ILLINOIS POLLUTION CONTROL BOARD
October 3, 2013

SIERRA CLUB, ENVIRONMENTAL LAW AND POLICY CENTER, PRAIRIE RIVERS NETWORK, and CITIZENS AGAINST RUINING THE ENVIRONMENT,	)	
Complainants,	)	
v.	)	PCB 13-15
	)	(Citizen's Enforcement – Water)
MIDWEST GENERATION, LLC,	)	
Respondent.	)	

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

Today the Board denies the motion of Midwest Generation LLC (MWG) to dismiss the enforcement complaint filed by Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (collectively, complainants).[1] But, the Board grants MWG's request to strike portions of counts 1-3 alleging that MWG violated federal regulations.

On October 3, 2012, complainants filed a seven-count enforcement complaint against MWG. The complaint alleges that various violations of the Environmental Protection Act (Act), 415 ILCS 5 (2012) and the Board's land and groundwater regulations are the result of MWG's disposal of coal ash in ash ponds. The ash ponds at issue are located at MWG's Powerton generating station in Pekin, Tazewell County; the Joliet 29 generating station, Will and Kendall counties; the Waukegan generating station, Lake County; and the Will County generating station, Will County.

In this order, the Board first sets out the procedural history of this case, and then summarizes the relevant filings. Next, the Board provides the applicable legal framework, including a discussion of citizen's enforcement actions and the standards that apply in determining whether a complaint is duplicative or frivolous. Finally, the Board rules on MWG's dismissal motion.

[1] Chad Kruse, who worked for the Illinois Environmental Protection Agency prior to joining the Board as an attorney assistant on March 19, 2013, took no part in the Board's drafting or deliberation of any order or issue in this matter.

PROCEDURAL HISTORY

On October 3, 2012, complainants filed their complaint. On November 5, 2012, MWG timely filed a motion to dismiss the complaint (Mot.), accompanied by a memorandum (Mem.) and exhibits in support of the motion (Exhs. 1-18).

On November 15, 2012, complainants timely filed a motion for extension of time in which to respond to the motion to dismiss, which the hearing officer granted. The time for response was extended through December 28, 2012.

On December 21, 2012, complainants filed a letter noting that MWG had filed a bankruptcy petition, staying this action. On December 28, 2012, the Board received a notice of bankruptcy for Edison Mission Energy and certain of its subsidiaries and affiliates, including MWG. The notice stated that on December 17, 2012, Edison Mission Energy *et al.* had filed voluntary petitions for relief under the Bankruptcy Code (11 U.S.C. Ch. 11), being jointly administered under the lead case name In re Edison Mission Energy, Case No. 12-49219 (PJC), in the United States Bankruptcy Court for the Northern District of Illinois (Bankruptcy Court). Also on December 28, 2012, the Board received a motion for extension of time to respond to the motion to dismiss in light of the pending bankruptcy proceeding. By order of January 8, 2013, the hearing officer extended the response time through January 11, 2013.

On January 10, 2013, complainants filed another motion for extension of time to respond to the dismissal motion, requesting an extension until the Bankruptcy Court either lifted the automatic stay or the stay otherwise expired. By order of February 7, 2013, the Board granted the motion for extension of time and directed the parties to make any appropriate filing to notify the Board within 30 days of the expiration of the automatic stay in this case.

On May 22, 2013, complainants filed a notice stating that on April 22, 2013, the Bankruptcy Court issued an order partially lifting the automatic stay as to this case "for the sole purpose of adjudicating MWG's motion to dismiss." By order of May 30, 2013, the hearing officer set a briefing schedule for complainants' response to, and MWG's reply in support of, the dismissal motion. On June 21, 2013, complainants filed a response in opposition to MWG's motion to dismiss. On July 9, 2013, MWG filed its reply in support of the motion to dismiss.

FILINGS

The Complaint

Complainants make a number of general factual allegations in their 19-page complaint (Comp.) regarding coal ash disposal at each generating station before setting forth the seven counts of alleged violations. Comp. at ¶¶ 1-9. The complaint then includes extensive allegations about particular contaminants present at one or more generating stations in quantities that exceed applicable standards. *Id.* at ¶¶ 10-27.

Attached to the complaint are maps of groundwater monitoring wells at each generating station, summaries of alleged violations of groundwater quality standards (GQSs), and

groundwater modeling data excerpted from groundwater monitoring reports submitted by MWG to the Illinois Environmental Protection Agency (Agency), with sampling dates from 2010 through 2012. Comp. Exh. A-J. Also attached to the complaint are Violation Notices (VNs) sent by the Agency to MWG on June 11, 2012 regarding each of the four stations. Comp. Exh. K-N.

Joliet 29 Station

The complaint alleges that at MWG's Joliet 29 power plant, MWG has "historically disposed of coal ash in three ponds"—two high-density-polyethylene-lined ponds, and one geocomposite-lined pond—on the north side of the Des Plaines River, and continues to use the ponds for coal ash disposal. Comp. at ¶ 1. In 2010, the complaint continues, MWG installed 11 groundwater monitoring wells around the Joliet 29 ash ponds. According to the complaint, since monitoring began in late 2010, groundwater monitoring results have detected levels of antimony, boron, chloride, iron, manganese, sulfate, and Total Dissolved Solids (TDS) that exceed Illinois GQSs. *Id.* at ¶ 2. On June 11, 2012, the complaint continues, the Agency sent MWG a violation notice (VN) for violations of Section 12 of the Act (415 ILCS 5/12 (2012)) and GQSs, including Class I GQS (35 Ill. Adm. Code 620.410), at the Joliet 29 plant. *Id.* at ¶ 9.

Powerton Station

Complainants allege that at MWG's Powerton Station, MWG has "historically" disposed of coal ash in "three active ash ponds on the site, two of them lined." Comp. at ¶ 3. MWG monitors groundwater at the station using 15 monitoring wells. According to the complaint, since monitoring began in 2010, groundwater monitoring results have shown levels of arsenic, boron, chloride, iron, lead, manganese, mercury, nitrate, selenium, sulfate, thallium, and TDSs that exceed Illinois' Class I and Class II groundwater quality standards (GQSs) "and/or open dumping standards." *Id.* at ¶ 4. On June 11, 2012, the complaint continues, the Agency sent MWG a VN for violations of Section 12 of the Act (415 ILCS 5/12 (2012)) and GQSs, including Class I GQS (35 Ill. Adm. Code 620.410) at the Powerton station. *Id.* at ¶ 9.

Waukegan Station

According to the complaint, MWG's Waukegan generating station includes two active ponds lined with high-density polyethylene (HDPE) in which MWG has been disposing of coal ash "for several years" and continues to dispose of coal ash. Comp. at ¶ 5. The complaint further alleges that MWG installed five groundwater monitoring wells around these ash ponds in 2010, and that monitoring results show levels of antimony, arsenic, boron, chloride, iron, manganese, pH, sulfate, and TDS that exceed GQS "and/or open dumping standards." *Id.* at 6. On June 11, 2012, the complaint continues, the Agency sent MWG a VN for violations of Section 12 of the Act (415 ILCS 5/12 (2012)) and GQSs, including Class I GQS (35 Ill. Adm. Code 620.410) at the Waukegan plant. *Id.* at ¶ 9.

Will County Station

According to the complaint, the Will County generating station includes "four active geocomposite-lined ponds" that are used and "historically been used for coal ash disposal."

Comp. at ¶ 7. The complaint further alleges that in 2010 MWG installed 10 monitoring wells around these ponds. *Id.* at ¶ 8. Monitoring results from the wells show levels of antimony, boron, chloride, iron, manganese, pH, sulfate, and TDS that exceed Class I and Class II GQSs "and/or open dumping standards." *Id.* On June 11, 2012, the complaint continues, Agency sent MWG a VN for violations of Section 12 of the Act (415 ILCS 5/12 (2012)) and GQSs, including Class I GQSs (35 Ill. Adm. Code 620.410) at the Will County station. *Id.* at ¶ 9.

Nature of Contaminants

According to the complaint, many of the contaminants found at elevated concentrations in the groundwater monitoring results at the four plants are constituents of coal ash. Comp. at ¶ 11. The complaint alleges that at the contaminant levels detected in the groundwater monitoring wells at MWG's generating stations, groundwater is "unusable" and aquatic ecosystems are in jeopardy. The latter is a "significant concern" to the extent contaminated groundwater migrates into adjacent "surface water bodies." *Id.* at ¶ 13. The complaint then describes the risks to human health that each contaminant poses—*e.g.*, arsenic is "known to cause multiple forms of cancer in humans and is associated with non-cancer effects of the skin and nervous system." *Id.* at ¶¶ 14-26. In addition, the complaint asserts that many contaminants associated with coal ash such as selenium "bioaccumulate in aquatic ecosystems," impairing the health of communities of fish and amphibians. *Id.* at ¶ 27.

Count 1—Open Dumping (Powerton)

Count 1 alleges that MWG's Powerton coal ash disposal ponds have caused or contributed to groundwater contamination beneath the plant in violation of Section 21(a) of the Act (415 ILCS 5/21(a) (2012)) and Sections 257.1 and 257.3-4 of the federal regulations promulgated under the Resource Conservation and Recovery Act (RCRA) (40 C.F.R. §§ 257.1, 257.3-4). Comp. at ¶ 43. The complaint identifies 12 groundwater samples collected from seven wells in 2010-12 that purportedly exceed RCRA's Maximum Contaminant Levels (MCLs) contained in 40 C.F.R. part 257 Appendix I. *Id.* at ¶ 44.

Count 2—Open Dumping (Waukegan)

In count 2, complainants allege that MWG's disposal of coal ash in the Waukegan station ponds have caused or contributed to groundwater contamination in violation of Section 21(a) of the Act and Sections 257.1 and 257.3-4 of the federal RCRA regulations. Comp. at ¶ 46. The complaint identifies 21 groundwater samples collected from three wells in 2010-12 that purportedly exceed RCRA MCLs. *Id.* at ¶ 47.

Count 3—Open Dumping (Will County)

Count 3 alleges that MWG's Will County ash ponds have caused or contributed to groundwater contamination in violation of Section 21(a) of the Act and Sections 257.1 and 257.3-4 of the federal RCRA regulations. Comp. at ¶ 49. The complaint identifies four groundwater samples collected from two wells in 2010-11 that purportedly exceed RCRA MCLs. *Id.* at ¶ 44.

Count 4—Water Pollution (Joliet 29)

In Count 4, complainants allege that disposal of coal ash at the Joliet 29 station has caused water pollution in violation of Section 12(a) and (d) of the Act (415 ILCS 5/12(a), (d) (2012)), and Sections 620.115, 620.301(a), and 620.405 of the Board's groundwater quality regulations (35 Ill. Adm. Code 620.115, 620.301(a), and 620.405). Comp. at ¶ 52. The complaint further alleges that since monitoring began in late 2010, there have been 55 violations of Class I GQSs and 42 violations of Class II GQSs. *Id.*

Count 5—Water Pollution (Powerton)

Count 5 alleges that coal-ash disposal at Powerton's ash ponds caused water pollution in violation of Section 12(a) and (d) of the Act, and 35 Ill. Adm. Code 620.115, 620.301(a), and 620.405. Comp. at ¶ 55. The complaint further alleges that since monitoring began in late 2010, there have been 152 violations of Class I GQSs and 73 violations of Class II GQSs at the Powerton plant. *Id.* at ¶ 56.

County 6—Water Pollution (Waukegan)

In Count 6, complainants allege that MWG's disposal of coal ash at the Waukegan station caused water pollution in violation of Section 12(a) and (d) of the Act and 35 Ill. Adm. Code 620.115, 620.301(a), and 620.405. Comp. at ¶ 58. Complaints further allege that since 2010, there have been 51 violations of Class I GQSs and 39 violations of Class II GQSs at the Waukegan plant. *Id.*

Count 7—Water Pollution (Will County)

Count 7 alleges that MWG's disposal of coal ash in the Will County station's ash ponds caused water pollution in violation of Section 12(a) and (d) of the Act, and 35 Ill. Adm. Code 620.115, 620.301(a), and 620.405. Comp. at ¶ 61. Complaints further allege that since monitoring began in late 2010 at the Will County plant, there have been 139 violations of Class I GQSs and 105 violations of Class II GQSs. *Id.*

Relief Requested

For each of the seven counts of the complaint, complainants ask the Board to find that MWG has violated open dumping and GQSs at the four generating stations. Complainants further ask the Board to order MWG to: (1) pay civil penalties as provided under Section 42 of the Act (415 ILCS 5/42 (2012)); (2) cease and desist from further violations; (3) modify its coal ash disposal practices "so as to avoid future groundwater contamination"; and (4) remediate the contaminated groundwater to meet applicable GQSs. Comp. at 18-19.

Respondent's Motion to Dismiss and Memorandum in Support

MWG moves to dismiss the complaint on three grounds, which the Board summarizes more completely below. First, MWG contends that because it has reached "binding and enforceable" compliance commitment agreements (CCAs) with the Agency concerning the ash ponds at each of the four generating stations, the complaint fails to state a cause of action upon which the Board can grant relief and is, therefore, "frivolous." Mot. at 4; Mem. at 9-15. Second, MWG urges dismissal of counts 1, 2, and 3 on the ground that these counts assert violations of federal regulations that the Board lacks authority to enforce and that these counts are otherwise inadequately pled. Mot. at 4; Mem. at 15-20. Third, MWG argues that the complaint is "duplicative" because the "underlying facts" and allegations are "substantially similar" to those in the VNs, and the "relief requested" in the complaint is "resolved by the CCAs" for the respective plants. Mot. at 4; Mem. at 20-24.

As background to all counts, MWG states that the "active" ash ponds at the four stations are an "integral part" of each station's "wastewater treatment systems," and are permitted under, and operate pursuant to, MWG's National Pollution Discharge Elimination System (NPDES) permits. Mem. at 2. All but one of the ash ponds at these plants is "fully lined," MWG adds, and the only unlined pond will be lined when the "compliance activities" in the corresponding CCA are completed. *Id.* at 2 & n.1. According to MWG, in 2010, MWG voluntarily agreed to perform a hydrogeological assessment around the ash ponds. *Id.* at 2. On June 11, 2012, MWG continues, the Agency issued VNs to MWG alleging violations of GQSs based on the groundwater monitoring results MWG "voluntarily submitted" for the hydrogeological assessment. *Id.* at 3. MWG states that these results are also the sole basis for complainants' claims here. *Id.* at 3, 6. The VNs alleged violations of Section 12 of the Act (415 ILCS 5/12 (2012)) and Sections 620.115, 620.301, 620.401, 620.405, and 620.410 of the Board's groundwater quality regulations (35 Ill. Adm. Code 620.115, 620.301, 620.401, 620.405, 620.410). *Id.*

MWG further asserts that its responses to the VNs disputed that the ash ponds caused the GQS exceedances. Mem. at 3. MWG adds that the ash ponds are not "disposal sites" because the ash is "routinely removed" and the geocomposite and HDPE liners are effective at preventing releases to the soil and groundwater at the plants. *Id.* MWG claims it also argued in response to the VNs that the exceedances were "random" and "inconsistent" and showed no link to the ash ponds. *Id.* However, MWG continues, to be "cooperative" and to "quickly resolve" the VNs, MWG proposed a CCA in response to each VN, but also submitted supplemental responses explaining that the ponds remove ash from the wastewater and are permitted under each station's NPDES permit. *Id.* at 3-4. According to MWG, the CCAs were finalized and became effective on October 24, 2012. *Id.* at 4; Mem. Exh. 1-4. MWG stresses that under Section 31 of the Act (415 ILCS 5/31 (2012)), CCAs are enforceable documents, and any person violating the terms of a CCA is subject to a $2,000 stipulated penalty in addition to any other penalty that "may be originally assessed." *Id.*

MWG states that under the CCAs, it will continue to use the ash ponds to precipitate ash, and will continue to remove ash from the ponds on a "periodic basis." Mem. at 4. The CCAs also require MWG to inspect the liners and maintain their integrity, including during ash

removal, and to implement a corrective action plan if signs of a breach are detected. *Id.* at 4-5. MWG must also continue to monitor groundwater quality on a quarterly basis and submit the results to the Agency. *Id.* at 5. MWG will take the following actions at each station in particular. At the Powerton station, MWG will conduct additional groundwater monitoring and re-line two ash ponds with an HDPE liner. *Id.* At the Will County plant, two ponds will be removed from service, and one pond will be re-lined with an HDPE liner. *Id.* At the Joliet 29 station, MWG will re-line one pond with an HDPE liner. At the Waukegan station, MWG will install additional groundwater monitoring wells. *Id.* Finally, at the Powerton, Will County, and Joliet 29 plants, MWG will remediate groundwater conditions through groundwater management zones (GMZs) (35 Ill. Adm. Code 620.250), and at the Powerton, Will County, and Waukegan stations, will implement environmental land use controls (ELUCs) (35 Ill Adm. Code 742.1010). Under the CCAs, these activities must be complete within a year of the CCAs' effective date, and MWG must submit a certification of compliance upon completing the activities. *Id.*

Frivolous

MWG argues that the complaint is frivolous because "there is no disagreement between the Agency and MWG" concerning the violations in the VNs. Mem. at 9-10. MWG argues that under Section 31(d) of the Act (415 ILCS 5/31(d) (2012)), a citizens enforcement action must meet the requirements of Section 31(c) of the Act (415 ILCS 5/31(c) (2012)), including that a complaint may be filed only regarding "'alleged violations *which remain the subject of disagreement between the Agency and the person complained against. . .*'" *Id.* at 9, quoting 415 ILCS 5/31(c) (2012) (emphasis in Mem.). According to MWG, a federal trial court has noted that citizen's suits must meet the requirements of Section 31(c), which pertains to alleged violations that remain subject to disagreement between the Agency and the alleged violator. *Id.* at 11, citing Chrysler Realty Corp. v. Thomas Industries, Inc., 97 F. Supp. 2d 877, 879 n.1 (N.D. Ill. 2000). The Board has repeatedly held, MWG emphasizes, that Section 31(c)'s requirements apply to citizen's suits, and should, therefore, enforce in this case the prerequisite of a disagreement between the Agency and the person complained against. *Id.* at 11-12.

MWG also highlights the 2011 amendments to Section 31(a) (Public Act 97-519, § 5 (eff. Aug. 23, 2011)) that made CCAs legally binding agreements and added a provision barring Agency referral of alleged violations to state law enforcement authorities where the alleged violator is complying with a CCA. Mem. at 12. Beyond signifying the lack of a disagreement between MWG and the Agency regarding groundwater quality violations at the four power plants, MWG continues, the binding CCAs resolve any related controversy, and thus make the complaint here moot. *Id.* at 13-14.

Further, MWG contends that citizens should not be permitted to "usurp the authority and expertise" of the Agency, the state agency authorized to implement and enforce environmental laws in Illinois. Mem. at 14. MWG claims that allowing a citizen's enforcement complaint to proceed in the face of a CCA addressing the alleged violations would "supplant" the Agency's authority and undermine the importance and effectiveness of CCAs" and undermine the 2011 amendments' intent to give CCAs "greater legal impact." *Id.* at 15. In that circumstance, MWG continues, the Agency would have to refer more matters to the Attorney General's Office for enforcement. *Id.* MWG also fears that allowing a citizen's complaint despite the existence of a

CCA resolving the same alleged violations could lead to "conflicting remedies," putting respondents in the "impossible position" of having to decide whether to violate the CCA or a Board order. *Id.*

Open Dumping Claims

MWG argues that counts 1-3 should be dismissed, and paragraphs 33-35 of the complaint struck, because they are predicated on federal regulations that the Board lacks authority to enforce. Mem. at 16. Specifically, according to MWG, the complaint relies on federal RCRA regulations to establish criteria to distinguish open dumps from sanitary landfills based on groundwater contamination. *Id.* In addition, MWG stresses that ash ponds cannot be deemed "open dumps" because they are regulated surface impoundments and properly permitted "water treatment units." *Id.*

Regarding the federal regulations on which the complaint relies, 40 C.F.R. §§ 257.1 and 247.3-4, MWG maintains these are not incorporated by reference into any Board regulation and the Board lacks authority to adopt regulations "identical in substance" to them. Mem. at 17. According to MWG, the Board has held that its RCRA identical in substance rulemaking authority applies to 40 C.F.R. part 258, not 40 C.F.R. part 257 or RCRA Subtitle D. *Id.*, citing RCRA Subtitle D Update, USEPA Regulations (July 1, 1996 through December 31, 1996), R97-20, slip. op. at 2 (Nov. 20, 1997).

In addition, MWG contends that setting aside the complaint's improper references to the federal regulations, counts 1-3 should be dismissed as inadequately pled because they fail to allege facts showing the ash ponds constitute open dumps. Mem. at 18, citing 415 ILCS 5/31(c) (2012); 35 Ill. Adm. Code 103.204. MWG claims these counts simply parrot statutory definitions of terms relating to open dumping without alleging facts establishing that the ash ponds fall within those definitions. *Id.* at 19.

MWG also maintains that, as the Agency has recognized, ash ponds are surface impoundments, not open dumps or disposal sites, and are properly "permitted and regulated as water pollution treatment units." Mem. at 19. MWG adds that the Board has also characterized ash ponds as surface impoundments rather than landfills, and has never treated as open dumping an "active part of a water pollution treatment process." *Id.* at 19-20 & n.12, citing Petition of Ameren Energy Generating Company for Adjusted Standards from 35 Ill. Adm. Code Parts 811, 814, 815, AS09-1, slip op. at 4 (Aug. 11, 2008). MWG states that each CCA includes a directive for the ash ponds to continue to function as water pollution treatment ponds to precipitate coal ash. *Id.* at 20.

Duplicative

Finally, MWG argues the complaint is duplicative because it is based on the same facts, alleged violations, and requested relief as the VNs and corresponding CCAs. Mem. at 20, citing 35 Ill. Adm. Code 101.202. In fact, according to MWG, the violations alleged in counts 4-7 of the complaint—that is, violations of Section 12 of the Act (415 ILCS 5/12 (2012)) and Sections 620.115, 620.301, and 620.405 of the Board's groundwater quality regulations (35 Ill. Adm.

Code 620.115, 620.301, 620.405)—are "almost identical" to those alleged in the VNs. *Id.* at 21. MWG also maintains that the complaint is premised entirely on groundwater monitoring results MWG submitted to the Agency, and otherwise lacks any "facts or information" to support its claims. *Id.*

As to requested relief, MWG contends it has already agreed, under the CCAs, to take the actions complainants ask the Board to require MWG to take: modify coal ash practices to avoid future groundwater contamination and remediate the groundwater to meet applicable GQSs. *Id.* at 22. Specifically, MWG states that at the Powerton, Will County, and Joliet 29 stations, it will replace existing geocomposite liners with HDPE liners, and that it will take two ash ponds out of service at the Waukegan plant. *Id.* MWG adds that it is "taking measures" at each station to remediate the groundwater to meet applicable standards and installing additional monitoring wells at the Powerton and Waukegan stations to further delineate groundwater quality. *Id.* According to MWG, it will also continue to monitor all groundwater monitoring wells on a quarterly basis. *Id.* As part of the remediation activities required by the CCAs, MWG will establish a GMZ at the Powerton, Will County, and Joliet 29 stations, and establish ELUCs at the Powerton and Waukegan plants. *Id.* MWG adds that the Agency has determined that these remediation activities "resolve the groundwater violations." *Id.*

Recognizing that there must be an identical or substantially similar matter pending before the Board or "another forum" for a complaint to be duplicative (35 Ill. Adm. Code 101.202), MWG claims the Agency's pre-referral process is "another forum," at least to the extent it results in a CCA. Mem. at 23. A CCA is "just like" a settlement agreement entered in an enforcement case brought in circuit court, according to MWG. *Id.* MWG adds that the Board's decisions holding that pre-referral steps such as issuance of a VN do not constitute "another forum" preceded the 2011 amendments to Section 31, and in any event a CCA is "far beyond a pre-enforcement step." *Id.* According to MWG, the statutory "characteristics" of a CCA under amended Section 31(a)—*i.e.*, that the respondent is subject to an automatic penalty for violating a term or condition of a CCA, and that the Agency may not refer for enforcement alleged violations addressed in a CCA with which the alleged violator is complying—make clear that a CCA is "not merely a pre-enforcement step but is an enforceable, binding document." *Id.* at 23-24. Thus, MWG concludes, the complaint should be dismissed as duplicative of the VNs and corresponding CCAs concerning groundwater quality violations at the four power plants. *Id.* at 24.

Complainants' Response to Motion to Dismiss

Frivolous

Complainants argue that MWG's claim that Section 31(c) of the Act (415 ILCS 5/31(c) (2012) imposes a "disagreement" threshold requirement for citizen's complaints is an incorrect and "strained interpretation" of the Act. Resp. at 4, 5, citing People v. Freeman United Coal Co., PCB 10-61, slip op. at 9 (Apr. 18, 2013). According to complainants, if every requirement of Section 31(c) applied to citizen's complaints, either the Attorney General's Office or the State's Attorney would have to file and serve citizen's complaints, which the legislature could not have intended. *Id.* at 6. In addition, complainants continue, under MWG's interpretation, citizen's

suits could be brought only in the "narrow window of time" after the Agency has issued a VN but before a CCA has been entered, a result that would "radically cripple" citizen's suits and that could not have been the legislature's intent. However, complainants note, "[a]s it happens," they filed their complaint within this window. *Id.* at 6 n.2.

Complainants also claim Chrysler Realty is "inapt" because it did not address whether a citizen's complaint is subject to the disagreement requirement MWG posits, but simply stated that such a complaint must satisfy Section 31(c)'s requirements. *Id.* at 6 n.3. That observation does not conflict with complainants' "common-sense" interpretation of Section 31(c), complainants add, which is that all enforcement actions must meet the "content requirements" for complaints imposed by Section 31(c). *Id.* at 6 n.3, 7. Complainants add that the Board decisions on which MWG relies actually support this reading of Section 31(c). *Id.* at 7.

Open Dumping Claims

Complainants argue that Section 21(a) of the Act (415 ILCS 5/21(a) (2012)), prohibiting open dumping, uses terms that the Act defines with reference to RCRA and associated regulations and thus "clearly incorporates elements of federal [RCRA] open dumping regulations." Resp. at 4, 7. As such, complainants continue, those regulatory provisions are "part of Illinois law," and must be consulted in determining whether MWG violated state law. *Id.* at 8, citing Commonwealth Edison Co. v. PCB, 127 Ill. App. 3d 446, 468 N.E.2d 1339 (3rd Dist. 1984). According to complainants, Commonwealth Edison Co.held that the "mere identification" of federal law in a state statute "makes that provision enforceable under the referencing statute; no specific incorporating language is required." *Id.*

Further, complainants claim the RCRA regulations on which the complaint relies were incorporated by reference as follows. Section 21(a) of the Act prohibits "open dumping," which the Act defines as the consolidation of refuse at a disposal site not meeting the requirements of a "sanitary landfill." Resp. at 9, citing 415 ILCS 5/3.305 (2012). In turn, the Act defines "sanitary landfill" as a facility permitted by the Agency "for the disposal of waste on land that meets the requirements of [RCRA]." *Id.*, citing 415 ILCS 5/3.445 (2012). And, under RCRA, a sanitary landfill is defined by "the specific criteria" of 40 C.F.R. part 257. *Id.* RCRA treats as open dumps facilities that do not meet the criteria of 40 C.F.R. § 257.3-4, including that the facility not contaminate "an underground drinking water source beyond the solid waste boundary or beyond an alternative compliance boundary." *Id.* Complainants add that under this provision, groundwater contamination occurs where there is an exceedance of an MCL set forth in 40 C.F.R. part 257 in an actual drinking water source or an aquifer with less than 10,000 milligrams per liter (mg/L) total dissolved solids. *Id.*

The RCRA regulations are also relevant here, according to complainants, because the structure of the Act's open dumping prohibition deliberately "parallels the structure of federal law." Resp. at 10. Complainants explain that RCRA defines an "open dump" as a solid waste disposal site that is not a "sanitary landfill" within the meaning of RCRA and that is not a facility for the disposal of hazardous waste. *Id.* Complainants add that section 3.305 of the Act (415 ILCS 5/3.305 (2012)) makes the same distinction in defining open dumping as the consolidation of waste at a disposal site that is not a proper sanitary landfill. *Id.* The "critical difference"

between RCRA and the Act, complainants continue, is that RCRA defines "open dump," while the Act does not, which means the Act must necessarily rely on the RCRA regulations to define the term. *Id.* Complainants maintain the Board has recognized this alignment of RCRA and the Act in stating that Section 21(a) and the predecessor provision to Section 3.305 of the Act, which "define and prohibit 'open dumping' in Illinois," were the "counterpart" to 40 C.F.R. part 257. *Id.* at 11, citing RCRA Subtitle C Update, USEPA Regulations (July 1, 1996 through December 31, 1996), R97-21, R98-3, and R98-5 (cons.), slip. op. at 11 (Aug. 20, 1998). Thus, complainants conclude, a violation of these federal regulations "is a violation of Illinois law." *Id.*

In this context, complainants continue, MWG relies on an irrelevant RCRA update to demonstrate that the Board has chosen not to adopt regulations identical in substance to 40 C.F.R. part 257. Resp. at 11, citing RCRA Subtitle D Update, USEPA Regulations (July 1, 1996 through December 31, 1996), R97-20 (Nov. 20, 1997). That was an "identical in substance" rulemaking concerning municipal solid waste regulations, complainants explain. Complainants add that in that proceeding, the Board declined to adopt, not RCRA's open dump provisions, but USEPA regulations governing non-municipal landfills accepting a particular kind of hazardous waste. *Id.* at 12. By contrast, complainants claim they know of no order in which the Board considered adopting 40 C.F.R. § 257.3-4—and there is no reason to do so because 40 C.F.R. part 257 already is incorporated into the Act. *Id.*

Complainants also claim that counts 1-3 of the complaint are adequately pled. Resp. at 12. Complainants recite that section 31(c) of the Act (415 ILCS 5/31(c) (2012)) requires a complaint to specify the provision of the Act or rule allegedly violated and to state the manner in and extent to which the respondent is said to violate the Act or regulation. *Id.* at 13. Complainants add that the content requirements for complaints set out in Section 103.204(c) of the Board's procedural rules (35 Ill. Adm. Code 103.204(c)) are met "when the complaint lists the source of pollution, *e.g.*, construction activities, and the year of the violation." *Id.*, citing Schilling v. Hill, PCB 10-100, slip op. at 10-11 (Nov. 4, 2010). The first three counts of the complaint in this case meet these requirements, complainants argue, by identifying, for each plant, the source of the contamination—the ash ponds at each plant—and the extent of contamination by date, pollutant, and monitoring well. *Id.* Complainants add that the details of how the "impoundments caused the contamination are not available" to them and are not required at the pleading stage.

Next, complainants maintain it is immaterial that, as MWG points out, coal ash is stored in impoundments rather than landfills. Resp. at 14. The Board has applied the Act's open dumping proscription to "non-landfill storage" multiple times, complainants continue, and the ash ponds at issue are "both impoundments and open dumps." *Id.* at 14, citing People v. State Oil Co., PCB 97-103, slip op. at 4 (Aug. 19, 1999). In State Oil, complainants continue, the Board denied a motion to dismiss as frivolous a claim under Section 21(a) of the Act concerning leakage from an underground storage tank (UST). *Id.*, citing State Oil, PCB 97-103, slip op. at 4. According to complainants, the Board has "repeatedly reaffirmed" this holding. *Id.* at 14-15, citing Universal Scrap Metal, Inc. v. Flexi-Van Leasing, Inc., PCB 99-149, slip op. at 7 (Apr. 5, 2001); People v. State Oil Co., PCB 97-103, slip op. at 21 (Mar. 20, 2003). Thus, complainants add, MWG's impoundments "do not need to be landfills" to violate Section 21(a). *Id.* at 15.

Nor, according to complainants, does it matter that the ash ponds may have NPDES permits. Rather, complainants continue, the UST cases cited above make clear that a site can be both a permitted and regulated storage area and a disposal site that violates Section 21(a), to the extent the "storage unit fails to contain the waste." *Id.*

Duplicative

Complainants cite four reasons the complaint is not "'identical or substantially similar to one brought before the Board or another forum,'" and thus not duplicative. Resp. at 16, quoting 35 Ill. Adm. Code 101.202. First, complainants contend, no other forum has addressed the violations alleged in the complaint, because "anything short" of an administrative or judicial "adjudication" is not "another forum." *Id.* at 17. Complainants add that this means participation in a "voluntary program offered by" the Agency does not constitute another forum. *Id.* at 17-18, citing UAW v. Caterpillar, Inc., PCB 94-240, slip op. at 5 (Nov. 3, 1994).

Complainants further maintain that duplicativeness depends on the circumstances that exist at the time the complaint was filed, and here, the complaint was filed three weeks before MWG and the Agency entered into the CCAs. Resp. at 17-18. According to complainants, when they filed the complaint, nothing had happened other than issuance of the VNs, and those did not address all of the violations alleged in this case. *Id.* In any event, complainants argue, CCAs are not another forum. *Id.* They are nothing like settlements in circuit court actions, according to complainants, because CCAs offer no opportunity for public intervention and input, as judicial proceedings do. *Id.* at 18-19. Complainants emphasize that they did not participate, and could not have participated, in the pre-enforcement process that led to the CCAs. *Id.* at 20.

Second, complaints maintain that their complaint, in addition to alleging water pollution, includes alleged violations that the VNs did not, namely, 37 "open dumping violations" proscribed by Section 21(a) of the Act (415 ILCS 5/21(a) (2012)). Resp. at 21. Complainants add that, unlike the groundwater protection provisions of Section 12 of the Act (415 ILCS 5/12 (2012)), Section 21(a) proscribes both land and water pollution. *Id.* Thus, according to complainants, the VNs and the complaint here are based on distinct legal theories. *Id.* at 22 & n.6.

Third, complainants point out that even as to groundwater quality, the complaint alleges additional GQS violations that the VNs did not, specifically, 12 violations of Class I GQSs and 259 violations of Class II GQSs. *Id.* at 22-23. The alleged violations in the complaint also extend over a longer time frame than those alleged in the VNs, according to complainants. *Id.* at 23. Specifically, complainants explain, the complaint alleges violations of Class I GQSs at the Joliet 29 plant that took place up to a year after the most recent violation alleged in the Joliet 29 VN. *Id.* at 23-24. According to complainants, the complaint alleges Class I GQS violations at the Waukegan station that occurred six months prior to the first violation alleged in the corresponding VN. *Id.* at 24.

Fourth, complainants stress that the complaint seeks "quite different and far more extensive relief" than that provided by the CCAs. Resp. at 24. Complainants add that this is in part a function of the distinct violations, extending over a longer time period, alleged in the

complaint. *Id.* at 24-25. Beyond that, complainants add, the complaint asks the Board to award relief for which the CCAs do not provide, including such relief as the Board deems just and proper, and an order requiring MWG to cease and desist open dumping coal ash and causing or threatening to cause water pollution, to modify its coal ash practices to avoid future groundwater contamination, and to remediate contaminated groundwater to applicable GQSs. *Id.* at 25, citing Comp. at 18-19. Complainants claim the CCAs provide no such relief, contrary to MWG's claims. *Id.*; *see also* Exhibit G (expert declaration of Remy J.-C. Hennet).

Complainants further argue that the relief the complaint seeks would require, at a minimum, permanent removal of the coal ash and any other contaminated materials from the coal ash ponds at Waukegan and Will County, and the installation of systems to pump and treat contaminated groundwater at all four plants. Resp. at 25. Complainants add that MWG will not comply with Illinois' open dumping prohibition "unless and until they prevent further groundwater contamination from occurring," which will require MWG to stop "dumping coal ash" into the ponds. *Id.* at 25-26 & n.7. According to complainants, the CCAs do not require this, and also do not require that MWG permanently remove coal ash and other contaminated materials from the ash ponds and pump and treat contaminated groundwater. *Id.* at 26. Nor, complainants contend, do the CCAs require MWG to cease dumping coal ash into the ash ponds. *Id.* In fact, complainants continue, the CCAs "offer only lengthy, aspirational processes that do not resolve" the "gravamen of the relief" requested in the complaint here. *Id.*

In addition, complainants claim it is "difficult to determine what relief the CCAs provide," but the clear terms do not provide the relief the complaint here seeks. Resp. at 26. Complainants explain that the CCAs rely on four inadequate measures to address groundwater impacts—groundwater monitoring, engineered controls (*i.e.*, liners), GMZs, and ELUCs. *Id.* Groundwater monitoring neither addresses the violations, according to complainants, nor provides sufficient data to permit "meaningful hydrogeological analysis or detection of further groundwater contamination." *Id.* at 27. And, complainants continue, the requirement to re-line or maintain liners for the ash ponds will not "come close to" fully protecting the groundwater and ensuring cleanup of contaminated groundwater, which is the relief sought in the complaint in this case. *Id.*

As an example, complainants assert that re-lining the Ash Surge Basin and the Secondary Ash Settling Basin at the Powerton station and of Ash Pond 2S at the Will County station will not "remedy violations at up-gradient wells," and "most likely" will not prevent the continuous release of contaminants to groundwater from materials beneath and around the lined basins. - Resp. at 27. Moreover, according to complainants, a requirement to maintain liners is "already [a] standard operating procedure[ ]" at the ash ponds, so such terms in the CCAs are unlikely to remedy ongoing GQS violations at the plants. *Id.*

Complainants further assert that the "hundreds of [GQS] violations" shown in MWG's groundwater monitoring results make clear that simply lining and re-lining ash ponds is of limited effect in preventing groundwater contamination. Resp. at 27. In fact, according to complainants, groundwater monitoring reports from three quarters of 2012 and the first quarter of 2013 reveal 250 additional exceedances of Class I GQSs and open dumping standards "above and beyond the violations" alleged in the complaint. *Id.* at 27-28; *see also id.* Exh. J, K, L, and

M. Such violations are likely to only increase, complainants maintain, because MWG plans to use dry sorbent injection (DSI) to control sulfur dioxide (SO_2)emissions from its fleet of coal-fired plants, which will generate a highly "leachable" waste stream that the CCAs will not address. *Id.* at 28.

Complainants also claim the CCAs' GMZ provisions are inadequate because they do not even apply to the Waukegan plant, and do not actually require a GMZ at the other three plants but simply provide "one-year timeframes for developing GMZs." Resp. at 28. Thus, complainants contend, "substantive elements" of the GMZs remain to be determined, and their effectiveness as a remedy cannot be evaluated. *Id.*

As for ELUCs, they, too, are insufficient, according to complainants. Resp. at 29. Complainants maintain that the Joliet 29 CCA does not include an ELUC provision, and the ELUC provisions in the other CCAs do not require MWG to actually establish ELUCs at two of the three generating stations. *Id.* Only at the Will County station must MWG establish an ELUC, complainants assert. *Id.* And, complainants add, at the three plants to which ELUC provisions apply, the "substantive elements" of the ELUCS remain "to be determined." *Id.* Complaints further argue that although events occurring after a complaint is filed cannot make the complaint duplicative, neither the GMZs MWG proposed nor the ELUCS it established pursuant to the CCAs in 2013 provide the relief the complaint here seeks. *Id.* In particular, complainants explain, neither the proposed GMZs nor the ELUCs for the Powerton, Will County, and Waukegan stations require removal of coal ash and other contaminated materials from the ash ponds, or pumping and treatment of contaminated groundwater. *Id.*

MWG's Reply in Support of Motion to Dismiss

MWG reiterates preliminarily that the complaint is both frivolous and duplicative. MWG reminds that even if a complaint is only one or the other, the Board has dismissed cases for being only frivolous or only duplicative. Reply at 2 & n.1.

Frivolous

MWG reiterates that the complaint is frivolous because it does not meet the "disagreement" requirement of Section 31(c) of the Act (415 ILCS 5/31(c))—which, MWG adds, is that provision's "primary requirement." Reply at 2, 4, citing Chrysler Realty Corp., 97 F. Supp. 2d at 879 n.1. MWG also argues that complainants "completely ignore" Section 31(c)'s plain terms, and do not and cannot point to any decision in which the Board has accepted a complaint that did not meet Section 31(c)'s requirements or declared citizen's suits exempt from those requirements. *Id.* at 4. On the contrary, MWG contends, the Board has consistently applied them to citizen's complaints. *Id.* at 4-5. In addition, MWG argues again that under amended Section 31(a), the CCAs are binding and are "unlike any other CCAs previously evaluated by the Board." *Id.* at 5-6.

Further, MWG claims "the most common sense" reading of Sections 31(c) and (d) is that a citizen's suit should proceed only when the "State fails to or elects not to act." Reply at 6. That, according to MWG, is how citizen suit provisions in environmental laws generally, and

federal environmental statutes expressly, are fashioned. *Id.* at 7-8. If that were not the case, MWG continues, citizen's suits would undermine the Agency's authority and ignore the "very purpose" of citizen's suits—to supplement rather than supplant governmental action. *Id.* at 6-7, citing Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 60 (1987). MWG adds that under such circumstances, citizen's suits would also give regulated entities "no incentive" to enter into a CCA. *Id.* at 7.

Complainants' disagreement with the terms of the CCAs "highlights the inherent flaws" in their position, according to MWG. Reply at 8. First, MWG argues, complainants show no deference to the Agency's experience and expertise in determining how best to enforce the Act. Reply at 8, citing Fox Moraine, LLC v. United City of Yorkville, 2011 IL App (2d) 100017, 960 N.E.2d 1144 (2nd Dist. 2011). Second, MWG argues that complainants have no right to "insert their private opinions into the CCA process," and should direct their initiative to be included in the process to the legislature rather than the Board. *Id.* In any event, MWG adds, there are "other means" to be heard on such issues, specifically, the Agency's Ash Impoundment Strategy, which is accepting public comments. *Id.* at 8 n.6. Third, MWG claims complainants' objections to the CCAs underscores the "problem of conflicting remedies." *Id.* at 9.

MWG also attempts to distinguish the cases on which complainants rely in arguing that a complaint is not duplicative of another one to the extent it seeks different relief. In some of those cases, MWG continues, injunctive relief was sought and either (a) the "State was a part of the civil action," or (b) the Board could not grant the relief ordered by the administrative agency. According to MWG, in the remaining cases, both the State and citizen complainants were seeking only non-injunctive relief, so there was no potential for a conflict in remedies. Reply at 9. MWG adds that here, the relief sought by the complaint, if granted, could "actually conflict with the binding CCAs already finalized," forcing MWG to choose whether to violate the CCA or a Board order. *Id.*

MWG further argues that Freeman United is distinguishable because it involved an "old" CCA—as MWG puts it, "simply a letter" from the Agency "stating the technical terms of the agreement" with the respondent—rather than a CCA under amended Section 31(a). Reply at 9. In addition, MWG continues, in Freeman United, the People did not object to the citizen group's participation and "the Board could coordinate all of the parties' demands to resolve the matter," so no possible conflict in remedies existed. *Id.* at 10. Freeman United was resolved on different grounds, according to MWG: that the citizen's suit could go forward "as part of a State enforcement action" because the CCAs addressed only one outfall, while the citizen's complaint alleged multiple violations of the respondent's NPDES permit. *Id.*

By contrast, in this case, MWG argues, all of the violations alleged by the complaint are covered by the CCAs. Reply at 11. While the open dumping claims rest on a different legal theory, MWG adds, they are based on substantially similar facts and circumstances as the VNs, and in any event fail as a matter of law because they rest on federal regulations unenforceable by the Board. *Id.*

Next, MWG reiterates that complainants' claims are moot because of the CCAs. Reply at 11. MWG adds that for purposes of mootness, it makes no difference that the complaint was filed before the CCAs were finalized. *Id.*

Open Dumping Claims

MWG maintains that the complaint does in fact allege that MWG violated federal law—40 C.F.R. §§ 257.1 and 257.3-4. Reply at 12. MWG adds that complainants are wrong that "the entire body of RCRA regulations are incorporated by reference" into the Act "through a single line in a definition." *Id.* If they were, MWG continues, it would contravene the Illinois Administrative Procedures Act (5 ILCS 100/1-1 *et seq.* (2012)), as amended by the 96th General Assembly because administrative rules have to be adopted through a prescribed process. *Id.* at 12-13. MWG adds that the Commonwealth Edison v. PCB case cited by complainants was decided before the amended APA went into effect and was "superseded" by the amended statute. *Id.* at 13.

In addition, MWG reiterates that the Board has not promulgated 40 C.F.R. part 257 as a Board regulation, and has stated that these regulations are "outside the scope" of the Board's "identical in substance" mandate. Reply at 13-14, citing RCRA Subtitle D Update, R97-21, R98-3, and R98-5 (cons.), slip op. at 11. Complainants selectively quote from that decision, MWG adds, omitting the Board's explanation that it would not adopt regulations identical in substance to "new USEPA regulations" at 40 C.F.R. §§ 257.5-257.30 but would retain its reference to those provisions in Section 721.105 of the Board's hazardous waste regulations (35 Ill. Adm. Code 721.105). *Id.* at 14. MWG adds that that is the only reference to 40 C.F.R. part 257 in the Board's regulations. *Id.* at 14-15.

Duplicative

The complaint is duplicative, according to MWG, because it is based "exclusively on the same groundwater monitoring well data MWG submitted to" the Agency and upon which the VNs were based. Reply at 15. While complainants' response attaches additional groundwater monitoring data that the VNs are not based on, that does not set the complaint apart because MWG was required to submit that data under the CCAs. *Id.* at 15 n.9. Thus, MWG continues, the complaint alleges "essentially the same violations" as the VNs, based upon groundwater monitoring data submitted to the Agency pursuant to the CCAs. *Id.* at 15-16. MWG concludes that because the relief provided by the CCAs will "resolve all of the alleged violations under the direction and authority" of the Agency, the Board should dismiss the complaint as duplicative. *Id.* at 16.

DISCUSSION

The Board first provides the legal framework for today's decision. The Board then analyzes and resolves MWG's motion to dismiss.

Legal Framework

Under Section 31(c) of the Act, the Attorney General and the State's Attorneys may bring actions before the Board to enforce Illinois' environmental requirements on behalf of the People. 415 ILCS 5/31(c) (2012); 35 Ill. Adm. Code 103.212(c). In addition, Section 31(d)(1) of the Act provides:

> Any person[2] 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 thereunder . . . . *** Unless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing . . . . 415 ILCS 5/31(d)(1) (2012); *see also* 35 Ill. Adm. Code 103.212(a).

The latter 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. Complainants' complaint against MWG initiated a citizen's enforcement proceeding.

Section 31(c), referred to in the passage of Section 31(d)(1) quoted above, 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 a 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 codify the requirements for the contents of a complaint, including:

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.

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[2] The Act defines "person" as "any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns." 415 ILCS 5/3.315 (2012).

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

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). 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. 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.*

Ruling on MWG's Motion to Dismiss

Below, the Board addresses MWG's claim that the complaint is frivolous based on the existence of the CCAs. Next, the Board considers whether the CCAs render the complaint duplicative. The Board then turns to MWG's arguments regarding counts 1-3 of the complaint, addressing first, whether those counts are frivolous for alleging violations of federal regulations and second, whether the counts are adequately pled.

Whether the CCAs Render the Complaint Frivolous

For the reasons given below, the Board denies MWG's motion to dismiss the complaint as frivolous based merely upon the existence of the CCAs. As the parties agree, Section 31(d)(1) of the Act expressly provides that a citizen's complaint must "meet[ ] the requirements of subsection (c)" of Section 31. 415 ILCS 5/31(d)(1) (2012). The parties also recognize that these requirements include those set forth in Section 31(c) governing the content of an enforcement complaint: that the complaint specify the provision of the Act or regulation allegedly violated and state the manner in and extent to which the respondent allegedly violated the Act or regulation. *Id.* at 5/31(c). The Board has repeatedly held that these content requirements, on which Section 103.204 of the Board's procedural rules (35 Ill. Adm. Code 103.204(c)) elaborates, apply to citizen's complaints. *See*, *e.g.*, Gregory v. Regional Ready Mix, LLC, PCB 10-106, slip op. at 4-5 (Nov. 18, 2010); Schilling v. Hill, PCB 10-100, slip op. at 10-11 (Nov. 4, 2010); United City of Yorkville v. Hamman, PCB 08-96, slip op. at 22 (Oct. 16, 2008).

However, the Board has never treated as an additional requirement for citizen's suits the existence of a disagreement between the Agency and the person complained against. On the contrary, the Board has held that Section 31(a)(10) of the Act (415 ILCS 5/31(a)(10) (2012)), which expressly bars the Agency from referring a case for enforcement where the respondent is in compliance with a CCA, bars neither the People nor "a citizen's group" from bringing an enforcement action. Freeman United, PCB 10-61, 11-02 (cons.), slip op. at 9 (Apr. 18, 2013). The Board finds that this analysis applies equally under Section 31(c) of the Act, such that the existence of a CCA does not preclude the filing by the People or any citizen of an enforcement action against the person subject to the CCA.

This reading is in keeping with the structure of Section 31, which is a relevant consideration. *See*, *e.g.*, *In re* Marriage of Kates, 198 Ill. 2d 156, 163, 761 N.E.2d 153, 157

(2001) (statutes should be construed as a whole). Subsections (a) and (b) of Section 31 specify procedures the Agency must follow before referring alleged violations to the Office of the Attorney General or State's Attorney for enforcement. *See* 415 ILCS 5/31(a), (b) (2012). Subsection (c) applies to matters the Agency has pursued but not resolved through the subsection (a) and (b) procedures. With this background, subsection (c) begins, "[f]or alleged violations which remain the subject of disagreement between the Agency and the person complained against . . . ." 415 ILCS 5/31(c)(1) (2012). This prefatory language provides a bridge between the Agency's pre-enforcement process and the filing of an enforcement complaint; it does not impose any kind of requirement.

Subsection (b) of Section 31 begins with nearly identical language, referring to alleged violations that remain subject to disagreement between the Agency and the person complained against after "fulfillment [by the Agency] of the requirements of subsection (a) . . . ." 415 ILCS 5/31(b) (2012). The "disagreement" provision, therefore, performs the same function in subsection (b) as it does in subsection (c): it connects the last step or set of steps in the pre-referral process to the ensuing requirements, which apply to the Agency under subsection (b), and to the Office of the Attorney General or State's Attorney in filing complaints under subsection (c).

Under Section 31(c), those are the content requirements for complaints, such as that the complaint "specify the provision of the Act," Board regulation, or permit that the person is alleged to have violated, which are followed by various filing and service requirements. 415 ILCS 5/31(c)(1) (2012). Section 31(d)(1) of the Act, if implicitly, requires a citizen's complaint to meet only the former, *i.e.*, content, requirements of subsection (c)(1), because the remainder of subsection (d)(1) specifies the service requirements for a citizen's complaint.

This reading of subsections 31(c)(1) and (d)(1) is fundamentally fair. While a citizen complainant, no less than the People, has absolute control over the contents of his or her complaint, a citizen complainant has no notice of or opportunity to participate in the pre-referral process the Agency must follow under subsections (a) and (b) of Section 31 of the Act (415 ILCS 5/31(a), (b) (2012)). A non-state complainant would have no formal way of knowing whether the Agency had pursued or was pursuing the same violations that the complainant sought to assert, and thus, no basis to allege in the complaint that the asserted violations were the subject of a disagreement between the respondent and the Agency.

Moreover, if such an Agency-respondent disagreement were a pre-condition to a citizen's complaint, a citizen could not bring a complaint alleging violations that the Agency had not pursued through the pre-referral process, for there could be no disagreement unless the Agency had issued VNs and otherwise taken action with respect to the concerned violations. Such absurd and unjust outcomes are to be avoided in statutory construction. *See, e.g.*, Khan v. Deutsche Bank AG, 2012 IL 112219, ¶ 78, 978 N.E.2d 1020, 1046 (2012) (statute should not be read in a manner that would produce "absurd, inconvenient, or unjust results"). For this reason, the Board declines to adopt the construction of Section 31 MWG advocates.

The Board emphasizes that its ruling on the permissibility of a citizen's complaint in the face of a CCA is consistent with Freeman United. The Board disagrees with MWG that Freeman

United is inapposite here. First, the Board finds that the amendments to Section 31(a) that make violating a CCA an independent violation of the Act and bar Agency referral of alleged violations where the alleged violator is complying with a CCA do not alter the scope of Section 31(c)(1)'s requirements for complaints. In fact, the amendments did not change the language of Section 31(c) or (d) at all, but enhanced the legal status of CCAs, which provided an opening for the legislature to limit citizen's enforcement cases where a CCA is in place. The legislature did not add such a limitation, however, and the Board is not authorized to add one. *See, e.g.*, U.S. Bank National Ass'n v. Clark, 216 Ill. 2d 334, 346, 837 N.E.2d 74, 82 (2005). The Board also finds that the State's involvement as a party to the consolidated proceedings, and lack of objection to the citizen's group's participation, in Freeman United, do not distinguish that case, as MWG maintains. Even under MWG's interpretation of Sections 31(c) and (d), nothing in Section 31 requires the People's consent to the filing of a citizen's complaint.

The Board further finds MWG's reliance on Chrysler Realty misplaced. There, a federal district court simply observed that a citizen's complaint must "meet the requirements of [Section 31(c)], which pertain to alleged violations that remain the subject of disagreement between the . . . Agency and the person complained against." Chrysler Realty, 97 F. Supp. 2d at 879 n.1. The federal district court's mere characterization, in a footnote, of Section 31(c) as concerning alleged violations subject to Agency-respondent disagreement did not constitute an interpretation of Section 31(c).

Nor is the Board persuaded that its construction of Section 31(c) threatens to produce conflicting remedies. While MWG fears it could end up subject to CCAs that conflict with a final Board order in this proceeding, that concern is not well founded. As the Board held in Freeman United, the implications of CCAs are "appropriate for consideration in determining penalties" rather than grounds for dismissing an enforcement action brought by the People or a citizen's group. Freeman United, PCB 10-61 & 11-2 (cons.), slip op. at 9 (Apr. 18, 2013). Thus, to the extent the Board were ultimately to find in this case that MWG has committed the violations alleged by complainants, the Board would, in fashioning an appropriate remedy, take into consideration any compliance by MWG with the CCAs. *See* 415 ILCS 5/33(c), 42(h) (2012)). Such consideration would entail taking into account, among other things, the need to ensure that the relief awarded did not conflict with the CCAs. Accordingly, MWG would not be put in the position of complying with either a CCA or a Board order but not both.

The Board is not persuaded that MWG's other policy-based arguments dictate a different result. First, in initiating an enforcement action based on alleged violations that are also the subject of a CCA, a citizen is not usurping the Agency's statutory role and enforcement expertise. While the Agency's role in the Section 31 pre-referral process *is* exclusive, given the Act's provision authorizing citizen suits (*see* 415 ILCS 5/31(d)(1) (2012)), the Agency's role in pursuing enforcement against alleged violations of the Act or Board regulations plainly *is not* exclusive. The Board finds that Section 31 is not, as MWG claims, intended to allow citizen's suits to proceed only where the Agency fails to act.

It is true that citizen suit provisions under federal environmental statutes such as the Clean Water Act bar a citizen's suit to compel compliance with federal standards if federal or state authorities have commenced and are diligently prosecuting an enforcement action regarding

the standard. *See, e.g.*, 33 U.S.C. § 363(b)(1)(B) (2006) (Clean Water Act); *see also* Gwaltney, 484 U.S. at 59-60.[3] The Act, however, includes no similar diligent-prosecution bar, so there is no basis to conclude the General Assembly intended to impose one. Relatedly, the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) expressly bars contribution claims by potentially responsible parties against "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement . . . ." 42 U.S.C. § 9613(f)(2) (2006). The General Assembly could have conferred similar express protection under the Act against actions by private parties where the respondent has agreed to resolve violations through a CCA. The legislature did not do so, however, which further indicates that the Act does not bar citizen's suits alleging violations addressed in a CCA.

Similarly, the Board disagrees with MWG that the Board has characterized a citizen's suit as a "last resort when the Agency does not exercise its enforcement responsibility." Mem. at 14, citing IEPA v. Barry, PCB 88-71 (May 10, 1990), citing Gwaltney, 484 U.S. at 60. In Barry, the Board simply noted that Gwaltney referenced "the federal government's reliance on the State to enforce federal environmental laws, with citizen's suits being a final resort." Barry, PCB 88-71, slip op. at 49. The Board was not characterizing there the role of citizen's complaints under the Act. As for MWG's claim that alleged violators will refuse to enter into CCAs if they do not impose a global bar on enforcement actions, whether that is true and whether it warrants amendment of Section 31 are questions for the legislature rather than the Board.

Next, the Board addresses MWG's argument that the issuance of the CCAs renders this action moot. A claim becomes moot where "no actual controversy exists or where events occur which make it impossible for the court to grant effectual relief." Dixon v. Chicago & North Western Transp. Co., 151 Ill. 2d 108, 116, 601 N.E.2d 704, 708 (1992). Here, nothing that has taken place in the Agency's pre-referral process, including issuance of the CCAs, eliminates the separate controversy complainants' claims presents or makes it impossible for the Board to grant relief on those claims. Rather, the only "controversy" the CCAs have eliminated, or at least deferred, concerns any relief the Agency may pursue by referring the matter for enforcement. Because this case continues to present a live controversy, it is not moot.

Whether the CCAs Render the Complaint Duplicative

To determine whether the complaint in this case is duplicative, the Board considers first whether the Agency pre-enforcement process, and the CCAs in particular, constitute "another forum" within the meaning of Section 101.202 of the Board's procedural rules (35 Ill. Adm. 101.202). As complainants note, the Board has consistently held that "another forum" means an adjudicatory proceeding before a tribunal, either administrative or judicial. *See, e.g.*, Finley, PCB 02-208, slip op. at 9 (Aug. 8, 2002) (USEPA violation notice was not another forum because it did not "purport to commence, or to be the product of, an adjudicatory proceeding by

[3] Notably, under the Clean Water Act, unlike under the Section 31 pre-enforcement process, a citizen may intervene as a matter of right in any action in federal court prosecuted by federal or state environmental authorities to require compliance with an effluent standard or limitation. *See* 33 U.S.C. §1365(b)(1)(B) (2006).

a tribunal, either administrative or judicial"); UAW v. Caterpillar, Inc., PCB 94-240, slip op. at 5 (Agency's voluntary cleanup program not another forum; issues before Board were not being litigated before any other "judicial forum" with jurisdiction to resolve the issues); White v. Van Tine, PCB 94-150, slip op. at 2 (June 23, 1994) (investigation by Agency or local law enforcement does not preclude matter from being brought before Board); *see also* Revision of the Board's Procedural Rules, R00-20, slip op. at 6 (Mar. 16, 2000) (definition of "duplicative" refers to "another forum" because State may bring enforcement proceedings in circuit court, and citizen may file third-party claim in circuit court). While not directly on point, this authority nonetheless makes clear that the statutory pre-enforcement process, from issuance of VNs to adoption of CCAs or referral to environmental enforcement authorities, does not constitute a proceeding in another forum within the meaning of "duplicative."

The Board disagrees with MWG about the effects of the 2011 amendments to Section 31, finding that they enhance the enforceability and legal effect of CCAs but do not transform the pre-referral process into "another forum." CCAs are part of the pre-enforcement process conducted by the Agency, which, as discussed above, is not an adjudication before any kind of tribunal. Pre-enforcement steps are administrative, non-judicial procedures between the Agency and an alleged violator that are not open to citizen participation. The legislature clearly did not intend to foreclose citizen suits based on this kind of non-adjudicatory process. While pre-enforcement steps may ripen into an enforcement proceeding before the Board or the circuit court, they are not an adjudication. Further, because a CCA resolves and is an inextricable part of a non-adjudicatory process, it is not akin to a settlement agreement in an actual enforcement proceeding, as MWG claims. Accordingly, MWG's reliance on Northern Illinois Anglers' Association v. City of Kankakee, PCB 88-183, slip op. at 5 (Jan. 5, 1989) is misplaced. There, the Board found several claims in a citizen complaint duplicative of a prior court action against the respondent involving substantially the same violations that had ended with a consent decree. *See id.* at 3-5. By contrast, the pre-referral process under Section 31 is, as discussed above, not an adjudication, and is not capable of producing anything comparable to a consent decree or settlement agreement.

While that is a sufficient basis to deny the motion to dismiss the complaint as duplicative, the Board finds additional grounds for doing so. These grounds relate to the factors the Board considers in determining whether a matter is the same or substantially similar as one pending before the Board or another forum, namely, whether (1) the parties to the two matters are the same; (2) the proceedings are based on the same legal theories; (3) the violations alleged in the two matters occurred over the same time period; and (4) the same relief is sought in the two proceedings. *See, e.g.*, Hamman, PCB 08-96, slip op. at 5-6 (Apr. 2, 2009).

Setting aside that the Agency's pre-referral process it not "another forum" but an entirely internal administrative procedure, there is no dispute that the first factor is not met, for complainants did not participate, and could not have participated, in the pre-referral process, including agreement on the CCAs. As to the second factor, while the VNs and the complaint in this action both include water pollution claims under the Act and the Board's GQSs (*compare* Comp. at ¶¶ 52-62, *with id.* at Exhs. K-N), the complaint, unlike the VNs, also alleges open dumping violations (*see* Comp. at ¶¶ 42-50). In addition, the complaint alleges violations of Class II GQSs, whereas the VNs did not. *Compare* Comp. at ¶¶ 52, 53, 55, 56, 58, 59, 61, 62,

Exh. C *with id.* at Exhs. K-N. Likewise, the time period of the alleged violations overlaps to a considerable extent, but the complaint does allege additional violations of Class I GQSs at the Joliet 29 and Waukegan plants on various dates before and after the alleged violations set forth in the respective VNs. *Compare* Comp. at Exh. B *with id.* at Exhs. K, M.

These additional alleged violations, including some extending over a longer time period than those alleged in the VNs, necessarily affect the scope of relief requested. *See* Freeman United, PCB 10-61, slip op. at 13 (July 15, 2010). Complainants seek civil penalties (Comp. at 18), which under the Act may be awarded in an amount not exceeding $50,000 per violation and $10,000 for each day that the violation continues (*see* 415 ILCS 5/42(a) (2012)). Beyond the accumulation of potential penalties, the complaint also asks the Board to award such additional relief as the Board deems just and proper, and also to require MWG to: (i) cease and desist from open dumping coal ash and from causing and threatening water pollution; (ii) modify its coal ash disposal practices to avoid future groundwater contamination; and (iii) remediate the contaminated groundwater so that it meets applicable GQSs. *See* Comp. at 18-19. According to complainants, such relief, if awarded, would require measures that the CCAs do not, namely, that MWG permanently remove coal ash and other contaminated materials from the ash ponds, install groundwater pumping and treatment systems, and cease dumping coal ash into the ash ponds. *See* Resp. at 25-26, citing *id.* at Exh. G (Hennet Decl.) at ¶¶ 7, 12(a), 13(a), 14(c), 14(d), 15(c), 15(d). While MWG insists the CCAs will resolve all alleged violations, it does not rebut complainants' claims that the CCAs fail to afford the relief that the complaint here seeks.

In sum, the Board finds that the complaint is not substantially similar to one pending in another forum. MWG has, therefore, not shown that the complaint is duplicative and, the Board accordingly denies the motion to dismiss it on that ground.

Motion to Dismiss Open Dumping Claims

Whether Counts 1-3 Are Frivolous for Alleging Federal Violations. Turning to grounds asserted in the motion to dismiss that are specific to counts 1-3, the Board first considers whether these counts are frivolous to the extent they are grounded in federal regulations. The Board lacks authority to enforce provisions of federal law that have not been incorporated into the Act or the Board's regulations. *See, e.g.*, Arendovich v. Illinois State Toll Highway Authority, PCB 09-102, slip op. at 2 (Dec. 17, 2009); Rulon v. Double D Gun Club, PCB 03-7, slip op. at 4 (Aug. 22, 2002).

Complainants insist they do not actually assert that MWG violated federal law in counts 1-3 of the complaint. But a simple reading of the complaint proves otherwise, since complainants allege MWG caused or contributed to groundwater contamination "in violation of 415 ILCS 5/21(a) *and* 40 C.F.R. §§ 257.1 and 257.3-4" at each generating station other than Joliet 29. Comp. at ¶¶ 43, 46, 49 (emphasis added). Thus, the complaint asks the Board to enforce federal regulations, which the Board cannot do unless those provisions are part of Illinois law. However, the Board has not adopted through general or identical-in substance-rulemaking 40 C.F.R. part 257, the federal regulation on which the complaint relies. *See* Comp. at ¶¶ 34-35, 43, 46-47, 49. The Board's identical in substance mandate under Section 22.40(a) of the Act (415 ILCS 5/22.40(a) (2012), which relates to RCRA municipal solid waste landfill unit

regulations, does not extend to 40 C.F.R. part 257. *See* RCRA Subtitle D Update, R97-20, slip op. at 3.

Nevertheless, complainants contend, 40 C.F.R. part 257 was incorporated by reference under the Act because Section 3.445 of the Act defines "sanitary landfill" as "a facility permitted by the Agency for the disposal of waste on land meeting the requirements of [RCRA], and regulations thereunder. . . ." 415 ILCS 5/3.445 (2012). That definition is incorporated into Section 21(a) of the Act (415 ILCS 5/21(a) (2012)), according to complainants, because Section 21(a) prohibits "open dumping," which the Act defines as the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a "sanitary landfill" (*Id.* at 5/3.305). Complainants further reason that the reference to RCRA regulations in the Act's definition of "sanitary landfill" must include 40 C.F.R. part 257 because the federal regulation sets out criteria for distinguishing between a sanitary landfill and an open dump, including MCLs for groundwater that apply beyond a facility's solid waste boundary. *See* 40 C.F.R. §§ 257.1, 257.3-4.

The Board disagrees with complainants that the mere reference in the Act's definition of "sanitary landfill" to RCRA and regulations thereunder makes 40 C.F.R. Part 257 an enforceable part of the Act. That definitional language is far removed from a provision actually incorporating into the Act a federal statute or regulation such that a violation of the federal law would constitute a violation of the Act. An example of such a provision is Section 9.1(d)(1) of the Act (415 ILCS 5/9.1(d)(1) (2012)), which expressly prohibits any person from violating Sections 111, 112, or 173 of the federal Clean Air Act or associated federal regulations. *See* 415 ILCS 5/9.1(d)(1) (2012).

By contrast, the Act does not make a violation of 40 C.F.R. part 257 a violation of the Act. Moreover, the Act defines and proscribes "open dumping" without any direct reference to the RCRA statute and regulations. *See* 415 ILCS 5/3.305, 12(a) (2012). As the Board has stated, the Act's "open dumping" definition and prohibition provisions are the "counterpart in Illinois" to 40 C.F.R. part 257, which means that they, rather than 40 C.F.R. part 257, are the applicable standards under Illinois law. RCRA Subtitle C Update, R97-21, R98-3, R98-5 (cons.), slip op. at 11. Thus, the Act does not rely on or incorporate RCRA to define "open dumping."

The Board finds complainants' reliance on Commonwealth Edison Co. v. IPCB, 127 Ill. App. 3d 446, 468 N.E.2d 1339 (3rd Dist. 1984) misplaced. There, the petitioners challenged hazardous waste regulations adopted by the Board that were identical in substance to RCRA's provisions governing hazardous waste management. *See* 127 Ill. App. 3d at 447-48, 468 N.E.2d at 1341. Among other things, the petitioner argued the appendices to the Board's identical in substance regulations were invalid to the extent they simply referenced, but did not formally incorporate into Illinois law, appendices to the federal RCRA regulations. *See* 127 Ill. App. 3d at 450-51, 468 N.E.2d at 1343. The appellate court rejected this argument as follows:

> This contention strikes us as somewhat frivolous. Clearly, by referring to the federal appendices, those provisions become a part of the Illinois regulatory structure. Whether the federal appendices are incorporated by reference, or simply identified with a signal "See," the result is the same and the appendices

> become a part of the administrative law of this state. . . . Commonwealth Edison Co., 127 Ill. App. 3d at 450-51, 468 N.E.2d at 1343.

This holding must be read in context, which was an identical-in-substance rulemaking, through which the Board adopts regulations that "require the same actions with respect to protection of the environment, by the same group of affected persons," as federal regulations would require if they applied in Illinois. 415 ILCS 5/7.2(a) (2012). Accordingly, in that context, the Board is required to adhere closely to federal standards, so a reference in appendices to Board regulations to counterpart federal appendices is properly read to incorporate the federal appendices into Illinois' regulatory scheme. By contrast, the incorporation complainants posit occurred, they claim, through a purely definitional provision of the Act, and one that does not make violation of the federal regulation at issue a violation of the Act. The Board therefore finds that it lacks authority to enforce 40 C.F.R. part 257.

The Board does not, however, exclude the possibility that an exceedance of the MCLs at one or more power plants may be evidence tending to show a violation of Section 21(a) of the Act. Whether a Section 21(a) violation has been established by MWG's groundwater monitoring data is an issue that must await full briefing and resolution at a later stage of the case. The Board holds only that it lacks authority to hear claims for violation of 40 C.F.R. part 257. Thus, only the portions of the complaint that claim MWG has violated the RCRA MCLs, which are limited to parts of paragraphs 43, 46, and 49 of the complaint, are struck.

The remaining paragraphs referencing provisions of 40 C.F.R. part 257 simply provide background on the MCLs (paragraphs 33-35) or list "violations," *i.e.*, exceedances, of MCLs for various contaminants (tables 1-3 and paragraphs 44, 47, 50). These references are more in the nature of evidence than claims of violation of the MCLs. Of course, a complainant need not set out evidence to state a claim. S*ee, e.g.*, Schilling, PCB 10-100, slip op. at 7, citing People *ex rel.* Fahner v. Carriage Way West, Inc., 88 Ill. 2d 300, 308, 430 N.E.2d 1005, 1008-09 (1981). However, that a complaint does so is not grounds for striking it, and the Board declines to strike portions of the complaint that reference the RCRA regulations as background or identify purported MCL exceedances in the groundwater under the generating stations.

Accordingly, the Board denies MWG's request to strike paragraphs 33-35 as well as tables 1-3 and paragraphs 44, 47, and 50 of the complaint. But the Board grants MWG's request to strike the portions of paragraphs 43, 46, and 49 claiming MWG violated 40 C.F.R. §§ 257.1 and 257.3-4.

Whether Counts 1-3 are Adequately Pled. The Board next considers whether counts 1-3 of the complaint are adequately pled. In ruling on a motion to strike or dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See, e.g.*, Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004); *see also In re* Chicago Flood Litigation, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997). 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 *ex rel.* William J. Scott v. College Hills Corp., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 467 (1982).

The Board is not persuaded that, considering only the allegations and claims not grounded in federal law, counts 1-3 are legally deficient. The elements of a violation of Section 21(a) are (i) "causing or allowing" (ii) the "open dumping" (iii) of "waste." 415 ILCS 5/21(a) (2012). As noted above, "open dumping" is defined as "the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill." 415 ILCS 5/3.305 (2012). "Refuse" means "waste." 415 ILCS 5/3.385 (2012). The Act defines "waste" to include, among other things, any "discarded material, including solid, liquid, or semi-solid . . . resulting from industrial, commercial, mining and agricultural operations, and from community activities . . . ." 415 ILCS 5/3.585 (2012). To "cause or allow" open dumping, the alleged polluter must have the "capability of control over the pollution" or "control of the premises where the pollution occurred. People v. A.J. Davinroy Contractors, 249 Ill. App. 3d 788, 793-96, 618 N.E.2d 1282, 1286-88 (5th Dist. 1993).

Here, the complaint alleges both that MWG owns the generating stations where the ash ponds are located and that MWG disposes of coal ash in the ponds at each facility. *See* Comp. at ¶¶ 1, 3, 5, 7. These allegations, if proven, would establish that MWG controls the source of pollution and the premises where it occurred, and, to the extent placement of the coal ash in the ponds constituted "disposal," that MWG disposed of "waste," *i.e.*, discarded coal ash, and in particular, the ash and other contaminated material that allegedly caused or contributed to groundwater contamination.

The core dispute between the parties with respect to counts 1-3 is whether the ash ponds constitute "disposal site[s]." MWG contends they are not such sites but instead are permitted "water pollution treatment units" and surface impoundments (*e.g.*, Mem. at 19). Complainants counter that the ash ponds are open dumps because they have "leaked or leached contaminants into the groundwater" (Resp. at 15). The Act defines "waste disposal site" as a "site on which solid waste is disposed" (415 ILCS 5/3.540 (2012)), and "disposal" as the

> [d]ischarge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water or into any well so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, *including groundwaters*. 415 ILCS 5/3.185 (2012) (emphasis added).

A "site" includes "any location . . . used for purposes subject to regulation or control" by the Act or regulations under the Act (415 ILCS 5/3.460 (2012)). Under these definitions, an area on which waste is deposited can be a "disposal site" if the waste deposition is conducted in a manner that allows waste material to enter the environment, including groundwater. Thus, even

a properly permitted facility may become a "disposal site" subject to the open-dumping proscription.

As complainants point out, the Board has previously applied Section 21(a) to leaking underground storage tank (UST) sites. *See, e.g.*, State Oil, PCB 97-103, slip op. at 21 (Mar. 20, 2003); *see also* State Oil, PCB 97-103, slip op. at 4 (Aug. 19, 1999) (petroleum leaking from a UST constitutes "discarded material," and thus "waste"). In State Oil, the Board ultimately found the individual respondents had violated Section 21(a), reasoning as follows:

> As the Board previously determined in this case, once petroleum has leaked from underground storage tanks, it becomes a "waste." . . . .
>
> [Respondents] allowed the waste to be consolidated on the Site when they failed to conduct any soil removal. Although [respondents] tested the underground storage tanks and made repairs to one tank, [they] did not address the removal of the waste from the Site. Consequently, the waste was consolidated on the Site. . . . State Oil, PCB 97-103, slip op. at 21-22 (Mar. 20, 2003).

It is true that the issue there did not turn on the meaning of "disposal site" in particular, but on whether gasoline leaking from the tanks constituted "waste" that, by leaking and not being removed from the affected soil, had been "consolidat[ed]." Nevertheless, the result in that case makes clear that Section 21(a) may apply to permitted or otherwise lawful facilities that improperly fail to contain waste.

Taking all well-pled allegations in the complaint as true and drawing all reasonable inferences from them in favor of complainants, the Board finds that counts 1-3 include sufficient factual allegations to state colorable claims for open dumping.

Ruling on Motion to Dismiss Counts 1-3

The Board finds that counts 1-3 are not frivolous, except to the extent they allege violation of federal RCRA regulations. Accordingly, the Board grants the motion to dismiss counts 1-3 only to the extent that the complaint alleges MWG violated 40 C.F.R. §§ 257.1 and 257.3-4, and otherwise denies the motion to dismiss these counts.

CONCLUSION

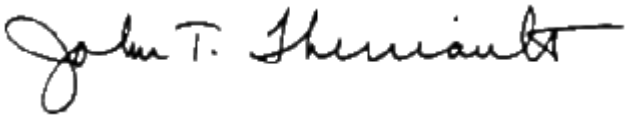
The Board denies MWG's motion to dismiss the complaint as frivolous or duplicative based merely upon the existence of the CCAs. In addition, the Board denies MWG's motion to dismiss the open dumping counts as insufficiently pled. However, the Board grants the request to strike counts 1-3 of the complaint to the extent they allege MWG violated federal regulations, and thus orders those portions of paragraphs 43, 46, and 49 of the complaint asserting such violations struck.

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) (2012); *see also* 35 Ill. Adm. Code

103.212(a). Having ruled on MWG's dismissal motion, the Board would ordinarily proceed to determine whether the complaint is otherwise duplicative or frivolous, and would, as appropriate, accept the complaint for hearing, specify the due date for an answer to the complaint, and order that the case proceed expeditiously to hearing. However, recognizing that the Bankruptcy Court lifted the automatic stay in this case "for the sole purpose of adjudicating MWG's motion to dismiss," and having ruled upon that motion, the Board proceeds no further at this time. The parties are directed to make any appropriate filing to notify the Board within 30 days after expiration of the automatic stay, either by action of the Bankruptcy Court or otherwise. Following receipt of such filing, the Board will make the determination required by Section 31(d)(1) of the Act (415 ILCS 5/31(d)(1) (2012)).

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on October 3, 2013, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board