shows that the NAAQS could be violated." *Id.* (¶15).

Sierra Club states that Section 201.141 of the Board's air pollution regulations prohibits any person from causing, threatening, or allowing "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." Comp. at 5 (¶16),

citing 35 Ill. Adm. Code 201.141. Sierra Club claims USEPA promulgated the 1-hour SO_2 NAAQS under the Clean Air Act and that it is an "applicable ambient air standard" under Section 201.141. Comp. at 5 (¶18). Sierra Club further claims that Section 201.141 "is violated by emitting SO_2 in amounts that, together with the emissions from other sources, are demonstrated to either cause or threaten a violation of the 1-hour SO_2 NAAQS, or amounts that threaten to prevent the maintenance of that NAAQS." Comp. at 5 (¶19). Sierra Club alleges that "MWG's SO_2 emissions and threatened emissions of SO_2 are in such amounts that they would cause, and threaten to cause, violations of the 1-hour SO_2 NAAQS. Therefore, they violate Section 9(a) of the Act and 35 Ill. Adm. Code § 201.141." Comp. at 6 (¶20).

Sierra Club states that MWG's plants "have permitted SO_2 emission limits of 1.8 pounds of SO_2 per million Btus [British Thermal Units] of heat input (lb/MMBtu)." Comp. at 6 (¶21). Sierra Club claims that, if the sulfur content of the coal used in the plants is high enough, the plants "could exceed" these permitted rates. *Id*. Sierra Club argues that, because the 1.8 lb/MMBtu limits applies on a basis longer than one hour, emissions in a particular hour can "vastly exceed" that permitted limit. *Id*. (¶22). Sierra Club alleges that MWG's SO_2 emissions threaten a violation of the 1-hour SO_2 NAAQS even at the permit limit of 1.8 lb/MMBtu. *Id*. Relying on results of computerized dispersion modeling, Sierra Club claims that MWG's SO_2 emissions threaten a violation of the 1-hour SO_2 NAAQS without considering emissions from other sources. *Id*. (listing threatened concentrations from 398.8 to 819.5 $\mu g/m^3$ at four MWG plants).

Considering what it describes as minimum background concentrations of SO_2 in the vicinity of the four MWG plants, Sierra Club alleges that MWG threatens to cause concentrations of SO_2 exceeding the NAAQS in areas downwind from them. Comp. at 7 (¶¶23, 24) (listing modeled concentrations from 433.6 to 850.5 $\mu g/m^3$). Sierra Club further alleges that the "reported maximum 1-hour coincidental emission rate at each plant" also threatens violation of the 1-hour SO_2 NAAQS. *Id*. (¶¶25, 26) (listing threatened concentration from 212.5 to 586.5 $\mu g/m^3$ at four MWG plants).

Sierra Club claims that ambient air quality monitoring is not sufficient to identify all Illinois locations "where existing sources are causing violations of the 1-hour SO_2 NAAQS." Comp. at 8 (¶27). Sierra Club cites USEPA's statement that modeling is an appropriate method to assess "short-term ambient SO_2 concentrations in areas with large point sources." Comp. at 8 (¶27), citing 75 Fed. Reg. 35551-70 (June 22, 2010).

Sierra Club asserts that "emissions from the plants must be limited to the rate that, together with contributions from other pollution sources, does not result in SO_2 concentrations that exceed the 1-hour SO_2 NAAQS." Comp. at 8 (¶28). Sierra Club relies on computer dispersion modeling of the MWG plants to propose hourly emission rates (in lbs/hour) for each plant "to ensure that the 1-hour SO_2 standard is met." *Id*. at 8-9 (¶28) (listing "Necessary Limits").

Sierra Club alleges that "MWG has [emitted] and will continue to emit and threaten to emit SO_2 in amounts that cause violations of the 1-hour SO_2 NAAQS, or prevent maintenance of the NAAQS in the areas downwind from the plants." Comp. at 9 (¶29). Sierra Club further

alleges that MWG emitted SO_2 in 2011 "in amounts that exceed the maximum pounds per hour set forth in Appendix A. . . ." *Id*. Sierra Club claims that, although data for 2012 were not available on the date of its filing, "[a]dditional violations likely occurred in 2012." *Id*.

Count 1

Count 1 alleges that MWG, by emitting SO_2 in amounts exceeding those proposed as Necessary Limits, "causes, threatens, or allows 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, which are set to protect human health and the environment, and therefore causes or tends to cause air pollution in violation of Section 9(a) of the Act." Comp. at 10 (¶32), citing 415 ILCS 5/9(a) (2012).

Count 2

Sierra Club alleges that, "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, MWG cause, threatens, or allows emissions that violate 35 Ill. Adm. Code § 201.141, in violation of Section 9(a) of the Act." Comp. at 10-11 (¶34), citing 415 ILCS 5/9(a) (2012).

Other Pending Proceedings

The complaint includes a paragraph concerning "several" other Board proceedings in which MWG is purportedly involved, including a variance and permit appeals. Comp. at 9-10 (¶30) (citations omitted). While Sierra Club acknowledges that some of these may generally involve the same plants and the issue of SO_2 emissions, it states its understanding that none involve 1-hour SO_2 impacts or the regulations at issue in this case." *Id*. at 10. Sierra Club notes that MWG is "the Defendant/Appellee in United States v. Midwest Generation, LLC, Docket No. 12-1026 (7th Cir.). That case involves alleged unpermitted illegal modifications made to some of the same power plants at issue here, and resulting violations of emission standards, but Sierra Club understands it does not involve the 1-hour SO_2 NAAQS or the regulations at issue here. *Id*. at 10.

Relief Requested

Sierra Club requests that the Board "[a]uthorize" a hearing in this matter; find that MWG has violated the Act and regulations as alleged in the complaint; impose a civil penalty under Section 42 of the Act (415 ILCS 5/42 (2012); order MWG to "[c]ease and desist from emissions that, alone or in combination with emissions from other sources, cause or threaten to cause violations of the 1-hour SO_2 NAAQS," "[l]imit SO_2 emissions to the hourly rates determined necessary to prevent any violation of the 1-hour SO_2 NAAQS," and "[f]urther reduce SO_2 emissions to offset unlawful past SO_2 emissions" (415 ILCS 5/33 (2012)); and grant other relief the Board deems just and proper. Comp. at 11.

SUMMARY OF MWG's MOTION TO DISMISS

MWG moves to dismiss Sierra Club's complaint as frivolous, both because it requests relief the Board lacks authority to grant and because it fails to state a cause of action on which the Board could grant relief. Memo. at 14-44. According to MWG, the complaint is frivolous because the complaint seeks to "usurp authorities" reserved for USEPA and IEPA and because "Sierra Club can plead no set of facts that would entitle it to the relief it seeks." *Id*. at 14.

Board Authority

MWG first argues that the complaint seeks relief that would require the Board to perform duties and functions assigned to other entities. Memo. at 15-29. According to MWG, the Board is not authorized to make nonattainment designations under the 1-hour SO_2 NAAQS or develop source-specific emission limitations to bring any Illinois nonattainment areas into attainment. *Id.* at 15-25. Even if it had such authority, MWG adds, the Board could not grant the requested relief without joining necessary parties to this proceeding. *Id.* at 25-29.

Nonattainment Designations

MWG argues that "[t]he Complaint essentially asks the Board to make nonattainment designations," an authority the Clean Air Act (CAA) grants only to USEPA. Memo. at 16, citing 42 U.S.C. §§ 7407, 7502; Comp. at 10-11. MWG also argues that in Illinois, the Illinois Environmental Protection Agency (Agency) and not the Board or Sierra Club has authority to propose nonattainment area boundaries to USEPA. Memo. at 17, citing 415 ILCS 5/4 (2012). MWG further argues that the complaint essentially asks the Board to determine that its four generating stations "are causing or contributing to those areas that have been designated nonattainment," an authority the Act grants only to the Agency. Memo. at 16, citing 415 ILCS 5/4 (2012); Comp. at 10-11.

MWG asserts that, at the time Sierra Club filed the complaint, "USEPA had not designated any area in Illinois as nonattainment." Memo. at 16. MWG notes that USEPA has since designated two nonattainment areas in Illinois, and that only two of the four MWG plants are within either area. *Id*. at 16-17. MWG argues that the complaint does not clarify "whether those areas coincide, in whole or in part, with the areas that are the subject of the Complaint." *Id*. at 17. According to MWG, if granted, the requested relief would require the Board to determine which nonattainment areas are at issue and potentially to identify other areas as nonattainment, and to find that its stations are contributing to that nonattainment. *Id*.

MWG states that the Agency has proposed nonattainment designations based on monitoring data and that USEPA has addressed that submission. Memo. at 18, citing 78 Fed. Reg. 47199 (Aug. 5, 2013). MWG notes that USEPA intends to base additional nonattainment designations on modeling data, although its modeling guidance for those designations is not yet final. Memo. at 18. MWG adds that to the extent USEPA makes additional designations based on modeling, the Agency has "the authority to determine which sources are contributing to the nonattainment areas as part of its duties to develop a SIP [State Implementation Plan] to achieve compliance with the NAAQS." *Id*., citing 415 ILCS 5/4 (2012). MWG argues that by relying

on its own modeling data to conclude that each of the four stations causes or contributes to a nonattainment area, Sierra Club attempts to usurp the statutory authority of USEPA and the Agency. Memo. at 18.

MWG notes that Sierra Club may participate in the "public participation process" on the designation of nonattainment areas for the SO_2 NAAQS, but may not make such designations itself or "ask the Board to do so." Memo at 19, citing 42 U.S.C. § 7407; 78 Fed. Reg. 11124 (Feb. 15, 2013). MWG also asserts that Sierra Club can pursue a legal challenge against USEPA if it "believes USEPA is not fulfilling its duty to make nonattainment designations. Memo. at 19, citing 42 U.S.C. § 7604.

Developing Emission Limitations

Noting that Sierra Club's requested relief includes emission limitations and reductions, MWG argues that only the Agency "has statutory authority to develop emission limits that may be necessary to achieve compliance with a NAAQS in Illinois." Memo at 20, citing 42 U.S.C. § 7407(a); Comp. at 11. MWG maintains that the Agency's authority to develop a SIP includes "the authority to determine source-specific SO_2 limitations that may be required to help an area achieve a NAAQS . . . ." Memo. at 21, citing 42 U.S.C. §§ 7410, 7514; 415 ILCS 5/4(b), 4(j). 4(l), 28.5 (2012). MWG further states that the Agency may then propose those emission limitations to the Board for adoption through the statutory rulemaking process. Memo. at 21, citing 415 ILCS 5/5, 28.5 (2012); 35 Ill. Adm. Code 102. MWG claims that the Agency would be required as part of the rulemaking process to provide technical and economic support for its proposed rule. Memo. at 21. MWG adds that the Agency would submit any rules adopted by the Board to USEPA as the attainment demonstration for the NAAAQS. Memo. at 22-23. MWG contends Sierra Club is not entitled, however, to raise in this enforcement proceeding any "issues it might have" with the NAAQS implementation process under the CAA. *Id.*

In addition, MWG maintains that granting Sierra Club's requested relief "would improperly deprive the public of the right to comment on proposed emission limitations designed to attain or maintain NAAQS." Memo. at 23. It would also, according to MWG, "contort existing law and practice by allowing Sierra Club to force emission limitations on a few sources in this enforcement action." *Id*. MWG asserts that Sierra Club's interest in speedier action than the established implementation process provides "cannot override the law." *Id*. at 24.

Sierra Club Federal Litigation

MWG argues that Sierra Club filed in 2013 federal-court challenges to "USEPA's failure to timely make nonattainment designation for the 1-hour SO_2 NAAQS," and is, therefore, "well aware that rulemaking, not enforcement against a single company, is the proper process to address nonattainment concerns." Memo. at 24, citing Sierra Club v. USEPA, Docket No. 13-1262 (D.C. Cir.); Sierra Club v. McCarthy, Docket No. 13-3953 (N.D. Cal.). MWG states that in the latter case, Sierra Club has admitted that it "does not, and cannot, ask [the court] to order particular designations for particular areas, to order USEPA to follow a particular methodology in determining the appropriate designations, or to dictate procedures for implementing the standard." Memo. at 25. MWG further claims that it is not "appropriate to bring an enforcement

action against individual sources to compel attainment of a NAAQS at this point, when two of those sources are not even in USEPA designated nonattainment areas, an implementation plan has not yet been adopted and requirements to achieve attainment of the NAAQS have not yet been imposed on the sources." *Id*.

Joinder

MWG cites Section 101.403(a) of the Board's procedural rules, which provides that

> [t]he Board, on its own motion or the motion of any party, may add a person as a party to any adjudicatory proceeding if:
>
> 1) A complete determination of a controversy cannot be had without the presence of the person who is not already a party to the proceeding;
>
> 2) The person who is not already a party to the proceeding has an interest that the Board's order may affect; or
>
> 3) It may be necessary for the Board to impose a condition on the person who is not already a party to the proceeding. 35 Ill. Adm. Code 101.403(a).

Under these standards, MWG argues, "[t]his case requires joinder of the numerous other sources that emit SO_2 in the areas around the Stations," as well as of USEPA and the Agency. Memo at 26. The complaint, MWG adds, acknowledges that other sources may have caused or contributed to the alleged failure to attain the SO_2 NAAQS. Memo at 26, citing Comp. at 10-11. MWG claims that, even if the Board has authority to do so, the Board "cannot determine MWG's contribution to the alleged nonattainment and related necessary emission rates without also determining "the impact, contribution and necessary emission rates for those other sources." Memo. at 26 MWG argues that, absent joinder of such other sources, the burden of reducing emissions may fall unfairly on it; MWG explains that achieving attainment may require emission reductions from these other sources. *Id*. at 27. The Agency and USEPA must also be joined as parties, MWG continues, because of their roles in proposing and making NAAQS designations, respectively, and the Agency's role in proposing emission limitations. Memo at 27 (citations omitted).

However, MWG claims, the doctrine of sovereign immunity precludes joinder of USEPA in this proceeding. Memo. at 28. MWG further claims that because any source contributing to nonattainment would be a necessary party, "significant time and effort would be required just to attempt to identify all such sources." Memo. at 28. MWG notes that under Section 101.403(b) of the procedural rules, the Board will not dismiss a case for failure to name a necessary party without first providing a reasonable opportunity to add the person as a party. *Id.*, citing 35 Ill. Adm. Code 101.403(b). Arguing that joinder of all necessary parties "is not feasible," MWG claims this action should be dismissed. Memo. at 28, 29. MWG adds that joining all necessary

parties would effectively duplicate the process of NAAQS designation and SIP development underway, resulting in "unnecessary time and expense . . . ." *Id.* at 29.

Failure to State a Cause of Action

MWG also asserts that the complaint is frivolous because it fails to state a claim upon which the Board may grant relief. *Id*. at 2-3, 29-44. MWG alleges that "(1) both counts are premised on standards that do not apply to MWG's Stations, and (2) the allegations are not set out with sufficient specificity." *Id*. at 29.

Enforcing the NAAQS Against Individual Sources

MWG asserts that both counts of the complaint are based upon limits that Sierra Club considers necessary for attainment of the SO_2 NAAQS. Memo. at 29. MWG argues that this is improper because "Sierra Club cannot bring claims seeking to directly enforce a NAAQS against individual sources" because it does not apply to them. Memo at 30. MWG characterizes the SO_2 NAAQS as a "level of air quality that USEPA has determined should be achieved nationally to protect human health with a margin of safety." *Id.* MWG argues that only emission limits promulgated as part of a SIP and not the NAAQS themselves apply to regulated sources. *Id.* at 30-31.

MWG argues that "no requirement related to nonattainment of the NAAQS will apply with respect to individual sources unless and until IEPA proposes and the Board adopts any rules IEPA has determined are necessary for the nonattainment areas to achieve attainment." Memo. at 31, citing 42 U.S.C. §§ 7410, 7514 (2008). MWG contends that the complaint alleges direct violation of the NAAQS, being "premised on the notion that emitting a pollutant that contributes in any way to nonattainment is, in all cases, a violation of Illinois law, one that warrants the imposition of penalties and other punitive relief." Memo. at 31-32. MWG concludes that Sierra Club "cannot seek to enforce the unenforceable," and that the complaint should be dismissed as frivolous. *Id*. at 32.

Modeling Alleged Violations

MWG claims that the complaint fails to include modeling data relied upon by Sierra Club to develop the Necessary Limits. Memo. at 32-33. MWG emphasizes that Sierra Club does not allege that its modeling satisfies the requirements of the 1-hour SO_2 NAAQS. *Id.* at 33. In addition, MWG continues, USEPA based its nonattainment designations on a 3-year average of monitored data. MWG asserts that "modeling is not the means to determine attainment status" for NAAQS, at least until USEPA issues guidance to the contrary. *Id*. at 33-34.

Sufficiency of Allegations

Count 1. MWG notes that Section 9(a) of the Act prohibits causing or threatening emissions that either "(1) cause or tend to cause air pollution in Illinois, or (2) violate regulations or standards adopted by the Board under the Act." Memo. at 35, citing 415 ILCS 5/9(a) (2012). MWG argues that count I is based on the first prong, and argues that such claims "are allowed

only when they are based on or related to nuisance conditions," which Sierra Club has not alleged. Memo. at 35. MWG claims that Section 9(a) is restated in Section 201.141 and "means that substances not covered by numerical standards may not be emitted so as to cause a nuisance." Memo. at 36, citing Emission Standards, R71-23, slip op. at 4-301 (Apr. 13, 1972). MWG argues that the "cause or tend to cause air pollution" prong is, therefore, "clearly intended to apply only when nuisance conditions are created." *Id.* MWG adds that the Seventh Circuit has stated that "emissions prohibited by the Act must be 'defined with some greater specificity, so that people will know what is forbidden.'" *Id.* at 37, citing McEvoy v. IEI Barge Servs., 622 F.3d 671, 678 (7th Cir. 2010). Here, MWG maintains, the complaint does not allege that MWG has contributed to a nuisance or that a nuisance exists, so the complaint fails to state a claim and should be dismissed. Sierra Club . Memo. at 37.

Count 2. MWG argues that count 2 fails to state a claim because it alleges that MWG's emissions combined with those from other sources prevent attainment of the NAAQS, conduct that Section 201.141 does not cover. Memo. at 38-39. MWG contends that Section 201.141 contains three prongs, each of which is separated by the disjunctive 'or.' Memo at 39, citing 35 Ill. Adm. Code 201.141. MWG states that the complaint alleges a violation under the third prong, which provides that "[n]o person shall cause or threaten or allow the discharge or emission of any contaminant into the environment in any State . . . so as to prevent the attainment or maintenance of any applicable ambient air quality standard." Memo. at 39. MWG argues that this prong "addresses only emissions from a single source, not the impact of emissions when combined with contaminants from other sources." Memo. at 39-40.

MWG further argues that ambient air in Illinois is not required to attain the 1-hour SO_2 NAAQS until 2018. Memo. at 40, citing 78 Fed. Reg. 47193 (Aug. 5, 2013). Thus, according to MWG, MWG cannot be found liable for "preventing" attainment, currently and in the past, of a standard "that on its face must not be attained until 2018." Memo. at 40. The Board cannot require sources like the MWG plants to reduce their emissions immediately after a new NAAQS becomes effective, MWG adds; rather, such action must await USEPA's designation of nonattainment areas, IEPA's development of implementation plans with source-specific limitations, and the expiration of the period to achieve attainment. *Id.* MWG further claims that because the asserted violation of Section 9(a) of the Act under count 2 hinges on an alleged violation of Section 201.141, Sierra Club has failed to state a claim under Section 9(a) as well as under Section 201.141. *Id.* at 40-41.

In addition, MWG maintains that Sierra Club's reading of Sections 9(a) and 201.141 "could impermissibly create violations without fair notice of what conduct is prohibited . . . ." Memo. at 41. MWG asserts that due process requires notice "of what conduct is prohibited before a sanction can be employed." *Id.* MWG claims that granting Sierra Club's requested relief would penalize MWG for failing to lower emissions to levels modeled by Sierra Club years later as sufficient to ensure that the emissions, along with emissions from other sources, did not prevent attainment of the NAAQS. *Id.* MWG elaborates that

> Sierra Club's interpretation of [Sections] 9(a) and 201.141 would empower any citizen to force immediate emission reductions by sources of their choosing in order to achieve immediate attainment of any newly issued NAAQS, and to

> impose penalties upon sources based upon modeled emission rates that cannot be known in advance and that are found in no statute or rule. *Id*.

Specificity of Allegations

MWG argues that Sierra Club's allegations "are not sufficiently specific to comply with the fact pleading requirements under Illinois law." Memo at 42. MWG argues that Section 31 of the Act requires that a complaint "shall specify the provision of the Act, rule, regulation, permit, or term or condition thereof," and the extent to which the person is alleged to have violated the provision. *Id*. at 42-43, citing 415 ILCS 5/31(c) (2012). MWG also cites the Board's procedural rules which require that a complaint must include "dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations." *Id*. at 43, citing 35 Ill. Adm. Code 103.204(c).

MWG asserts that the complaint alleges nonattainment of the 1-hour SO_2 NAAQS but fails to specify where the nonattainment is taking place. Memo at 43. MWG argues it is insufficient to allege that MWG's emissions threaten to cause certain SO_2 "concentrations in areas downwind from each respective plant." *Id*., citing Comp. at 7 (¶ 24). Moreover, MWG notes the complaint's allegation that emissions threaten nonattainment when combined with background levels and contributions of other sources, but claims the complaint provides no information on the background levels or sources contributing to them. Memo. at 43, citing Comp. at 7 (¶¶24, 26). MWG also asserts that the complaint provides only a "vague" description of the "modeling" and results on which the allegations are based. *Id*. at 43-44. MWG concludes that it

> cannot adequately respond to a complaint that vaguely alleges its Stations 'could' be threatening or causing or contributing to nonattainment, when some unidentified level of emission contributions from other unnamed sources are considered, while not specifying (1) where that alleged nonattainment is occurring or (2) how violations or threatened violations were determined or (3) who else is allegedly contributing and how much. *Id.* at 44.

SUMMARY OF SIERRA CLUB'S RESPONSE TO MOTION TO DISMISS

Sierra Club maintains that 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 be[ ] enforced under state law." Accordingly, Sierra Club urges the Board to deny the motion to dismiss. Resp. Dis. at 2, 42.

NAAQS

Sierra Club claims that MWG's argument regarding designation of nonattainment areas is "a red herring." Resp. Dis. at 1. Sierra Club argues that promulgation of the 1-hour SO_2 NAAQS provided stakeholders including MWG the opportunity to "participate in rulemaking and comments." *Id*. at 3. Opportunities to challenge the NAAQS have passed, Sierra Club adds. *Id.*

Sierra Club asserts that "the SO_2 emission rates from MWG plants threaten ambient concentrations immediately downwind that exceed the level that [USEPA] determined necessary to protect human health." Resp. at 6. Sierra Club argues that actual and potential emissions from the MWG plants are so great that they cause or threaten to cause concentrations of SO_2 regardless of whether other sources' SO_2 emissions are considered. *Id*. at 6-7, citing Comp. at 6-9 (¶¶20-29).

Sierra Club denies that the Necessary Limits "separate from" existing standards, arguing that emissions above those limits prevent or tend to prevent attainment of the NAAQS. Resp. Dis. at 7. Sierra Club states that it called these "Necessary Limits" because they are the emission rates necessary for compliance with Section 9(a) of the Act and Section 201.141 of the Board's air pollution regulations. *Id*. at 7 n.2. Sierra Club argues that if MWG disputes the methodology and analysis on which the Necessary Limits are based, it can challenge them during during discovery. Resp. at 7, n.1.

Board Authority

Sierra Club insists its claims "are firmly based in law the Board has authority to enforce," and that MWG's contrary arguments misconstrue the complaint. Resp. Dis. at 8-9. The complaint, according to Sierra Club, does not ask the Board to designate nonattainment areas, develop SIPs, or determine the contribution of MWG plants to any designated nonattainment area. *Id*. at 9. Rather, Sierra Club asserts that the complaint seeks to enforce separate requirements under state law, arguing that under that 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." Resp. at 1, 9.

Sierra Club claims that MWG effectively claims that the Board's authority to enforce state law "has somehow been pre-empted by the Clean Air Act or repealed by implication by other state procedures." Resp. at 9. Sierra Club responds by noting that the Board has "repeated[ly] enforced these separate state provisions despite concurrent implementation of CAA provisions "for nonattainment designations and implementation plan development." *Id.* at 9-10.

Sierra Club further contends that states have authority "to regulate air pollution beyond the bare floor provided by" the CAA. Resp. Dis. at 10-12. Sierra Club asserts that Illinois has provided stricter protections against air pollution than the CAA, and that "the federal nonattainment designation and implementation plan process . . . do[ ] not preempt the Board's authority and obligation to enforce" state requirements. *Id*. at 12. According to Sierra Club, Sierra Club claims the Board has recognized that enforcement actions under Section 201.141 may be appropriate when regulations do not ensure compliance with air quality standards. *Id.* at 13, citing Emission Standards, R71-23, slip op. at 5 (Apr. 13, 1972).

Sierra Club also claims that USEPA and the Illinois Attorney General have relied on Section 201.141 "to ensure that emission from an Illinois facility do not cause or threaten violation of the new lead NAAQS, without the need to wait for an implementation plan. . . ." Resp. Dis. at 13, citing Exhs. 1 (complaint in People v. H. Kramer & Co., Case No. 11 CH 30569

(Cook Cty. Cir. Ct.)), 2 (In re H. Kramer & Co., NOV EPA 5-11-IL-11 (Apr. 20, 2011)). Sierra Club concludes that, because Illinois provides air pollution protections beyond those the CAA provides, the Board "has both the authority and duty to enforce the additional protections provided by Illinois law." Resp. Dis. at 13.

Sierra Club further argues that the complaint "does not ask the Board to develop a [SIP]. . . . 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." Resp. Dis. at 14, citing 415 ILCS 5/31, 33 (2012). According to Sierra Club, MWG cites no authority that withdraws the Board's authority to enforce state requirements or that subjugates to the Agency's authority to develop a SIP. Resp. at 15. And, Sierra Club continues, it is established that an enforcement action alleging air pollution may be brought even if the Agency "has already developed an implementation plan and a source is complying with those numeric limitations." Resp. at 15-16 (citations omitted). According to Sierra Club, an ambient air standard is enforceable even if a more specific numeric emission limit may be promulgated under the CAA to address SO_2. *Id*. at 16.

Sierra Club adds that, in IEPA v. City of Springfield, the Board found that SO_2 emissions from the respondent's plant violated Section 9(a) of the Act by threatening to cause air pollution in excess of the "then-pending" NAAQS. Resp. at 17, citing EPA v. City of Springfield, PCB70-9 (May 12, 1971). Sierra Club cites the Board's statement that

> no regulation or standard on sulfur dioxide emissions, or emission reduction exists 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." Resp. Dis. at 17, citing City of Springfield, PCB 70-9, slip op. at 8.

Sierra Club also disputes MWG's claim that Illinois ambient air need not attain the 1-hour SO_2 NAAQS until October 4, 2018. Resp. Dis. at 18. Rather, Sierra Club maintains, this deadline applies only to Illinois's development of a SIP and not to MWG's emissions. *Id.* In addition, Sierra Club asserts that its federal court suits have no bearing here, as those actions "seek to compel compliance by [USEPA] with statutory obligations applicable to the federal agency under a federal process." *Id.*

Joinder

Sierra Club argues that the Board's procedural rules provide for permissive joinder of parties. Resp. Dis. at 20, citing 35 Ill. Adm. Code 101.403(a). Sierra Club also maintains that while subsection (b) suggests there are mandatory joinder rules, that subsection also provides that the Board will not dismiss an action for nonjoinder without first providing a reasonable opportunity to add the persons as parties. Resp. Dis. at 21. The joinder cases MWG relies on, according to Sierra Club, either involve permissive joinder or provide no basis to dismiss a case for failing to join a respondent. *Id.*

Sierra Club acknowledges that necessary parties must generally be joined but argues joinder is not required when it "would destroy the jurisdiction of the court or the party is not amenable to the court's jurisdiction." Resp. at 22. Sierra Club claims that other sources of SO_2, as well as USEPA and the Agency, are not necessary parties. *Id.* at 23. Even if they were, Sierra Club continues, joinder would not be appropriate because it "would divest the Board of jurisdiction over this matter." *Id*.

Sierra Club further argues that "[t]he Act is clear that a single facility can violate [Section] 9(a) by emitting pollution in high enough concentrations that the emitted pollution contributes to air pollution or a violation of a Board rule." Resp. Dis. at 23-24. Sierra Club asserts that the Board has "repeatedly" entertained actions for violation of these standards without requiring joinder of other sources that may contribute to the alleged pollution. *Id*. at 24. Sierra Club also emphasizes that its complaint alleges that MWG's coal-fired plants violate the SO_2 NAAQS without contribution from other sources of SO_2. *Id.* at 24 n.7, citing Comp. at 6-7 (¶¶22, 26). At most, according to Sierra Club, the contribution of other sources, if any, may be a consideration for the Board when determining the proper relief in this case. Resp. Dis. at 24 n.7.

As for USEPA and the Agency, Sierra Club claims they are not necessary parties because the complaint does not seek designation of nonattainment areas or development of an implementation plan. Resp. Dis. at 26-27. Sierra Club argues that a Board order limiting MWG's SO_2 emissions could not conflict with limits incorporated in a SIP, because compliance with the more stringent limit would mean compliance with the less stringent limit, too. *Id*. at 26.

Statutory and Regulatory Authority

Sierra Club discounts MWG's arguments that Sierra Club seeks to enforce the NAAQS directly instead of a requirement that is directly applicable to MWG. Resp. at 27, citing Memo. at 29-34. Sierra Club distinguishes CAA citizen suit provisions from Section 31(d) of the Act. Resp. at 27-28. Sierra Club asserts that, "[u]nlike 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." *Id*. at 27. Sierra Club states that Section 31(d) of the Act "allows a citizen to file a complaint with the Board 'against any person allegedly violating [the Act]' or 'any rule or regulation adopted under the Act.'" *Id*. at 28-29. Sierra Club notes that the Board has enforced the Act by applying the "then-draft NAAQS for SO_2 to assess whether a power plant's emissions threatened to cause air pollution." *Id*., citing IEPA v. City of Springfield, PCB 70-9, slip op. at 8-9 (May 12, 1971).

Modeling

Sierra Club cites USEPA's purported statement that modeling is the "appropriate methodology for purposes of determining compliance, attainment, and nonattainment" of the NAAQS because "it would be virtually impossible to site sufficient monitors around each individual source of SO_2 pollution." Resp. at 4, citing 75 Fed. Reg. 35551 (June 22, 2010).

Therefore, Sierra Club asserts, MWG's attacks on modeling as a basis for the complaint are unfounded. Resp. at 5.

Sierra Club also argues that the complaint need not, as MWG maintains, identify the modeling data used to derive the Necessary Limits. Resp. Dis. at 29-30. Instead, Sierra Club continues, a complaint need only plead the ultimate facts supporting a claim; evidence is to be presented at a hearing. *Id.* Sierra Club maintains that the complaint meets the pleading requirements of Sierra Club argues that by specifying the location, times, and times of the alleged violations, which "goes well beyond" the "minimum pleading requirements" under the Board's procedural rules. *Id*. at 30, citing 35 Ill. Adm. Code 103.204(c).

Need to Plead Nuisance Under Section 9(a)

Sierra Club asserts that, while MWG cited a number of cases allowing nuisance claims under Section 9(a), MWG failed to cite any case rejecting a Section 9(a) claim not alleging a nuisance. Resp. Dis. at 32-33. Rather, according to Sierra Club, Section 9(a) prohibits causing a nuisance in addition to causing or threatening emissions that are harmful to "human or animal health." *Id.* at 34. Sierra Club adds that in City of Springfield, the Board did not find violations of Section 9(a) solely because the respondent's SO_2 emissions caused a nuisance, but also because its emissions threatened human, plant, or animal health. *Id.* at 35, citing City of Springfield, PCB 70-9, slip op. at 9 (May 12, 1971).

Section 201.141

Regarding Section 201.141, Sierra Club states that it is a "broad prohibition on causing nuisance conditions *in addition to* causing ambient air concentrations that violate ambient air quality standards." Resp. Dis. at 35 (emphasis in original). Sierra Club adds that McEvoy v. IEI Barge Servs., 622 F.3d 671, 688 (7th Cir. 2010), cited by MWG, did not address whether Section 201.141's air pollution proscription can be enforced through Section 31 of the Act. Resp. at 37. Rather, Sierra Club asserts, there the court was "determining whether the 'unreasonably interfere with' [*i.e.*, nuisance] prong of 'air pollution' met the federal Clean Air Act's definition of an 'emission standard or limitation.'" *Id*.; citing McEvoy, 622 F.3d at 688.

Next, Sierra Club contends that, contrary to MWG's argument, Section 201.141 does prohibit emissions that, in combination with those of other sources, prevent the attainment or maintenance of any applicable ambient air quality standard. Resp. Dis. at 38. According to Sierra Clubm, "[t]he 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." *Id*. at 39. Even if it does not, however, Sierra Club argues that a violation of the NAAQS, a human health-based ambient air quality standard, is evidence of causing or tending to cause air pollution. *Id.* Sierra Club claims it has properly pled a violation of this prong of Section 201.141. *Id.* at 38-39. Moreover, Sierra Club asserts that the complaint alleges that MWG's emissions alone, without background levels of SO_2 or other contributing sources, violate Section 201.141. *Id*. at 39-40. But, Sierra Club adds, [b]ackground

concentrations should be considered, as a factual matter, to understand the extent of the threat." *Id*. at 39.

Fair Notice

Sierra Club claims MWG had fair notice of the violations alleged in the complaint. Resp. Dis. at 40, citing Memo. at 41-42. According to Sierra Club, the plain language of Section 201.141 "prohibits emissions that prevent attainment or maintenance of an applicable air quality standard;" and, Sierra Club, adds, MWG does not dispute that the 1-hour SO_2 NAAQS is an applicable air quality standard. Resp. at 41.

In addition, Sierra Club argues that the fair notice doctrine "only applies to penalties" and cannot be a basis to dismiss a complaint at the pleading stage. Resp. Dis. at 40-41. That limitation aside, Sierra Club argues that if the doctrine did apply, MWG would have 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 air standard." *Id*. at 41. Sierra Club argues that, even if the defense applied, 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." *Id*. at 41. Indeed, Sierra Club continues, "MWG need only read the regulation to have notice of what is prohibited." *Id.* Sierra Club adds that the State has enforced these provisions. *Id*., citing City of Springfield, PCB 70-9, slip op. at 8-9; Exh. 1.

SUMMARY OF MWG'S REPLY

MWG argues that, "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." Reply at 3. The asserted claims, according to MWG, are "not the types of claims contemplated by" Sections 9(a) and 201.141; and even if they were, MWG continues, a claim based on failure to achieve the NAAQS would be premature here, as attainment of the SO_2 NAAQS in Illinois is not required until October 2018. Reply at 2.

Sierra Club's Allegations Are Improper and Premature

Board Authority

MWG claims the complaint asks the Board to treat the 1-hour SO_2 NAAQS as a self-executing standard that is directly applicable to individual sources. Reply at 1. The complaint's allegations attempt "to short-circuit the well-established NAAQS implementation process," according to MWG. *Id.* at 3. Nonetheless, MWG maintains, a nonattainment designation is a prerequisite for Sierra Club's claims. Reply at 4. In essence, MWG continues, MWG characterizes asks the Board to make nonattainment designations and impose on MWG "emission limitations Sierra Club claims are necessary and appropriate to cause, or help cause, attainment." *Id*. MWG notes that, since the filing of the complaint, two areas in Illinois have been designated nonattainment, adding that two of the four stations addressed in the complaint are located in one of these areas. 4 n.2, citing 78 Fed. Reg. 47199 (Aug. 5, 2013). MWG reports

that the Agency is concurrently developing a SIP for attainment of the 1-hour SO_2 NAAQS. Reply at 4, citing 78 Fed. Reg. 47193 (Aug. 5, 2013).

MWG contests Sierra Club's argument that the dismissal motion is based on preemption under the CAA. Reply at 5. MWG maintains its argument actually is that Sierra Club asks the Board to "intrude upon the roles and authority of USEPA and IEPA and is misconstruing state law." *Id*. MWG argues that "[t]he Board has no authority to do so. *Id*. MWG argues that Sierra Club's frustration with the pace of USEPA and Agency action does not allow it effectively to create new rules through an enforcement action. *Id*. at 8

MWG argues that Sierra Club's attempt to prematurely enforce the NAAQS risks a "proliferation of lawsuits," among other problems. Reply at 7. MWG adds that lawsuits seeking relief from the same emissions that the State is addressing through rulemaking would create "inefficiency, burden and concerns for consistency." *Id*. MWG also suggests that by Sierra Club's logic the State could "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." *Id*. at 7 n.7.

Fair Notice

MWG argues that it is inconsequential whether it was aware of Section 9(a) of the Act or Section 201.141 of the Board's air pollution regulations. Reply at 9. What matters, according to MWG, is that Sierra Club seeks penalties and other relief for alleged exceedances of SO_2 emissions limits that do not exist and will not exist until a SIP is in place. *Id*. at 8. MWG argues when the 1-hour NAAQS was adopted, MWG did not know and could not have known "what emission rates for its Stations might be imposed some day in the future to help bring . . . not-as-yet-determined nonattainment areas into attainment." *Id*. at 9. MWG adds that it "clearly lacked any notice" of Sierra Club's Necessary Limits. *Id.*

MWG asserts that "retroactive imposition of liability" based on unknown standards offends the constitutional principle of fair notice, an element of due process. Reply at 9. MWG claims that fair notice applies, not only to the imposition of penalties, but also to injunctive relief requiring payment of "significant amounts of money. *Id*. at 10, citing United States v. Chrysler Corp., 158 F.3d 1350, 1354-55 (D.C. Cir. 1998). MWG adds that the relief requested in the complaint may involve significant costs to install controls and reduce or stop its operations. Reply at 10, n.7. MWG argues that each of these is a "sufficiently grave sanction" demand fair notice, and that Sierra Club's interpretation of the law "creates fundamental fairness, compliance planning, and constitutional problems." *Id*. at 11-12.

Failure to Plead Adequate Claim

Prematurity

Reiterating that that "the State is not required to demonstrate attainment until 2018." Reply at 12, MWG contends it cannot be liable for preventing attainment or causing air pollution based upon nonattainment before Illinois is required to come into compliance with the NAAQS.

deadline has passed. *Id.* MWG asserts that Sierra Club effectively seeks to "rewrite the statute that provides the allowed timeframes" for NAAQS compliance. *Id*. at 12-13.

Modeling

MWG reiterates that Sierra Club "improperly relies on modeling to support its claims." Reply at 13. Under existing law, according to MWG, attainment and nonattainment demonstrations must be based on "monitored data not modeling." *Id.* MWG adds that an exceedance of the SO_2 NAAQS "is based upon an average of three years of certified and quality-assured monitoring data." *Id*., citing 40 C.F.R § 50.17. MWG contends that while Sierra Club has alleged that the MWG plants have caused a NAAQS exceedance, Sierra Club has "used the wrong data." *Id*. at 14.

Authority Cited by Sierra Club

MWG argues that cases cited by Sierra Club do not support its position 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." Reply at 14. MWG asserts that both Commonwealth Edison and City of Springfield were decided in the absence of federal or state SO_2 emission limits. Reply at 15. In addition, MWG states that City of Springfield involved nuisance allegations, and that Commonwealth Edison "resulted in a dismissal of a § 9(a) claim of air pollution on the basis that petitioner's complaint" did not was " provide respondent with fair warning regarding the nature of the § 9(a) claim." Reply at 14-15, citing City of Springfield, PCB 70-9, slip op. at 8-9; Commonwealth Edison, PCB 70-4, slip op. at 4-5. MWG maintains that with SO_2 ambient air quality standards now in place, there is no need to create an additional remedy. Reply at 16.

Nor, according to MWG, does the Board's opinion adopting the provision now codified as Section 201.141 support Sierra Club's claims. Reply at 16, citing Emissions Standards, R71-23 (Apr. 13, 1972). MWG argues that the Board that the air pollution prohibition in Section 9(a) of the Act and Section 201.141 were intended to address nuisance conditions. Reply at 16. MWG argues that case law and the rulemaking cited above "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 numerical standards." *Id.* at 17 n.9. The complaint does not allege nuisance conditions, and the complaint must, therefore, fail. *Id*. at 17, 19.

Regarding Section 201.141's proscription against emissions that prevent the attainment or maintenance of any ambient air quality standard, MWG maintains that in adopting the provision the Board explained that this language was federally-required and was adopted as part of the same rulemaking that adopted Illinois' regulations included in its the first plan to implement NAAQS for pollutants including SO_2. *Id*., citing Emissions Standards, R71-23, slip op. at 4-329 to 4-337. MWG contends that this timing and rulemaking language suggest that "to the extent an action may be brought under § 201.141 for preventing the attainment or maintenance of NAAQS, such a suit must be directed to failure to act in accordance with or to interfere with the Illinois SIP." Reply at 17-18. MWG adds that this provision intended to address areas in which the NAAQS could be violated because of an "unlimited proliferation of

sources," even if the area would otherwise be in compliance. *Id.* at 18, citing Emissions Standards, R71-23, slip op. at 4-301 (Apr. 13, 1972). This situation is not what is "happening or alleged" here, according to MWG. Reply at 18. MWG adds that USEPA has since the adoption of Section 201.141 adopted the New Source Review program "to directly address and prevent the proliferation of new sources so as to prevent the attainment or maintenance of a NAAQS." *Id*., citing 91 Stat. 685, P.L. 95-95.

MWG next asserts that the complaint in People v. H. Kramer & Co. nor the related USEPA notice of violation issued put forth mere allegations, did not result in a decision on the merits, and have no precedential value. Reply at 19-20. MWG also notes, unlike in this case, the H. Kramer complaint relied on monitored data traced to a specific source to allege actual harm, and that the notice of violation also relied on data from monitors placed near the source of the alleged violations. *Id*. at 20-21, citing Resp. Dis. Exh. 1, 2.

Section 201.141

MWG repeats its contention that Section 201.141's three prohibitions, separated by "or so as to," must be read in the disjunctive. Reply at 23. According to MWG, doing so makes clear that the third prohibition, on emissions that prevent the attainment or maintenance of any applicable ambient air quality standard, "addresses emissions from only a single source." *Id*. MWG argues that the phrase "alone or in combination with" applies only to the first prohibition, against causing or tending to cause air pollution. *Id*.

MWG further asserts that by acknowledging that the Will County station exceeds the NAAQS only when background SO_2 concentrations are taken into account, Sierra Club has "admit[ted] that it in no way has a claim concerning the Will County Station under § 201.141." Reply at 24. And, according to MWG, Sierra Club's Section 201.141 claim may rest only on an allegation that each station is the sole source of emissions exceeding the NAAQS; but the complaint does not so limit that claim, and Sierra Club cannot amend its complaint through its response to the dismissal motion. *Id.*

Specificity

MWG argues again that the complaint is not sufficiently specific to allow it to prepare a defense. Reply at 24-25. MWG also dismisses Sierra Club's claim that the location of the alleged violations is the stacks at the four stations, asserting that this specifies only the source of the emissions and not the location where the alleged violations of the ambient air quality standard occurred. Reply at 26, citing 40 C.F.R. § 50.1(e); 35 Ill. Adm. Code 201.102. MWG argues that Sierra Club's claims assert "theoretical violations that 'could' occur based on some nebulous modeling," adding that it cannot refute Sierra Club's "supposed allegations." Reply at 26.

Joinder

MWG acknowledges that the Board's procedural rules only suggest there are cases in which joinder of a party is mandatory. *Id*. at 27, citing 35 Ill. Adm. Code 101.403(b).

Nevertheless, according to MWG, joinder is mandatory under Illinois law when a party's presence is necessary "(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 or (2) to protect the interests of those who are before the court . . . ." Reply at 27, citing Holzer v. Motorola Lighting, Inc., 295 Ill. App. 3d 963, 693 N.E.2d 446 (1st Dist. 1998). Additionally, joinder is "desirable," according to MWG, where it would "enable the court to make a complete determination of the controversy." *Id.* MWG argues that both of the bases for mandatory joinder apply here because USEPA nonattainment determinations and the Agency's development of a SIP and source-specific emission limits will be affected by any final order the Board may enter in this case. *Id.* at 28-29. MWG further argues that, if no other sources of SO_2 emissions are joined, MWG may disproportionately bear responsibility for NAAQS attainment in Illinois and emission limits on other sources "may not fairly reflect their contribution[s]." *Id*. at 29.

MWG also repeats its claim that joinder of USEPA, the Agency, and other emission sources is "not feasible" here. Reply at 29. The doctrine of sovereign immunity precludes joining USEPA in this state proceeding, according to MWG. *Id.* Other affected sources cannot be joined either, MWG continues, because identifying all of them, including mobile sources, "would be very difficult, if not impossible, for Sierra Club." *Id.* And, MWG adds, that is "precisely the analysis" the Agency is undertaking in the NAAQS implementation process. *Id.*

SUMMARY OF SIERRA CLUB'S NOTICE OF SUPPLEMENTAL AUTHORITY AND MWG'S RESPONSE

Notice of Supplemental Authority

The notice first cites the United States Supreme Court's June 2, 2014 decision, attached to the notice, denying the defendants' petition for *writ of certiorari* in Bell v. Cheswick Generating Station, 734 F.3d 188 (3rd Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014). Sierra Club maintains that Bell rejected preemption arguments "very similar" to those made by MWG in this case. Not. at 1, citing Resp. Dis. at 11-12.

Sierra Club then cites three court decisions, also attached to the notice, holding that various state-law claims are not preempted by the CAA. Not. at 1-2. According to Sierra Club, in the first of these, Little v. Louisville Gas & Elec. Co., 2014 U.S. Dist. LEXIS 94947 (W.D. Ky. July 17, 2014), the court held that the CAA does not "preempt claims—like those providing the basis for" the claims in this case—"based on state law." Not. at 1-2. Sierra Club adds that, like MWG here, the defendants in Little asserted that the CAA "leave[s] no room for supplemental pollution protections" under state law. *Id.* at 2.

Next, Sierra Club cites Merrick v. Diageo Americas Supply, No. 12-CV-334-CRS (W.D. Ky. Mar. 19, 2014). Not. at 2. Sierra Club maintains that this decision, too, holds that the CAA "does not preempt state law claims." *Id.*

The third cited decision is Freeman v. Grain Processing Corp., 2014 Iowa Sup. LEXIS 72 (June 13, 2014), in which, according to Sierra Club, the Iowa Supreme Court held that various state-law claims were improperly dismissed on preemption grounds. Not. at 2. Sierra Club

states that, like other courts, the Freeman court stated that the CAA does not expressly or impliedly preempt state law, and that states may impose more stringent emission standards than those the CAA imposes. *Id.* Sierra Club adds that Freeman held that Iowa's "air pollution permitting" statutes did not foreclose a state-law statutory nuisance claim. *Id.*

Response to Notice of Supplemental Authority

In addition to arguing, as noted above, that the notice is procedurally improper, MWG contends that the cited authorities are "completely irrelevant" to the issues raised by the dismissal motion. Sierra Club, according to MWG, "misconstrues its own claims and [MWG's] arguments and asserts relevance when there is none." Resp. Not. at 2. MWG further asserts that, contrary to Sierra Club's characterization, the state-law claims allowed to go forward in the cases cited in the notice were, unlike the claims here, negligence, nuisance, and other tort claims. *Id.* By contrast, MWG maintains, Sierra Club asserts "regulatory violation claims" in this case. *Id.* at 3.

In addition, MWG asserts its dismissal motion is not based on preemption by the CAA, as Sierra Club claims. Resp. Not. at 3. Rather, MWG continues, the motion relies on "several" independent grounds, including that Sierra Club is "attempting to usurp the roles of" the Agency and USEPA and to "fabricate violations of emission standards before such standards even exist." *Id.* MWG adds that the Agency "continues to develop" and will file with the Board proposed source-specific SO_2 emission standards, including for "some of the plants" at issue here. *Id.* That ongoing process is the proper means to address NAAQS attainment, according to MWG. *Id.* Thus, MWG concludes, the authorities cited in the notice are "quite simply beside the point." *Id.*

LEGAL FRAMEWORK

In the following subsection of the opinion, the Board provides the legal framework for citizen's enforcement complaints and addresses the standard of review of a motion to dismiss before setting out relevant statutory and regulatory provisions.

Citizen's Enforcement Complaints

Section 31(d)(1) of the Act authorizes any person to file a complaint with the Board against any person in violation of the Act or Board rules. 415 ILCS 5/31(d)(1) (2012); *see also* 35 Ill. Adm. Code 103.212(a). This type of enforcement action is referred to as a "citizen's enforcement proceeding," which the Board defines as "an enforcement action brought before the Board pursuant to Section 31(d) of the Act by any person who is not authorized to bring the action on behalf of the People of the State of Illinois." 35 Ill. Adm. Code 101.202. A citizen's enforcement complaint must meet the requirements of Section 31(c), set out below. *See* 415 ILCS 5/31(d)(1) (2012). Under Section 31(d)(1), the Board shall schedule a hearing unless it finds the complaint to be "duplicative or frivolous." *Id.*

Section 31(c) states that the complaint "shall specify the provision of the Act or the rule or regulation . . . 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 or such rule or regulation." 415 ILCS 5/31(c) (2012). Even though "[c]harges in an administrative proceeding need not be drawn with the same refinements as pleadings in the court of law," (Lloyd A. Fry Roofing Co. v. PCB, 20 Ill. App. 3d 301, 305, 314 N.E.2d 350, 354 (1st Dist. 1974)), the Act and the Board's procedural rules "provide for specificity in pleadings" (Rocke v. PCB, 78 Ill. App. 3d 476, 481, 397 N.E.2d 51, 55 (1st Dist. 1979)), and "the charges must be sufficiently clear and specific to allow preparation of a defense." (Lloyd A. Fry Roofing, 20 Ill. App. 3d at 305, 314 N.E.2d at 354).

The Board's procedural rules require that the complaint must contain:

1) A reference to the provision of the Act and regulations that the respondents are alleged to be violating;

2) The dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations. The complaint must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense; and

3) A concise statement of the relief that the complainant seeks. 35 Ill. Adm. Code 103.204(c).

In assessing the adequacy of pleadings in a complaint, the Board has stated that "Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action." Loschen v. Grist Mill Confections, Inc., PCB 97-174, slip op. at 4 (June 5, 1997), citing Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303. "[L]egal conclusions unsupported by allegations of specific facts are insufficient." Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303, citing Estate of Johnson v. Condell Memorial Hospital, 119 Ill. 2d 496, 509-10, 520 N.E.2d 37 (1988). A complaint's allegations are "'sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action.'" People v. Sheridan-Joliet Land Dev. LLC, PCB 13-19 and PCB 13-20 (cons.), slip op. at 24 (Aug. 8, 2013), quoting People *ex rel.* William J. Scott v. College Hills Corp., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 467 (1982).

Within 30 days after being served with a complaint, a respondent may file a motion to strike or dismiss a complaint, which may include a challenge that the complaint is "duplicative" or "frivolous." 35 Ill. Adm. Code 101.506, 103.212(b).

Motions to Dismiss

Under Section 31(d) of the Act, the Board must determine whether a citizen's complaint alleging violation of the Act and regulations is frivolous. *See* 415 ILCS 5/31(d)(1) (2012); 35 Ill. Adm. Code 103.2112(a). The Board's procedural rules provide that "frivolous" means "a request for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief." 35 Ill. Adm. Code 101.202.

When deciding a motion to dismiss, the Board considers all well-pled facts in the complaint as true, and draws all inferences from the facts in favor of the non-movant. People v. Stein Steel Mills Services, Inc., PCB 02-1, slip op. at 1 (Nov. 15, 2001); *see* Krautsak v. Patel, PCB 95-143, slip op. at 2 (June 15, 1995). Dismissal of the complaint is proper only if it is clear that no set of facts could be proven that would entitle complainant to relief. *See* Stein Steel, PCB 02-1, slip op. at 1; Krautsack, PCB 95-143, slip op. at 2.

Statutory and Regulatory Background

Section 3.115 of the Act defines "air pollution" as "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." 415 ILCS 5/3.115 (2012).

Section 3.165 of the Act defines "contaminant" as "any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source." 415 ILCS 5/3.165 (2012).

Section 9(a) of the Act provides in its entirety that no person shall:

> [c]ause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act. 415 ILCS 5/9(a) (2012).

Section 31(d)(1) of the Act provides in its entirety that

> [a]ny person may file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this Act or any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order. The complainant shall immediately serve a copy of such complaint upon the person or persons named therein. Unless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing and serve written notice thereof upon the persons or persons named therein, in accordance with subsection (c) of this Section. 415 ILCS 5/31(d)(1) (2012).

Section 201.102 of the Board's regulations defines "air contaminant" as "any solid, liquid or gaseous matter, any odor or any form of energy, that is capable of being released into the atmosphere from an emission source." 35 Ill. Adm. Code 201.102 (Definitions).

Section 201.102 also 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." 35 Ill. Adm. Code 201.102.

In addition, Section 201.102 defines "frivolous" to mean "a request for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief." 35 Ill. Adm. Code 201.102.

Section 201.141 of the Board's air pollution regulations provides in its entirety that:

> [n]o 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 (Prohibition of Air Pollution).

DISCUSSION

In this section, the Board first provides a brief overview of the process of NAAQS promulgation and implementation, as well as a description of the SO_2 NAAQS and the schedule for its implementation. Next, the Board analyzes and rules on the motion to dismiss the complaint as frivolous. In doing so, the Board first rules on the argument that the complaint fails to state a cause of action on which the Board could grant relief, because it seeks to directly enforce the SO_2 NAAQS against individual emission sources, misconstrues Sections 9(a) and 201.141, lacks the required specificity, and fails to give fair notice of what conduct is prohibited. The Board then resolves the claim that the complaint requests relief that the Board does not have the authority to grant, because it requests the imposition of emission limits and reductions and fails to join necessary parties.

NAAQS Implementation and the 1-Hour SO_2 NAAQS

Under the CAA, USEPA establishes NAAQS for certain air pollutants. *See* 42 U.S.C. §§ 7408, 7409 (2008). They include primary standards, established to protect human health with an adequate margin of safety, and secondary standards, developed to protect public welfare. *Id.* at § 7409(b)(1), (b)(2); *see also id.* at § 7408(a)(1)(A) (primary and secondary NAAQS control emissions of pollutants that "cause or contribute to air pollution" that "may reasonably be anticipated to endanger public health or welfare"). NAAQS apply to designated "air quality region[s]" in each State; each State is primarily responsible for ensuring attainment of the NAAQS within its boundaries. *Id.* at § 7407(a), (c). To that end, States must submit to USEPA a list designating the established areas within the State as nonattainment, attainment, or unclassifiable for each NAAQS. *Id.* at § 7407(d)(1)(A). Based on that submission, USEPA promulgates in the *Federal Register* final designations—*i.e.*, nonattainment, attainment, or unclassifiable—of the areas within each State. *Id.* at § 7407(d)(1)(B).

With respect to NAAQS for SO_2 and certain other pollutants, a State must, within 18 months after any nonattainment designation by USEPA, submit for USEPA's approval a state implementation plan (SIP) meeting certain requirements, including attainment of the relevant standard "as expeditiously as practicable," but no later than 5 years after USEPA's designation. 42 U.S.C. §§ 7514(a), 7514a(a) (2008); *see also id.* at § 7502(a)(2)(A). A SIP must include, among other things, enforceable emission limitations and an enforcement program. *Id.* §§ 7410(a), 7502(c)(6).

As relevant here, in 2010, USEPA adopted a new primary 1-hour SO_2 NAAQS of 75 parts per billion (ppb), based on "the 3-year average of the annual 99th percentile of 1-hour daily maximum concentrations." *Primary National Ambient Air Quality Standard for Sulfur Dioxide*, 75 Fed. Reg. 35520, 35523 (June 22, 2010). In 2013, USEPA issued its designations of nonattainment areas for the 1-hour SO_2 NAAQS, to take effect October 4, 2013. *See Air Quality Designations for the 2010 Sulfur Primary National Ambient Air Quality Standard*, 78 Fed. Reg. 47191 (Aug. 5, 2013). The States that have nonattainment areas must submit by April 6, 2015, SIPs providing for those areas to attain the NAAQS as "expeditiously as practicable," but no later than October 4, 2018 (*i.e.*, within five years of designation). *Id.* at 47193. Illinois's nonattainment areas designated by USEPA include Lemont (that is, portions of Cook and Will Counties), and Pekin (specifically, parts of Tazewell and Peoria Counties). *Id.* at 47199.

Whether the Complaint States a Cause of Action

Direct Enforcement of NAAQS

MWG maintains that the complaint fails to state a proper cause of action because it seeks to enforce the 1-hour SO_2 NAAQS directly against specific emission sources, but NAAQS apply across entire states and not to sources individually. Memo. at 29-30. The NAAQS are national *ambient air* quality standards, which States are primarily responsible for achieving within each "air quality control region," and, ultimately, the "entire geographic area" encompassed within each State's boundaries. *See* 42 U.S.C. § 7407(a) (2008); *see also id.* at § 7401(a)(3) (stating that "air quality control at its source is the "primary responsibility of States and local governments"). For this reason, federal courts interpreting the CAA have recognized that USEPA does not "directly regulate actual sources of emissions" (North Carolina ex rel. Cooper v. Tenneesee Valley Auth., 615 F.3d 291, 299 (4th Cir. 2010), and that the NAAQS do not themselves constitute enforceable emission standards or limitations (*see, e.g.*, Coalition Against Columbus Center v. City of New York, 967 F.2d 764, 769 (2nd Dist. 1992); Clean Air Council v. Mallory, 226 F. Supp. 2d 705, 719 (E.D. Pa. 2002); Cate v. Transcontinental Gas Pipe Line Corp., 904 F. Supp. 526, 535-36 (W.D. Va. 1995)). Rather, what may be enforced directly against specific sources are emission limits included in a SIP aimed at bringing nonattainment areas into NAAQS attainment, which must also include "other control measures" that may be necessary or appropriate to attain the NAAQS. 42 U.S.C. § 7410(a)(2) (2008). Once approved by USEPA, a SIP has the force and effect of law, and may be enforced against any person who is in violation of a SIP requirement or prohibition. *Id.* at § 7413(a)(1); *see also, e.g.*, Clean Air Council, 226 F. Supp. 2d at 721-22 (collecting cases).

Based on these principles, to the extent the complaint seeks to enforce the 1-hour SO_2 NAAQS directly against the MWG plants, the complaint does not state a proper cause of action. However, as Sierra Club stresses (*see* Resp. Dis. at 8-9), that is not what the complaint asserts. Neither count of the complaint asserts a violation of or seeks enforcement of the NAAQS against the MWG plants. Rather, the complaint expressly seeks enforcement of Section 9(a) of the Act (415 ILCS 5/9(a) (2012)) and Section 201.141 of the Board's air pollution regulations (35 Ill. Adm. Code 201.141). *See* Comp. at 10-11 (¶¶32, 34). As part of the Act and the Board's regulations, violation of both provisions may be alleged in a citizen's enforcement complaint. *See* 415 ILCS 5/31(d) (2012). Thus, the only question for the Board at this stage of the proceeding is whether the complaint adequately pleads claims for violation of Sections 9(a) and 201.141. The Board addresses each of these provisions.

Section 9(a) (Count 1). Count 1 asserts a violation of the "air pollution" prong of Section 9(a). Such a claim requires a complainant to allege that the respondent (1) caused or threatened or allowed (2) the emission of any "contaminant" into the environment (3) so as to cause or tend to cause "air pollution" in Illinois. 415 ILCS 5/9(a) (2012). As set forth above, the Act defines "air pollution" as the presence in the atmosphere of a contaminant in a sufficient quantity or of such characteristics and duration as to be "injurious to human, plant, or animal life, or health, or to property, or to unreasonably interfere with the enjoyment of life or property." *Id.* at 5/3.115. MWG does not maintain that the complaint fails to plead the first two elements of a Section 9(a) claim, and the Board finds these elements adequately pled. The MWG plants are undisputedly sources of SO_2 emissions, and SO_2, as a form of "gaseous matter," plainly constitutes a "contaminant" under the Act. *Id.* at 5/3.165.

The core dispute in this case is whether the complaint adequately pleads that the plants' SO_2 emissions constitute threatened or actual "air pollution." Count 1 alleges that because the 1-hour SO_2 NAAQS, as a primary standard, was set at a level necessary to protect human health, emissions that exceed the 1-hour SO_2 NAAQS also violate Section 9(a). *See id.* at ¶14. In effect, the complaint treats Section 9(a)'s prohibition of emissions that cause "air pollution," and specifically those that are "injurious" to health (415 ILCS 5/3.115 (2012)), as triggered whenever ambient air quality exceeds a primary NAAQS such as the 1-hour SO_2 NAAQS. 415 ILCS 5/3.115 (2012); Comp. at 10 (¶32).[1] MWG objects that a Section 9(a) air pollution claim must allege actual harm to health or nuisance conditions—*i.e.*, emissions that "unreasonably interfere" with life or property. However, that position is not supported by the definition of "air pollution," which includes emissions "injurious" to health *or* that cause unreasonable interference. The Board finds nothing in Section 9(a) or the definition of air pollution that requires allegations of actual harm to health or nuisance conditions to state a violation of Section 9(a). To be clear, this does not mean that a proven exceedance of the NAAQS at the emissions source necessarily violates Section 9(a). That question is not before the Board at this stage, however, and the Board

[1] As MWG points out (*see* Mot. at 4 n.2), the 1-hour SO_2 NAAQS is a primary and not a secondary standard (*see Primary NAAQS*, 75 Fed. Reg. at 35520); as such, it is designed to protect human health rather than public welfare, including the environment (*see* 42 U.S.C. 7409(b)(1) (2008). For this reason, the Board does not address the complaint's claims that emissions that exceed the NAAQS are harmful to "human welfare" or the "environment." *See, e.g.*, Comp. at 5 (¶14), 10 (¶32).

holds only that the complaint adequately alleges a violation of Section 9(a)'s prohibition of air pollution.

Further, the Board agrees with Sierra Club that MWG's challenge to the dispersion modeling on which the complaint is based is premature. Whether such evidence is admissible, and the weight it should be given, is a matter to be taken up at a later stage of this proceeding, not in assessing the adequacy of the complaint.

Section 201.141 Claim (Count 2). Count 2 asserts that MWG violated Section 201.141 (and Section 9(a), in turn) by causing or threatening SO_2 emissions that prevent the attainment or maintenance of the 1-hour NAAQS. *See* Comp. at 10-11 ¶34; *see also id.* at 5 (¶19). While Sierra Club claims it also pled a claim under Section 201.141's prohibition against causing "air pollution," MWG submits that the complaint includes no allegation to that effect. Reply at 16 n.8. The Board agrees: Count 2 alleges that MWG has violated Section 201.141 by emitting or threatening to emit SO_2 in amounts that prevent the attainment or maintenance of the 1-hour SO_2 NAAQS. *See* Comp. at 10-11 (¶34); *see also id.* at 5 (¶19). Because the complaint does not assert a claim for violation of the "air pollution" prohibition in Section 201.141, the Board does not consider any such claim.

Count 2 alleges a violation of Section 201.141's prohibition against causing or allowing the emission of any "contaminant into the environment . . . so as to prevent the attainment or maintenance of any applicable ambient air quality standard." 35 Ill. Adm. Code 201.141. Under the Board's air pollution rules, "ambient air quality standard" includes the NAAQS. *See* 35 Ill. Adm. Code 201.102. Here, as with count 1, there is no dispute that the complaint adequately alleges that the MWG plants (1) cause or threaten or allow (2) the emission of a "contaminant" into the environment. The Board finds that count 2 adequately alleges these elements of a Section 201.141 claim.

The parties instead contest whether the plants' SO_2 emissions could, prior to implementation of the NAAQS at the state level, "prevent the attainment or maintenance" of the 1-hour SO_2 NAAQS. The Board notes that the 1-hour SO_2 NAAQS, while not fully implemented in Illinois, does not have a delayed effective date, and is, therefore, an "applicable ambient air quality standard." *See* 35 Ill. Adm. Code 243.122(c).[2] Moreover, nothing in the language of Section 201.141 makes the proscription against preventing the attainment or maintenance of an air quality standard dependent on whether the standard, if a NAAQS, has been implemented through a SIP. While there may be good reasons for the Board to take the SIP process into account in awarding relief once this kind of Section 201.141 violation has been established, that does not foreclose asserting such a claim before SIP approval. At this stage, the Board finds that the complaint sufficiently states a claim for violation of Section 201.141.

[2] In 2012, the Act was amended to add the NAAQS as a federal program area subject to "identical-in-substance" rulemaking under the Act. *See* 415 ILCS 5/7.2(b), 10(H) (2012). As a result, the Board incorporated the 1-hour SO_2 NAAQS into the Board's air pollution regulations. *See* National Ambient Air Quality Standards, USEPA Regulations (through December 31, 2012), R13-11, slip op. at 1-2 (July 25, 2013).

In so ruling, the Board finds instructive that in adopting Section 201.141 (formerly Rule 102), the Board stated as follows:

> 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. . . . [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 this provision enforcement action may be undertaken against an emission source even if it is in compliance with numerical standards, if such compliance is insufficient to assure that the air is of satisfactory quality. *Id.* at 4-301 to 4-302.

The import of these statements is that a Section 201.141 claim need not be directly tied to source-specific emission standards incorporated in a SIP. Thus, violation of the proscription against preventing the attainment or maintenance of an ambient air quality standard need not await adoption of a numerical limit under a SIP. Of course, compliance with such a limit may be a relevant consideration in establishing a violation. *See* 415 ILCS 5/49(e) (providing that compliance with Board regulations is a *prima facie* defense to any action for violation of the Act). But at the pleading stage it suffices to conclude that a Section 201.141 claim for preventing the attainment or maintenance of a NAAQS is stated if its elements are adequately pled, regardless of the status of NAAQS implementation.

The Board appreciates MWG's arguments that Section 201.141 was adopted before any SO_2 ambient air quality standard was in place, and that the Board's stated concern in R71-23 about the "unlimited proliferation of sources in a relatively small area," threatening violation of air quality standards (Emission Standards, R71-23, slip op. at 4-301), has been addressed through the subsequent "New Source Review" amendments to the CAA and related Board regulations. *See* 91 Stat. 685; 35 Ill. Adm. Code 201, 203. These may conceivably be grounds to consider amending Section 201.141, in a proper proceeding. A rulemaking proposal to amend Section 201.141 is not before the Board here, however, and the Board must apply the plain terms of Section 201.141 terms as written. Given that those terms prohibit emissions that prevent the attainment and maintenance of a NAAQS, and not just of one implemented at the state level, the Board finds that count 2 states a proper cause of action.

MWG also argues that count 2 fails to state a claim to the extent it alleges that the MWG plants only contribute to NAAQS exceedance, along with other sources, and are not the sole cause of such exceedance. *See* Mot. Dis. at 39-40; Reply at 23-24. According to MWG, Section 201.141 proscribes only causing or threatening air pollution "in combination with" other sources, not preventing the attainment or maintenance of a NAAQS in combination with other sources. *Id.* The Board finds it unnecessary to resolve this argument in ruling on MWG's dismissal motion. The complaint alleges both that the plants threaten to exceed the SO_2 NAAQS by themselves and that they threaten exceedances in combination with emissions from other sources—depending on which emission rate is used in the modeling analysis. The complaint first alleges that at the plants' permitted SO_2 emission limits of 1.8 pounds per million Btus of heat input, each plant threatens to exceed the SO_2 NAAQS "*before including the concentration*

added by other facilities. . . ." Comp. at 6 (¶22) (emphasis added). Subsequent allegations rely on the plants' respective "reported maximum 1-hour coincidental emission rates" in the dispersion modeling to conclude that the MWG plants threaten violations of the SO_2 NAAQS. Comp. at 7-8 (¶¶25-28). Sierra Club explains that the resulting "lower impacts" still exceed the NAAQS "for all plants other than the Will County plant *without* adding background concentrations . . . ." Resp. Dis. at 6 (emphasis in original). Which of these emission rates, if any, may be used to model exceedances of the NAAQS, and whether modeling itself may be used, are matters beyond the scope of the Board's review to determine whether a complaint is frivolous. It would be premature, then, for the Board to settle on the proper construction of Section 201.141. That question will become ripe, if at all, only if Sierra Club ultimately attempts to prove a violation of Section 201.141 based on the MWG plants' threatening to exceed the NAAQS in combination with other sources rather than just alone.

Specificity and Fair Notice

MWG maintains that the complaint lacks necessary detail and fails to give fair notice of the conduct that is allegedly prohibited. Applying pleading standards under the Act and the Board's procedural rules, MWG's allegations concerning Sections 9(a) and 201.141 must specify the "manner in and the extent to which [the respondent] is said to violate" the prohibitions against causing or allowing emissions that are "injurious" to health and against preventing the attainment or maintenance of the SO_2 NAAQS, respectively. 415 ILCS 5/31(c) (2012); *see also id.* at 5/31(d) (allowing any person to file a complaint "meeting the requirements of" Section 31(c)); 35 Ill. Adm. Code 103.204(c). The complaint specifically alleges that SO_2 emissions from the four plants cause air pollution. The complaint further includes allegations about maximum SO_2 emissions from the MWG plants in 2010 and 2011, and likely exceedances of the NAAQS in 2012. *See* Comp. at 6-9 (¶¶21-29). The complaint compares these levels to the health-based levels of the 1-hour SO_2 NAAQS. These allegations are sufficient, in the Board's view, to "advise [MWG] of the extent and nature of the alleged violation[ ] so as to reasonably allow preparation of a defense," and, therefore, to state a proper cause of action. 35 Ill. Adm. Code 103.204(c). *See also, e.g.*, Sheridan-Joliet, PCB 13-19 and PCB 13-20 (cons.), slip op. at 24. In so holding, the Board makes no finding concerning whether Sierra Club will be able to prevail on its Section 9(a) air pollution claim or the NAAQS-related claim under Section 201.141.

In addition, because the Board finds that the complaint adequately states claims for violation of Sections 9(a) and 201.141, the Board also concludes that the complaint does not deny MWG fair notice of what conduct is allegedly prohibited. Moreover, the prehearing and hearing parts of this proceeding will afford MWG the opportunity to test the evidence in support of Sierra Club's claims and, if any violations are established, to argue that they do not warrant the relief that the complaint requests.

Whether the Complaint Requests Relief the Board Lacks Authority to Grant

The Board turns next to whether the complaint is frivolous for the additional reason that it requests relief that the Board lacks authority to grant. The complaint asks that the Board find the alleged violations, impose a civil penalty, order MWG to cease and desist from emissions

that cause or threaten exceedance of the SO_2 NAAQS, "[l]imit SO_2 emissions to the hourly rates determined necessary to prevent any violation of the 1-hour SO_2 NAAQS," and "[f]urther reduce SO_2 emissions to offset unlawful past SO_2 emissions." Comp. at 11 (¶¶ 2-5). The Board is authorized to find violations of the Act and Board regulations and order appropriate relief to address such violations. The Board is required to make appropriate findings in adjudicatory proceedings (*see* 415 ILCS 5/33(a) (2012)), and may, upon finding a violation of the Act or rules, among other things, direct the respondent to cease and desist from such violations and order the respondent to pay civil penalties in accordance with Section 42 of the Act (*see id.* at 5/33(b); *see also id.* at 5/42). More generally, the Board may issue a final order "as it shall deem appropriate under the circumstances." *Id.* at 5/33(a).

MWG maintains that to grant the requested relief, the Board would have to (a) determine which nonattainment areas designed by USEPA are at issue—and potentially identify other areas in Illinois as nonattainment—and find that all four power stations named in the complaint are contributing to that nonattainment; and (b) develop source-specific SO_2 limitations designed to bring any nonattainment areas into attainment with the 1-hour SO_2 NAAQS. Memo. at 17, 20-21.

The Board notes that the relief requested by the complaint, and particularly the requests for the Board to impose emission limitations and offsetting reductions on the MWG plants, may call for actions closely related to matters assigned to other agencies by statute. As noted above, the CAA gives USEPA alone the authority to make attainment designations. *See* 42 U.S.C. §§ 7407(d)(1)(B), 7502(a) (2008). And, at the state level, in Illinois the Agency proposes any emission limitations necessary for NAAQS attainment and submits such limitations adopted by the Board to USEPA. *See* 42 U.S.C. §§ 7407(d)(1)(A), 7410(a), 7514 (2008).

These principles may become relevant to the proper scope of relief should Sierra Club prevail on the allegations in the complaint. The Board finds, however, that this is not the appropriate stage of the proceeding to determine what remedies would be available to Sierra Club were it to prove the alleged violations. While the possibility exists that the Board is unauthorized to grant the relief sought, Section 33 of the Act gives the Board "wide discretion in fashioning a remedy." Roti v. LTD Commodities, 355 Ill. App. 3d 1039, 1053, 823 N.E.2d 636, 647 (2d. Dist. 2005); *see also* Discovery South Group, Ltd. v. PCB, 275 Ill. App. 3d 547, 557-561, 656 N.E.2d 51, 58-61 (1st Dist. 1995). Accordingly, the relief sought by Sierra Club in this case is not necessarily outside the Board's authority to impose. For these reasons, the Board finds that the complaint is not frivolous based on the relief it seeks.

Joinder

MWG also urges dismissal for Sierra Club's failure to join USEPA and the Agency, as well as other sources of SO_2 emissions, as respondents to this proceeding. *See* Mot. Dis. at 25-29; Reply at 26-30. The Board is not persuaded, however, that any of these entities is a necessary party, *i.e.*, one whose absence makes it impossible for the Board to make a "complete determination" of this controversy. 35 Ill. Adm. Code 101.403(a); *see also id.* at 103.206(a) (applying "complete determination" standard to adjudicatory cases). As discussed above, the complaint asserts claims against MWG alone for violation of Sections 9(a) and 201.141. *See*

Comp. at 4-6 (¶¶13-22), 11 (¶¶2, 3). No other party is necessary to resolve such alleged violations.

In sum, the Board denies MWG's dismissal motion in its entirety. In so ruling, the Board makes no determination on the weight, sufficiency, or persuasiveness of the evidence supporting any of Sierra Club's claims.

Duplicative or Frivolous

As stated above, "[u]nless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2006); *see also* 35 Ill. Adm. Code 103.212(a). A complaint is "duplicative" if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. As noted above, a complaint is "frivolous" if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.* Based on the information in this record, the Board finds that Sierra Club's complaint is neither frivolous nor duplicative.

Hearing and Answer

The Board accepts Sierra Club's complaint for hearing. *See* 415 ILCS 5/31(d)(1) (2012); 35 Ill. Adm. Code 103.212(a). A respondent's failure to file an answer to a complaint within 60 days after receiving the complaint may have severe consequences. Generally, if MWG fails within that timeframe to file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board will consider MWG to have admitted the allegation. *See* 35 Ill. Adm. Code 103.204(d). Any answer to the complaint must be filed on or before March 9, 2015, which is the 60th day after the date of this order.

The Board directs the hearing officer to proceed expeditiously to hearing. Among the hearing officer's responsibilities is the "duty . . . to ensure development of a clear, complete, and concise record for timely transmission to the Board." 35 Ill. Adm. Code 101.610. A complete record in an enforcement case thoroughly addresses, among other things, the appropriate remedy, if any, for the alleged violations, including any civil penalty.

If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2012). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may

mitigate or aggravate the civil penalty amount. These factors include the following: the duration and gravity of the violation; whether the respondent showed due diligence in attempting to comply; any economic benefits that the respondent accrued from delaying compliance based upon the "lowest cost alternative for achieving compliance"; the need to deter further violations by the respondent and others similarly situated; and whether the respondent "voluntarily self-disclosed" the violation. 415 ILCS 5/42(h) (2012). Section 42(h) requires the Board to ensure that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship." *Id*. Such penalty, however, "may be off-set in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent." *Id*.

Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any (including whether to impose a civil penalty), and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. The Board also directs the hearing officer to advise the parties to address these issues in any stipulation and proposed settlement that may be filed with the Board.

CONCLUSION

The Board denies MWG's motion to dismiss the complaint as frivolous and, finding it neither frivolous nor duplicative, accepts the complaint for hearing. Any answer to the complaint must be filed within 60 days after the date of this order, that is, on or before March 9, 2015.

ORDER

1. The Board denies the motion of David C. Bender to appear *pro hac vice* on behalf of Sierra Club. As an out-of-state attorney seeking to represent Sierra Club, Mr. Bender may file a new appearance representing that he is in, and will maintain throughout any further proceedings in this case, compliance with Illinois Supreme Court Rule 707.

2. The Board denies Midwest Generation, LLC's request to strike or disregard Sierra Club's notice of supplemental authority.

3. The Board denies Midwest Generation, LLC's motion to dismiss.

4. The Board accepts for hearing Sierra Club's complaint.

5. MWG may file an answer to Sierra Club's complaint on or before March 9, 2015.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 8, 2015, by a vote of 4-0.

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John T. Therriault, Clerk
Illinois Pollution Control Board