

**BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS**

<b>SIERRA CLUB, PRAIRIE RIVERS</b>	)	
<b>NETWORK, and NATIONAL</b>	)	
<b>ASSOCIATION FOR THE</b>	)	
<b>ADVANCEMENT OF COLORED</b>	)	
<b>PEOPLE,</b>	)	
	)	
<b>Complainants,</b>	)	<b>PCB 18-11</b>
	)	<b>(Enforcement – Water)</b>
<b>v.</b>	)	
	)	
<b>CITY OF SPRINGFIELD, OFFICE OF</b>	)	
<b>PUBLIC UTILITIES d/b/a</b>	)	
<b>CITY WATER, LIGHT and POWER,</b>	)	
	)	
<b>Respondent.</b>	)	

**NOTICE OF FILING**

To: Don Brown, Clerk  
Illinois Pollution Control Board  
100 West Randolph  
Suite 11-500  
Chicago, IL 60601

And Attached Service List

Please take note that on September 13, 2018, I filed electronically with the Office of the Clerk of the Illinois Pollution Control Board the attached Motion for Extension and Leave to File Instanter Complainants' Reply to Respondent's Affirmative Defenses a copy of which is attached and served upon you.

Respectfully Submitted,



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<b>CITY WATER, LIGHT and POWER,</b>	)	
	)	
<b>Respondent.</b>	)	

**COMPLAINANTS’ REPLY TO RESPONDENT’S AFFIRMATIVE  
DEFENSES TO FIRST AMENDED COMPLAINT**

Complainants Sierra Club, Prairie Rivers Network, and National Association for Advancement of Colored People (collectively, “Complainants”) hereby reply to the defenses pleaded by Respondent City of Springfield, Office of Public Utilities d/b/a City Water, Light and Power in its Answer to Complainants’ First Amended Complaint and Affirmative Defenses (“Answer”) filed on July 5, 2019, and state as follows:

1. In its Answer and Defenses, Respondent pleads defenses that it calls “affirmative defenses.”
2. Section 101.100(b) of the Board’s procedural rules states that the provisions of Illinois’ Code of Civil Procedure “do not expressly apply to proceedings before the Board;” however, the Board “may look to the Code of Civil procedure...for guidance when the Board’s procedural rules are silent.”
3. The Board’s procedural rules provide for the filing of affirmative defenses, Section 103.204(d) (“Any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing”); however, they are silent as to the filing of responses or replies to affirmative defenses. Therefore, to aid the Board, Complainants herein bring to the Board’s

attention relevant provisions of the Illinois Code of Civil Procedure as well as pertinent appellate opinions concerning affirmative defenses.

4. Illinois courts interpreting the Illinois Code of Civil Procedure have held that the “failure to answer an affirmative defense constitutes an admission of the allegations contained in it.” *Ness v. Ness*, 2013 Ill. App. (2d) 121177-U, \*P14 (Ill. App. Ct. 2d Dist. June 11, 2013) (citing *Filliung v. Adams*, 387 Ill. App. 3d 40, 56 (Ill. App. Ct. 1st Dist. 2008)). However, affirmative defenses are not deemed admitted, notwithstanding the failure to answer those defenses, if “the existing complaint already negates them” or if they constitute legal conclusions. *Id.*; *Filliung*, 387 Ill. App. 3d at 57; *Florsheim v. Travelers Indemnity Co. of Illinois*, 75 Ill. App. 3d 298, 309 (Ill. App. Ct. 1st Dist. 1979).

5. The burden of proving an affirmative defense falls on the party asserting that affirmative defense. *In re Marriage of Jorczak*, 315 Ill. App. 3d 954, 957 (Ill. App. Ct. 4th Dist. 2000).

### **RESPONDENT’S FIRST DEFENSE**

6. “Complainants allege that Respondent has ‘discharged contaminants into the environment at CWLP site and thereby caused water pollution in violation of Sections 12(a) and 12(d)’ of the Environmental Protection Act. ¶ 28. Those provisions state that no person shall:

‘(a) Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.’

‘(d) Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard.’ 415 ILCS 5/12(a) and 12(d).” Answer, Para. 31.

ANSWER: Complainants state that paragraph 28 of the Amended Complaint speaks for itself; the statutory provisions of 415 /LCS 5/12(a), 12(d) speak for themselves; and any further allegations in paragraph 31 of the Answer constitute a legal conclusion to which no response is required.

7. “Complainants allege no specific actions Respondent has taken that would constitute a discharge of contaminants into the environment or specific actions that have caused water pollution, as defined in the Act. Complaints allege no actions taken by Respondent that constitute depositing contaminants onto the land so as to create a water pollution hazard.” Answer, Para. 32.

ANSWER: The allegations in paragraph 32 of the Answer regarding what constitutes “water pollution, as defined in the Act” and “water pollution hazard” consist of legal conclusions to

which no response is required and all remaining allegations in paragraph 32 of the Answer are denied.

8. “Complaints identify as violations of the Act and Board regulations the numeric values of raw data obtained from groundwater monitoring wells without regard to whether the raw data has been analyzed and without regard to whether any constituents present are found in background wells AP-4 and AP-5. Respondent cannot violate the Act -- or any regulations intended to implement the Act -- by monitoring levels of constituents in the environment. Monitoring of these constituents does not constitute a discharge of contaminants that caused water pollution.” Answer, Para. 33.

ANSWER: Complainants deny the allegations that Complainants identified violations “without regard to whether the raw data has been analyzed and without regard to whether any constituents present are found in background wells AP-4 and AP-5.” Complainants further state that the Complaint speaks for itself. The remaining allegations in paragraph 33 of the Answer constitute a legal conclusion to which no response is required. To the extent one is required, Complainants deny the allegations to the extent that they are inconsistent with the Environmental Protection Act.

9. “Because Complainants allege no facts that would represent actions taken in violation of Section 12(a) or 12(d) of the Act, the Amended Complaint is insufficiently pled under Section 103.204(c)(1) and (2) of the Board's procedural rules and relief cannot be granted by the Board. 35 Ill. Adm. Code 103.204(c)(1) and (2).” Answer, Para. 34.

ANSWER: Complainants state that paragraph 28 of the Amended Complaint speaks for itself; the statutory provisions of 415 ILCS 5/12(a), (d) speak for themselves; the regulatory provisions of Section 103.204(c)(1) and (2) of the Board's procedural rules speak for themselves; and any further allegations in paragraph 34 of the Answer constitute a legal conclusion to which no response is required.

### **RESPONDENT'S SECOND DEFENSE**

10. “Complainants allege that Respondent ‘has discharged contaminants into the environment at CWLP site and thereby caused water pollution in violation of 415 ILCS 5/12(a) and (d), and 35 Ill. Admin. Code §§620.115, 620.301(a), and 620.405.’ ¶ 28.” Answer, Para. 36.

ANSWER: Complainants state that paragraph 28 of the Amended Complaint speaks for itself; the statutory provisions of 415 ILCS 5/12(a), (d) speak for themselves; the regulatory provisions of 35 Ill. Admin. Code §§620.115, 620.301(a), 620.405 speak for themselves; and any further allegations in paragraph 36 of the Answer constitute a legal conclusion to which no response is required.

11. “‘Water pollution’ is defined as ‘such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render

such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or w3other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.’ 415 ILCS 5/3.545.” Answer, Para. 37.

ANSWER: Complainants state that the statutory provisions of 415 ILCS 5/3.545 speak for themselves and any further allegations in paragraph 37 of the Answer constitute a legal conclusion to which no response is required.

12. “Count 1 of the Complaint does not specify which provisions in the definition of water pollution it alleges are present, but in order to find a violation of Sections 12(a) and 12(d) of the Act through actions of the City of Springfield that ‘caused water pollution,’ the Board must find a nuisance or waters that are harmful, detrimental or injurious to public health or other beneficial uses of waters of the State.” Answer, Para. 38.

ANSWER: Complainants state that Count 1 of the Amended Complaint speaks for itself; the statutory provisions of the Environmental Protection Act found at 415 ILCS 5/12(a), (d) speak for themselves; and any further allegations in paragraph 38 of the Answer constitute a legal conclusion to which no response is required.

13. “Respondent has not caused water pollution in violation of the Act because there is no nuisance, harm or injury to public health, or impairment or preclusion of any beneficial uses of any waters of the State as a result of low levels of constituents in groundwater samples and the inability of any contaminants to migrate off-site or impact the public's health or uses of groundwater. Because Complainants have not alleged facts that demonstrate water pollution under the Act, the Amended Complaint is insufficiently pled and relief cannot be granted by the Board.” Answer, Para. 39.

ANSWER: Complainants state that the conclusions that “Respondent has not caused water pollution in violation of the Act” and that “Complainants have not alleged facts that demonstrate water pollution under the Act” constitute legal conclusions to which no response is required. All remaining allegations in paragraph 39 of the Answer are denied.

### **RESPONDENT’S THIRD DEFENSE**

14. “Count 1 of the Complaint alleges that ‘the groundwater at the CWLP Site has exceeded the Class I GQSs for arsenic, boron, chromium, iron, lead, manganese, sulfate, and TDS, or the Class II GQSs for arsenic, boron, iron, lead, manganese, sulfate, and TDS. 35 Ill. Admin. Code §§ 620.410, 620.420.’ ¶ 29.” Answer, Para. 41.

ANSWER: Complainants state that Count 1 of the Amended Complaint speaks for itself, and the regulatory provisions found at 35 Ill. Admin. Code §§ 620.410, 620.420 speak for themselves.

15. “Section 620.201 of the Board’s regulations provides that ‘All groundwaters of the State are designated as: a) One of the following four classes of groundwater in accordance with

Sections 620.210 through 620.240: 1) Class I: Potable Resource Groundwater; 2) Class II: General Resource Groundwater....' It is not possible under this definition for the groundwater to be both a Class I and Class II groundwater and therefore it is not possible for the Respondent to have violated both 35 Ill. Adm. Code 620.210 and 620.420." Answer, Para. 42.

ANSWER: Complainants state the regulatory provisions found at 35 Ill. Admin. Code §§ 620.410, 620.420 speak for themselves and the remaining allegations in Paragraph 42 constitute legal conclusions to which no response is required. Complainants deny all additional allegations to the extent they mischaracterize the Complaint as amended.

16. "In the Amended Complaint, Complainants have now properly pled these violations of Class I and Class II standards in the alternative. However, Complaints still fail to allege facts to support which standard it alleges to be applicable to the CWLP site and therefore the Amended Complainant is still insufficiently pled under the Board's procedural regulations and the allegations of violations of the Board's groundwater standards cannot be sustained. 35 Ill. Adm. Code 103.204(c)(1) and (2)." Answer, Para. 43.

ANSWER: Complainants state the regulatory provisions found at 35 Ill. Adm. Code 103.204(c)(1) and (2) speak for themselves and the remaining allegations in Paragraph 43 constitute legal conclusions to which no response is required.

#### **RESPONDENT'S FOURTH DEFENSE**

17. "In the Amended Complaint, Complainants have removed allegations of violations of the Act and Board regulations as a result of constituents monitored in upgradient, background wells. Nevertheless, Complaints have not removed allegations that Respondent has violated Class I or Class II groundwater quality standards at downgradient wells for those constituents which have been documented to have naturally occurring levels of constituents at higher levels than the Class I or Class II standards." Answer, Para. 45.

ANSWER: Complainants state that Count 1 of the Amended Complaint speaks for itself; the regulatory provisions found at 35 Ill. Admin. Code §§ 620.410, 620.420 speak for themselves; and any further allegations in paragraph 45 of the Answer constitute a legal conclusion to which no response is required.

18. "Because Complainants allege no actions Respondent has taken to cause or allow water pollution and because Complainants allege background conditions at Respondents site can represent a violation of the Act, the Complaint is insufficiently pled and relief cannot be granted by the Board." Answer, Para. 46.

ANSWER: Complainants state that Count 1 of the Amended Complaint speaks for itself and the conclusion that Respondent has not "cause[d] or allow[e]d water pollution" constitutes a legal conclusion to which no response is required. All remaining allegations in paragraph 46 of the Answer are denied.

**RESPONDENT'S FIFTH DEFENSE**

19. "In their prayer for relief, Complainants request the Board to 'Order Respondent, pursuant to 415 Ill Comp. Stat. 5/33, to... ii. Modify its coal ash and coal combustion waste disposal and storage practices to avoid future groundwater contamination, iii. Remediate the contaminated groundwater so that it meets applicable Illinois Groundwater Quality Standards...' Complaint at p. 11." Answer, Para. 48.

ANSWER: Complainants state that the prayer for relief in the Compliant speaks for itself.

20. "The contents of a Board Order in a citizens' enforcement case are identified in and limited by the language in Section 33(b) of the Act, which provides:

*'Such order may include a direction to cease and desist from violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order, and/or the imposition by the Board of civil penalties in accord with Section 42 of this Act. The Board may also revoke the permit as a penalty for violation. If such order includes a reasonable delay during which to correct a violation, the Board may require the posting of sufficient performance bond or other security to assure the correction of such violation within the time prescribed.'* 415 ILCS 5/33(b)." Answer, Para. 49.

ANSWER: Complainants state that the provision of the Environmental Protection Act found at 415 ILCS 5/33(b) speaks for itself.

21. "While the Board may order a Respondent to cease and desist from violations of the Act, the Board authority does not extend to the imposition of the relief requested by Complainants to order modification of coal ash practice or to order a plan of remediation of contaminated groundwater. Such injunctive relief is beyond the Board's authority under the Act. See, [sic] *Janson v. Illinois Pollution Control Bd.*, 69 Ill.App.3d 324, 328, 387 N.E.2d 404, 408 (3rd Dist., 1979) and *Clean the Uniform Company-Highland v. Aramark Uniform & Career Apparel, Inc.*, PCB 03-21, Nov. 7, 2002, slip. Op. at 1& 3." Answer, Para. 50.

ANSWER: Complainants state that the allegations in Paragraph 50 constitute legal conclusions to which no response is required.

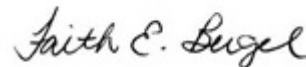
22. "The process for injunctive relief under the Environmental Protection Act is limited to the process provided in Section 42(e) whereby '[t]he State's Attorney of the county in which the violation occurred, or the Attorney General, may, at the request of the Agency or on his own motion, institute a civil action for an injunction, prohibitory or mandatory, to restrain violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order, or to require such other actions as may be necessary to address violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order.' 415 ILCS 5/42(e)." Answer, Para. 51.

ANSWER: Complainants state that the provision of the Environmental Protection Act found at 415 ILCS 5/42(e) speaks for itself and the remaining allegations in Paragraph 51 constitute legal conclusions to which no response is required.

23. Because Complainants request relief not available under the Act, the Board may not act on Complainants prayer for relief and it must be stricken.

ANSWER: Complainants state that the allegations in Paragraph 50 that “relief [is] not available under the Act” constitutes a legal conclusion to which no response is required. All remaining allegations in paragraph 50 of the Answer are denied.

Respectfully Submitted,



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*Attorneys for Sierra Club, Prairie Rivers  
Network, and National Association for the  
Advancement of Colored People*

Dated: September 13, 2019



**CERTIFICATE OF SERVICE**

The undersigned, Greg Wannier, an attorney, certifies that I have served electronically upon the Clerk and by email upon the individuals named on the attached Service List a true and correct copy of the **MOTION FOR EXTENSION AND LEAVE TO FILE INSTANTER and COMPLAINANTS' REPLY TO RESPONDENT'S AFFIRMATIVE DEFENSES**, before 5 p.m. Central Time on September 13, 2019 to the email addresses of the parties on the attached Service List.

Respectfully Submitted,



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PCB 2018-11

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