BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
SIERRA CLUB, ENVIRONMENTAL LAW AND POLICY CENTER, PRAIRIE RIVERS NETWORK, and CITIZENS AGAINST RUINING THE ENVIRONMENT	)	
	)	PCB 2013-015
Complainants,	)	(Enforcement – Water)
	)	
v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondents.	)	

NOTICE OF FILING

TO: John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board Appearances of Jennifer T. Nijman, Susan M. Franzetti and Kristen L. Gale; Respondent's Motion to Dismiss; and Respondent's Memorandum in Support of Its Motion to Dismiss, copies of which are herewith served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: November 5, 2012

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
NIJMAN FRANZETTI LLP
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Environmental Law & Policy Center
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Chicago, IL 60601

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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	)	PCB 2013-015
Complainants,	)	(Enforcement – Water)
	)	
v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondents.	)	

APPEARANCE

Jennifer T. Nijman of Nijman Franzetti LLP hereby enters her appearance on behalf of Midwest Generation, LLC.

Respectfully submitted,

/s/ Jennifer T. Nijman

Dated: November 5, 2012

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(312) 251-5255

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v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondents.	)	

APPEARANCE

Susan M. Franzetti of Nijman Franzetti LLP hereby enters her appearance on behalf of Midwest Generation, LLC.

Respectfully submitted,

/s/ Susan M. Franzetti

Dated: November 5, 2012

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondents.	)	

APPEARANCE

Kristen L. Gale of Nijman Franzetti LLP hereby enters her appearance on behalf of Midwest Generation, LLC.

Respectfully submitted,

/s/ Kristen L. Gale

Dated: November 5, 2012

Kristen L. Gale
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
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SIERRA CLUB, ENVIRONMENTAL LAW AND POLICY CENTER, PRAIRIE RIVERS NETWORK, and CITIZENS AGAINST RUINING THE ENVIRONMENT	)	
	)	**PCB 2013-015**
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v.	)	
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MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

RESPONDENT'S MOTION TO DISMISS

Respondent, Midwest Generation, LLC ("MWG"), by its undersigned counsel, respectfully requests that the Board enter an order dismissing the Complaint brought by the Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (collectively "the Complainants"). In support of its Motion, MWG submits its Memorandum in Support of Motion to Dismiss and states as follows:

1) MWG owns and operates the Joliet #29 Generating Station, located in Will County, Illinois. (Complaint ¶1). Joliet #29 operates three active coal ash ponds; two are lined with a high density polyethylene ("HDPE") liner, and the third lined with a geocomposite liner. (Complaint, ¶1). The coal ash ponds operate and are permitted under the Joliet #29 NDPES Permit #IL0064254. (Ex. 7).

2) In 2010, MWG installed eleven groundwater monitoring wells around the Joliet #29 coal ash ponds. (Complaint ¶2). On June 11, 2012, Illinois EPA issued Violation Notice

("VN") W-2012-00059 to MWG based upon the results from the groundwater monitoring wells. (Complaint, ¶9).

3) On October 24, 2012, Illinois Environmental Protection Agency ("Illinois EPA") issued a Compliance Commitment Agreement ("CCA") for the Joliet #29 Station that includes compliance activities to resolve allegations in the VN. (Ex. 3).

4) MWG owns and operates the Powerton Generating Station ("Powerton") in Pekin, Tazewell County, Illinois. (Complaint ¶3). Powerton operates three active coal ash ponds, two of which are lined. (Complaint, ¶3). The Powerton coal ash ponds are permitted under the Powerton NDPES Permit #IL0002232. (Ex. 5).

5) MWG monitors the groundwater at Powerton in fifteen groundwater monitoring wells. (Complaint, ¶4). On June 11, 2012, Illinois EPA issued VNW-2012-00057 to MWG based upon the results from the groundwater monitoring wells at Powerton. (Complaint, ¶9).

6) On October 24, 2012, Illinois EPA issued a CCA for the Powerton Station that includes compliance activities to resolve allegations in the VN. (Ex. 1).

7) MWG owns and operates the Waukegan Generating Station ("Waukegan") in Waukegan, Lake County, Illinois. (Complaint, ¶5). Waukegan operates two active coal ash ponds that are lined with an HDPE liner. (Complaint, ¶5). The Waukegan coal ash ponds are permitted under the Waukegan NDPES Permit IL0002259. (Ex. 8).

8) In 2010, MWG installed five groundwater monitoring wells around the Waukegan ash ponds. (Complaint, ¶6). On June 11, 2012, Illinois EPA issued VNW-2012-00056 to MWG based upon the results from the groundwater monitoring wells at Waukegan. (Complaint, ¶9).

9) On October 24, 2012, Illinois EPA issued a CCA for the Waukegan Station that includes compliance activities to resolve allegations in the VN. (Ex. 4).

10) MWG owns and operates the Will Generating Station ("Will County") in Romeoville, Will County, Illinois. (Complaint, ¶7). Will County operates four active coal ash ponds, all of which are lined with a geocomposite liner. (Complaint, ¶7). The Will County coal ash ponds are permitted under the Will County NDPES Permit IL0002208. (Ex. 6).

11) In 2010, MWG installed ten groundwater monitoring wells around the Will County ash ponds. (Complaint, ¶8). On June 11, 2012, Illinois EPA issued VNW-2012-00058 to MWG based upon the results from the groundwater monitoring wells at Will County. (Complaint, ¶9).

12) On October 24, 2012, Illinois EPA issued a CCA for the Will County Station that includes compliance activities to resolve allegations in the VN. (Ex. 2).

13) Illinois EPA and MWG entered into the CCAs pursuant to Section 31(a)(7)(i) of the Act. 415 ILCS 5/31(a)(7)(i). (Ex. A-D, ¶1)

14) All of the CCAs state MWG "shall comply with all provisions of this CCA," and that pursuant to Section 42(k) of the Act, MWG is liable for an additional civil penalty of $2,000 for violation of any of the terms or conditions of the CCAs. (Ex. A-D, ¶6, 8).

15) On October 3, 2012, Complainants filed a seven count complaint against MWG. Counts 1, 2 and 3 (open dumping) allege violations of Section 21(a) of the Illinois Environmental Protection Act ("Act") 415 ILCS 5/21(a) and 40 C.F.R. §§257.1 and 257.3-4 at the Powerton, Waukegan, and Will County Stations. Counts 4, 5, 6 and 7 allege violations of Section 12(a) and (d) of the Act, 415 ILCS 5/12(a), (d) and 35 Ill. Adm. Code §§620.115, 620. 301(a) and 620.405 at the Powerton, Waukegan, Will County, and Joliet #29 Stations. All the counts of the complaint are based on the same facts and the same groundwater data as each of the Illinois EPA VNs.

16) When considering a complaint filed pursuant to Section 31(d) of the Act, the Board must determine whether the complaint is frivolous or duplicative. (415 ILCS 5/31(d), 35 Ill. Adm. Code 103.212(a)). 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." (35 Ill. Adm. Code 101.202). A complaint is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." *Id*.

17) The complaint should be dismissed as frivolous because it fails to state a cause of action upon which the Board can grant relief. Section 31(d) of the Act requires that any citizen suit meet the requirements of Section 31(c) of the Act. 415 ILCS 5/31(c), (d). The first requirement of Section 31(c) is that the alleged violations remain the subject of disagreement between the Agency and the person complained against. Because the Illinois EPA and MWG have agreed to compliance activities through binding and enforceable CCAs, no disagreements exist between the Agency and MWG. Therefore, the complaint is frivolous because it fails to state a cause of action upon which the Board can grant relief.

18) Counts 1, 2, and 3 should be dismissed because they allege violations of Federal regulations that are outside the boundaries of the Board's authority. Without the Federal regulation allegations, Counts 1, 2, and 3 are not based upon any facts or statements as required by Section 31(c) of the Act and the Board's Procedural rules, 35 Ill. Adm. Code 103.204.

19) The complaint should be dismissed as duplicative because the underlying facts and allegations are substantially similar to those in the VNs, and the relief requested is resolved by the CCAs.

WHEREFORE, Respondent, Midwest Generation, LLC, respectfully requests that the Board dismiss Complainants' Complaint with prejudice.

Respectfully submitted,

Midwest Generation, LLC

By: /s/ Jennifer T. Nijman
One of Its Attorneys

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Susan M. Franzetti
Kristen L. Gale
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312-251-5255

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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	)	**PCB 2013-015**
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MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

RESPONDENT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

Respondent, Midwest Generation, LLC ("MWG"), has filed its Motion to Dismiss requesting that the Illinois Pollution Control Board ("Board") dismiss the Complaint filed by the Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (collectively "the Complainants") pursuant to Sections 101.500 – 101.506 of the Board's Procedural Rules, 35 Ill. Adm. Code 101.500-506, and Section 103.212 of the Board's Enforcement Rules, 35 Ill. Adm. Code 103.212, because the Complaint is frivolous and duplicative as those terms are defined in Section 101.202 of the Board's Procedural Rules, 35 Ill. Adm. Code 101.202.

The Complaint should be dismissed as frivolous because it fails to state a claim on which the Board may grant relief. First, the Complaint does not meet the requirements of Section 31(c) of the Illinois Environmental Protection Act ("Act") because there are no alleged violations that remain the subject of disagreement between MWG and the Illinois Environmental Protection Agency ("Illinois EPA or Agency"). Second, Counts 1, 2 and 3 of the Complaint do not include

facts sufficient to establish open dumping under Illinois law. The Complaint should be dismissed as duplicative because it is based on the same facts and alleges the same violations as Violation Notices ("VNs) issued by Illinois EPA, and requests similar relief as remedied by the subsequent, binding Compliance Commitment Agreements ("CCAs") entered into by Illinois EPA and MWG. In support of its Motion, MWG states as follows:

I. BACKGROUND

The Complaint relates to the following four electronic generating stations owned and operated by MWG: the Joliet #29 Generating Station ("Joliet #29") located in Joliet, Will County, Illinois (Complaint, ¶1); the Powerton Generating Station ("Powerton) located in Pekin, Tazewell County, Illinois (Complaint, ¶3); the Waukegan Generating Station ("Waukegan") located in Waukegan, Lake County, Illinois (Complaint, ¶5); and the Will County Generating Station located in Romeoville, Will County, Illinois (Complaint, ¶7). Each of the generating stations include active ash ponds as an integral part of the generating stations' wastewater treatment systems (Complaint ¶¶1, 3, 5, 7; MWG Supplemental Response to VN, Ex. 13 at 2-3; Ex. 14 at 2; Ex. 15 at 2-3; Ex. 16 at 2-3; MWG Facility NPDES Permits, Exhibits 5-8). All of the ash ponds are permitted pursuant to MWG's NPDES permits and operate pursuant to the limits, terms and conditions of the permits. (Ex. 5 at 1-2; Ex. 6 at 4; Ex. 7 at 5; Ex. 8 at 4). All but one of the ash ponds at the MWG facilities is fully lined.[1] (Complaint ¶¶1, 3, 5, 7; Ex. 9 at 5-6; Ex. 10 at 5-6; Ex. 11 at 5-6; Ex. 12 at 5.)

A. Illinois Environmental Protection Agency Violation Notices and the Binding CCAs

In 2010, MWG voluntarily agreed to Illinois EPA's request to perform a hydrogeological assessment around the ash ponds at its generating stations. (Ex. 9-12 at 1-2). On June 11, 2012,

[1] A single, unlined pond at Powerton will have a liner upon completion of the compliance activities outlined in the CCA.

Illinois EPA issued VNs to MWG alleging violations of groundwater quality standards purportedly caused by the ash ponds. (Complaint, ¶9, Ex. K-N). Illinois EPA alleged that each station violated Section 12 of the Act and 35 Ill. Adm. Code 620.115, 620.301, 620.401, 620.405, and 620.410. (Complaint, ¶9, Ex. K-N). Illinois EPA based the allegations on the groundwater monitoring results MWG voluntarily submitted for the hydrogeological assessment.[2] (Complaint, ¶9, Ex. K-N). The VNs listed alleged exceedances of the groundwater quality standards for specific constituents at each station, such as chloride, antimony, and boron. (Complaint ¶9, Ex. K-N).[3]

On July 27, 2012, MWG responded to the VNs pursuant to the procedures in Section 31 of the Act, disputing that the ponds were the cause of groundwater exceedances. (Ex. 9-12). MWG explained that the ash ponds are not disposal sites because the ash is routinely removed. (Ex. 9-12 at 5). MWG also described how each ash pond at the stations was lined, either with a geocomposite liner commonly called "Poz-o-Pac" or a high density polyethylene ("HDPE") liner.[4] (Ex. 9, 11-12 at 5, Ex. 10 at 6). Both the Poz-o-Pac liner and the HDPE liner are effective in preventing releases to the soil and groundwater. (Ex. 9, 11-12 at 5, Ex. 10 at 6). MWG showed in its responses that the alleged groundwater exceedances were random, inconsistent and did not show a connection to the ash ponds. (Ex. 9 at 12, Ex. 10 at 8, Ex. 11 at 9, Ex. 12 at 8). In an effort to be cooperative and quickly resolve the VNs, MWG proposed a CCA in response to each VN. (Ex. 9 at 14, Ex. 10 at 11, Ex. 11 at 12, Ex. 12 at 10-11). MWG also submitted supplemental responses to the VNs to further explain the treatment and function of the ash ponds. (Ex. 13-16). MWG described that the ash ponds are wastewater treatment

[2] Complainants use the same monitoring results as the basis for its action. (Complaint, ¶¶43-44, 46-47, 49-50, 52-53, 55-56, 61-62, Ex. B, C, D, F, H, J)
[3] Complainants note in ¶9 that Illinois EPA identified groundwater monitoring results that exceeded Illinois Class I groundwater quality standards.
[4] One ash pond at the Powerton Station is not lined. *See supra* note 1.

ponds that remove ash from the wastewater. (Ex. 13-16 at 2). The ash ponds operate as a part of the wastewater treatment system at the stations and are permitted according to each station's respective NPDES permit. (Ex. 5 at 1-2; Ex. 6 at 4; Ex. 7 at 5; Ex. 8 at 4; Ex. 13-16 at 2-3).

After a significant exchange of information, Illinois EPA and MWG agreed on a CCA for each MWG station to resolve the VNs. Both MWG and Illinois have signed the CCAs and they became effective and final on October 24, 2012. (Ex. 1-4). Illinois EPA issued the MWG CCAs pursuant to the current CCA provisions in Section 31(a) of the Act. (415 ILCS 5/31(a)). These CCA provisions were amended in 2011 to make CCAs enforceable documents. (415 ILCS 5/31(a)). CCAs under current Section 31 are binding agreements and no person may violate their terms or conditions. (415 ILCS 31(a)(7.6)). If a person fails to follow the CCA, there is a $2,000 stipulated penalty in addition to any penalty that may be originally assessed. (415 ILCS 5/42(k)). Illinois EPA confirms on its website that the recent changes to the CCAs make them an "enforceable document." (www.epa.state.il.us/enforcement/compliance-commitment, attached as Ex. 17).[5] Illinois EPA states further that the purpose of the enforceable CCAs is to "provide greater certainty to the regulated community regarding the full and final resolution of alleged violations contained in the Violation Notice." *Id*.

B. The Terms and Conditions of the MWG Compliance Commitment Agreements

In the CCAs for each generating station, MWG agreed to take significant and effective measures to resolve the alleged violations. (Ex. 1-4). MWG will continue to use the ash ponds as treatment ponds to precipitate ash and will continue to remove the ash from the ponds on a periodic basis. (Ex. 1-4, ¶5.a). MWG will also maintain and operate the ash treatment ponds such that the integrity of the liners is maintained, including operating the ash removal equipment

[5] The Board has authority to take notice of the Illinois EPA webpage pursuant to 35 Ill. Adm. Code 101.630.

in a manner that minimizes the risk of any damage to the liners. (Ex. 1-4, ¶5.b). During the ash removal process, MWG will visually inspect the ash treatment pond liners and implement a corrective action plan for repair should MWG identify any signs of a breach in the liner. (Ex. 1-4, ¶5.c). MWG will continue monitoring the existing groundwater monitoring wells on a quarterly basis and submit the results to Illinois EPA. (Ex. 1-3, ¶5.d, Ex. 4, ¶5.e). Finally, MWG will submit a certification of compliance to the Illinois EPA upon completion of compliance activities in each of the CCAs. (Ex. 1, ¶5.k, Ex. 2, ¶5.j, Ex. 3, ¶5.h, Ex. 4, ¶5.i). Notably, for all of the CCAs, MWG will complete all of the compliance activities within a year of the effective date. (Ex. 1-4). If MWG does not accomplish the compliance activities in the CCAs, MWG will be subject to enforcement and to an additional penalty of $2,000. (Ex. 1-4, ¶8).

Specifically, at Powerton, MWG will conduct additional groundwater monitoring and will re-line two of the ash ponds with an HDPE liner.[6] (Ex. 1, ¶¶5.d, 5.e, 5.f). At the Will County Station, MWG will remove Ponds 1 North and 1 South from service and will reline Pond 2 South with a HDPE liner.[7] (Ex. 2, ¶¶5.e, 5.f). At Joliet #29, MWG will reline Pond #3 with a HDPE liner;[8] and at the Waukegan Station, MWG will install additional groundwater monitoring wells. (Ex. 3, ¶5.e, Ex. 4, ¶5.d). At Powerton, Will County, and Joliet #29, MWG will remediate the groundwater conditions through groundwater management zones pursuant 35 Ill. Adm. Code Part 620.250 and at Powerton, Will County, and Waukegan MWG will enter into environmental land use controls pursuant to 35 Ill. Adm. Code 742.1010. (Ex. 1, ¶¶5.g-5.j, Ex. 2, ¶¶5.g-5.i, Ex. 3, ¶¶5.f, 5.g, Ex. 4, ¶¶5.f, 5.g).

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[6] The third ash pond at Powerton has an HDPE liner. (Complaint. ¶3, Ex. 1)
[7] Pond 3 South is already lined with an HDPE liner. (Ex. 2)
[8] The two other ash ponds at Joliet #29 have HDPE liners. (Complaint, ¶1)

Illinois EPA agreed that these measures rectify the alleged violations in the VNs and signed the CCAs on October 24, 2012. (Ex. 1-4). Therefore, since October 24th, the day the CCAs became effective, no violations remain the subject of disagreement between the Agency and MWG.

C. Allegations of the Complaint

On October 3, 2012, Complainants filed their Complaint alleging violations of the Act, the Board Regulations, and Federal regulations. The allegations are based exclusively on the same groundwater monitoring well data MWG submitted to the Illinois EPA and upon which the Illinois EPA issued its VNs. Complainants allege open dumping violations in Counts 1, 2 and 3 because they claim that the groundwater monitoring results exceed the Federal Maximum Contaminant Levels ("MCLs") in violation of the Federal open dumping regulations. Counts 4, 5, 6, and 7 allege violations of Section 12 of the Act and violations of the Board groundwater regulations. (35 Ill. Adm. Code 620.115, 620.301(a), and 620.405). These alleged violations are substantially similar to the VN allegations by the Illinois EPA that have been resolved by the CCAs.

The only information supporting the Complaint's alleged violations is the same MWG groundwater monitoring data that Illinois EPA relied upon in the VNs. Complainants attach as exhibits two tables listing alleged exceedances of groundwater standards. (Complaint Ex. B and C, respectively). The tables list all of the individual alleged groundwater exceedances for each constituent and each sampling event at each station. All of the information in the tables is from the Illinois EPA violation notices and MWG groundwater monitoring results for each of the stations. (Complaint Ex. B and C). Complainants also attach as exhibits "[g]roundwater monitoring data excerpted from Midwest Generation groundwater monitoring report" and the

Illinois EPA VN for each station. (Complaint, Ex. D, F, H, J-N). Complainants do not include any other data or information to support their claims.

Complainants request that the Board order MWG to cease and desist from causing water pollution, modify its practices to avoid future groundwater contamination, and remediate the groundwater so that it meets the applicable Illinois groundwater standards. (Complaint, Relief Requested). The requested remedies are virtually identical to the terms and conditions in the CCAs that Illinois EPA determined will remedy the alleged violations in the VNs. (Ex. 1-4 and *infra* at 22).

II. STANDARD FOR GRANTING A MOTION TO DISMISS

When considering a complaint filed pursuant to Section 31(d) of the Act, the Board must determine whether the complaint is duplicative or frivolous. (415 ILCS 5/31(d), 35 Ill. Adm. Code 103.212(a)). A complaint is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." (35 Ill. Adm. Code 101.202). 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*.

In ruling on a motion to dismiss, the Board looks to Illinois civil practice for guidance. *Elmhurst Memorial Healthcare et al. v. Chevron U.S.A. Inc. and Texaco Inc.*, PCB 09-66 (December 16, 2010). "In assessing the adequacy of pleadings in a complaint, the Board has accordingly stated that 'Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action."' *Rolf Schilling, et al v. Gary Hill et al.*, PCB 10-100 2011, slip op 7, August 4, 2011, *citing Loschen v. Grist Mill Confections, Inc., PCB* 97-174, slip op. at 4 (June 5, 1997); *citing LaSalle National Trust N.A. v. Village of Mettawa,* 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (2nd Dist 1993)); *People ex rel. William J. Scott v.*

College Hills Corp., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 466-67 (1982); *Sierra Club and Jim Bensman v. City of Wood River and Norton Environmental*, PCB 98-43, slip op. at 2 (Nov. 6, 1997); (petitioner is not required "to plead all facts specifically in the petition, but to set out ultimate facts which support his cause of action"). "[L]egal conclusions unsupported by allegations of specific facts are insufficient." *LaSalle National Trust N.A. v. Village of Mettawa*, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297, 1303 (2nd Dist., 1993), *citing Estate of Johnson v. Condell Memorial Hospita*l, 119 Ill. 2d 496, 509-10, 520 N.E.2d 37 (1988). Also, a complaint's allegations should be sufficiently specific that they reasonably inform the defendant by factually setting forth the elements necessary to state a cause of action. *United City of Yorkville v. Hamman Farms*, PCB 08-96 (October 16, 2008). The disposition of a motion to strike and dismiss for insufficiency of the pleadings is largely within the sound discretion of the court. *Rolf Schilling, et al.*, PCB 10-100 2011, slip op 7, *citing Village of Mettawa*, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303. Finally, the Board may consider pleadings as well as affirmative matter not contained in the pleadings when supported by oath or other certification. (35 Ill. Adm. Code 101.504).

III. ARGUMENT

The Complaint fails on its face and should be dismissed because it is both frivolous and duplicative. First, the alleged violations are no longer the subject of a disagreement between the Illinois EPA and MWG as required by the Section 31(c) of the Act. (415 ILCS 5/31(c)). MWG and the Illinois EPA resolved the same violations alleged in the Complaint through binding CCAs signed pursuant to Section 31(a) of the Act and subject to penalty and enforcement. Therefore, the Complaint does not meet the requirements of Section 31(c) of the Act. The Complaint is also moot because no controversy remains after the CCAs became effective.

Allowing a citizen suit after a CCA has been entered would negate the very purpose of the CCA as a binding, enforceable settlement which resolves the alleged violations, subject a respondent to undue harassment, and potentially subject a respondent to conflicting relief.

Second, the Board should dismiss the open dumping counts of the Complaint as frivolous because the counts are based upon federal regulations over which the Board has no authority. Without the federal regulation allegations, the open dumping counts are not based upon any facts or statement to uphold the allegation, as required by Section 31(c) of the Act.

Third, the Complaint should be dismissed because it is duplicative. The Complaint is based upon the same facts, alleges the same violations of the Act, and seeks the same relief as alleged in the VNs and as resolved in the CCAs. For all of these reasons, MWG requests that the Board dismiss the complaint with prejudice.

A. The Complaint Should be Dismissed as Frivolous Because There is No Disagreement Between the Agency and MWG

The Complaint should be dismissed as frivolous because there is no disagreement between the Agency and MWG. Section 31(d) of the Act requires that a citizen complaint meet the requirements under Section 31(c) of the Act. (415 ILCS 5/31(c),(d)). Section 31(c) states that a complaint may be filed "[f]or alleged violations *which remain the subject of disagreement between the Agency and the person complained against*…". (415 ILCS 5/31(c) (emphasis added)). Although Complainant asserted that Illinois EPA filed VNs against MWG (Complaint ¶9), Complainants failed to include in the Complaint the fact that MWG responded to the VNs by proposing compliance commitment agreements pursuant to the Section 31 process (Ex. 9-12), and that the Agency and MWG thereafter agreed to binding and enforceable CCAs for all of the MWG stations that are the subject of the Complaint. (Ex. 1-4). Because there are no violations that remain the subject of disagreement between MWG and the Agency, the Complaint cannot

meet the first requirement under Section 31(c) of the Act. Consequently, there is no cause of action upon which the Board can grant relief and the Board should dismiss the Complaint.

1. A Citizen's Complaint Must Meet the Requirements of Section 31(c) of the Act

It is indisputable that a citizen's suit must strictly follow each of the requirements in Section 31(c) of the Act. (415 ILCS 5/31(c)). Section 31(d) of the Act allows any person to file a complaint with the Board that meets the requirements of Section 31(c) of the Act. (415 ILCS 5/31(c),(d)).

Section 31(c)(1) states:

> For alleged violations *which remain the subject of disagreement* between the Agency and the person complained against following waiver pursuant to subdivision (10) of subsection (a) of this Section or fulfillment of the requirements of subsections (a) and (b) of this Section, the Office of the Illinois Attorney General or the State's Attorney of the county in which the alleged violation occurred shall issue and serve upon the person complained against a written notice, together with a formal complaint, which shall *specify the provision of the Act, rule, regulation, permit, or term or condition thereof under which such person is said to be in violation* and a statement of the *manner in and the extent to which such person is said to violate the Act, rule, regulation, permit, or term or condition thereof*… (415 ILCS 5/31(c) (emphasis added)).

Thus, the three requirements of Section 31(c) are: (1) that the alleged violations remain the subject of disagreement between the Agency and the person complained against; (2) that the formal complaint specifies the provision of the Act, rule, regulation, permit, or term or condition thereof under which such person is alleged to be in violation; and, (3) that the formal complaint includes a statement of the manner in which and the extent to which such person is said to violate the Act, rule, or regulation. (415 ILCS 5/31(c)). Although the language of Section 31(c) does not, on its face, state that it applies to citizen suits, the legislature clearly stated in Section 31(d) that citizen suits must meet the requirements of Section 31(c). (415 ILCS 5/31(c),(d)).

Moreover, both courts and the Board have held that citizen suits must meet the three requirements of Section 31(c).

The District Court for the Northern District of Illinois noted that citizen suits under the Act must meet the requirements of Section 31(c), "which pertains to alleged violations that remain the subject of disagreement between the [Illinois EPA] and the person complained against." *Chrysler Realty Corp. v. Thomas Industries, Inc.*, 97 F.Supp.2d 877, 879 n.1 (N.D. Ill. 2000) *citing* 415 ILCS 5/31(d). The Board has similarly held that a citizen's complaint filed pursuant to Section 31(d) must strictly follow the provisions in Section 31(c). (415 ILCS 5/31(c), (d)). While the Board has not specifically addressed the language concerning disagreement between the Agency and the person complained against, the Board has repeatedly held that the provisions of 31(c) apply to citizen's suits. *See Terri Gregory v Regional Ready Mix, LLC,* PCB 10-106, slip op. at.3-4 (November 18, 2010)(Board dismissed citizen's complaint on three separate occasions for failure to allege specific provisions of the rule or regulation and failure to allege facts related to the alleged violations, as required by Section 31(c) of the Act); *Rolf Schilling et al/ v. Gary D. Hill, et al.*, PCB 10-100, slip op. at p. 6 (November 4, 2010) (citizens' suit must allege sufficient facts as required by 31 (c)); *William Leesman v. CIMCO Recycling, Sterling, and CIMCO Resources, Inc.* PCB 11-1, slip op. at p. 3 (Oct. 7, 2010) (Board dismissed complaint because it did not allege specific provisions of the Act or Board's regulations or standards and thus did not fulfill the requirements of Section 31(c) of the Act); *Brian Finley et al. v. IFCO ICS-Chicago, Inc.*, PCB 02-208, December 5, 2002 (holding that "[b]ecause Section 31(d) provides that a complaint must meet the 31(c) requirements, and 31(c)(1) requires a hearing, a hearing in a citizen's enforcement action cannot be waived.").

In this case, the Board must come to a similar conclusion. Because Section 31(d) provides that a complaint must meet the 31(c) requirements, and 31(c) requires a disagreement, a complaint in which there is no longer a disagreement cannot go forward.

2. The CCAs are a Binding Agreement Between the Illinois EPA and MWG Signifying No Disagreement Between the Agency and MWG

The signed CCAs between MWG and the Agency mean that there are no issues that remain the subject of disagreement and the Complaint should be dismissed for failing to meet the requirements of Section 31(c). After the Agency issues a VN to a person under the Act, the two parties may enter into a CCA to resolve the violations. (415 ILCS 5/31(a)). Prior to 2011, the CCA provisions of Section 31 did not include any enforceable provisions or penalties. (415 ILCS 5/31(a) (effective 1996)). If a CCA was violated under the previous version of the Act, it was simply met with a new VN by Illinois EPA, and the process of preparing a CCA began again. In 2011, the Illinois General Assembly amended Section 31 to make CCAs more meaningful and so that they have a greater impact. (97th Ill. Gen. Assembly, House Proceedings, April 13, 2011, p. 90, Statement of Senator Wilhelmi, attached as Ex. 18). The statutory changes to Section 31 set forth the legal basis for determining that post-2011 CCAs are binding agreements between the Illinois EPA and the person complained against. (415 ILCS 5/31(a)(7.5), (effective August 23, 2011)). The 2011 amendments include a statutory prohibition from violating the terms and conditions of a CCA, stating that, "no person shall violate the terms or conditions of a Compliance Commitment Agreement entered into under subdivision (a)(7.5) of this Section." (415 ILCS 5/31(a)(7.6)). The 2011 amendments further provide that compliance with a CCA bars the Agency from referring the allegations of violation to the Attorney General's Office or the State's Attorney's Office. (415 ILCS 31(a)(10)). Finally, if the signatory to a CCA fails to follow the terms and conditions in the CCA, then the signatory is

subject to a $2,000 stipulated penalty in addition to any other penalty or remedy that may apply. (415 ILCS 5/42(k)).

The Agency has made it clear that CCAs are binding agreements that definitively resolve the alleged violations. The Agency describes the CCA as an "enforceable document." (Ex. 17). In a recent Board proceeding, the Agency stated that alleged violations were resolved by the execution of a CCA and there was no longer a disagreement. *In the Matter of: Adjusted Standard Petition of Cabot Corp.* PCB AS12-01, *Recommendation of the Illinois EPA,* March 29, 2012, ¶ 21 (Violation notices issued to petitioner were resolved by CCA).

In this case, on October 24, 2012 the Agency issued binding CCAs for the four MWG facilities that are the subject of this Complaint. (Ex. 1-4). The CCAs state that the Illinois EPA has determined the terms and conditions are necessary to attain compliance with the Act and Board regulations. (Ex. 1-4, ¶5). MWG must comply with the terms and conditions of the CCAs and is subject to enforcement and additional penalties if it does not fully comply. (Ex. 1-4, ¶¶6, 8). By entering into these final CCAs, no violations remain the subject of disagreement between the Agency and MWG and the Complaint does not fulfill the first requirement of Section 31(c) of the Act. (415 ILCS 5/31(c)). The Board should dismiss the Complaint as frivolous because it fails to state a cause of action upon which the Board can grant relief.

3. The Complaint is Moot Because No Actual Controversy Exists

The Complaint should also be dismissed as frivolous because the Complaint is moot. A claim or complaint is moot "*if no actual controversy exists* or where the events occur which make it impossible for the Court to grant effectual relief." *Dixon v. Chicago and North Western Transportation Company*, 151 Ill.2d 108, 116, 601 N.E.2d 704, 708 (1992)(*emphasis added*). "A moot controversy is one that once existed but that, because of the happening of an event, has ceased to exist and no longer presents an actual controversy between the parties." *McCaster v.*

Greenwood, 328 Ill.App.3d 643, 645, 766 N.E.2d 666, 668 (5th Dist. 2002), *citing Shifris v. Rosenthal*, 192 Ill.App.3d 256, 261, 548 N.E.2d 690, 693 (1st Dist. 1989). *See also Duncan Publishing, Inc. v. City of Chicago*, 304 Ill.App.3d 778, 782, 709 N.E.3d 1281, 1285 (1st Dist. 1999) (Plaintiff's claim for FOIA documents from City was moot after City provided the documents); *ESG Watts, Inc. v. Illinois EPA*, PCB 00-160, February 6, 2003 (Petitioner's request for declaration that it had posted sufficient financial assurance was moot because Board had already held that petitioner had posted sufficient financial assurance in a previous case).

In this case, the issuance of the CCAs for each of the stations has ended any controversy. As a binding agreement, the CCAs resolve the alleged violations and provide effective relief under the direction and authority of the Illinois EPA.[9] In other words, the CCAs are the event that has occurred, resolving the violations alleged in the Complaint, that makes it impossible for the Board to grant effectual relief. There is no longer a controversy and the Complaint is moot.

4. A Citizen Suit Should not Supplant Illinois EPA's Enforcement Authority

A citizen should not be able to usurp the authority and expertise of a State Agency delegated the authority to implement and enforce environmental laws. The Board, citing to the U.S. Supreme Court, has stated that a citizen suit should only be used as a last resort when the Agency does not exercise its enforcement responsibility. *Illinois EPA v. Allen Barry, et al*, PCB 88-71, slip op. p. 35, May 10, 1990) citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60, 108 S.Ct. 376, 383 (1987)(Citizen suit is "meant to supplement rather than to supplant governmental action"…and "the [Senate] Committee intends the great volume of enforcement actions [to] be brought by the State"). Allowing a citizen suit to be filed after the parties have entered into binding CCAs would supplant the Agency's authority

[9] See also infra at Section III.C, describing substantial similarity between Complaint and Illinois EPA VNs and relief provided in CCAs.

and diminish the importance and effectiveness of CCAs. If the Agency takes action pursuant to its Section 31 authority and a party resolves the dispute through CCAs, the party should not be subject to additional litigation from outside parties. This is not what the legislature intended when it modified Section 31 in 2011 to make CCAs more meaningful and to give them greater legal impact. (Ex. 18). A party would have no incentive to enter into a CCA if the possibility of litigation brought by private parties remains. Diminishing the finality of the CCA administrative process to resolve alleged violations will gut the Section 31 process envisioned by the State legislature. As respondents turn their backs on proposed CCAs that cannot provide a final resolution of the alleged violations, Illinois EPA will be forced to refer more cases to the Attorney General or State's Attorney for enforcement to achieve compliance with the Act through use of either the courts or the Board.

Moreover, allowing a citizen suit to proceed while a respondent is already under a binding agreement with the Illinois EPA could result in conflicting remedies. A respondent could be placed in the impossible position of either violating the CCA, and being subject to additional penalties, or violating a Board Order. MWG entered into enforceable CCAs with the Illinois EPA to resolve the dispute with the Agency. The CCAs require MWG to perform specific remedies for the alleged groundwater violations. Allowing this citizen suit after MWG has entered into the CCAs would negate the purpose of the CCAs, dissuade companies from attempting to resolve alleged violations without litigation, and potentially result in conflicting remedies. For all of these reasons, the Board should dismiss the Complaint as frivolous.

B. The Open Dumping Counts Should Be Dismissed as Frivolous Because They Do Not Include Facts Sufficient to Establish Open Dumping Under Section 31(c) of the Act

The alleged open dumping claims, Counts 1, 2 and 3 of the Complaint, should be dismissed as frivolous because they fail to state a cause of action upon which the Board can grant

relief. Complainants improperly base the open dumping counts on federal regulations which must be stricken because the Board does not have the authority to enforce federal regulations. Without reference to the federal regulations, the open dumping counts violate Section 31(c) of the Act because they are not based on any facts or statements supporting the allegations. (415 ILCS 5/31(c)). Further, the ash ponds are not "open dumps" but instead are classified as surface impoundments under the Board regulations and the ash ponds are properly permitted treatment units.

1. Complainants' Allegations that MWG Violated Federal Regulations are Outside the Board's Authority and Should be Stricken, and the Open Dumping Counts Dismissed

The federal regulation allegations in paragraphs 33-35 of the Complaint and the resultant open dumping violations in Counts 1, 2 and 3 of the Complaint are outside the Board's authority and should be dismissed. In an attempt to make their claim of open dumping under Illinois law, Complainants allege that MWG violated two federal regulations, 40 CFR 257.1 and 257.3-4. (Complaint ¶¶33, 34, 35, 42-50). Complainants specifically rely on the federal regulations to "establish a criterion for identifying open dumps based on groundwater contamination." (Complaint ¶33-35). Complainants fail to cite to any facts to support the allegation of open dumping other than groundwater contamination pursuant to the federal regulations. Because the Board does not have authority over federal regulations, the Board should strike the open dumping allegations and dismiss Counts 1, 2 and 3.

"The Board is a creature of statute and the Board can only operate within the bounds of its powers set out by the Illinois General Assembly." *Rolf Schilling et al v. Gary D. Hill et al*, PCB 10-100, 2011 WL 3505248, August 4, 2011, slip of at p. 8; *Granite City Div. of Nat. Steel Co. v. IPCB*, 155 Ill.2d 149, 171, 613 N.E.2d 719, 729 (1993). The Board has the authority under the Act to:

> (b) determine, define and implement the environmental control standards applicable in the State of Illinois and may adopt rules and regulations in accordance with Title VII of this Act; 415 ILCS 5/5(b)
>
> * * *
>
> (d) conduct proceedings upon complaints charging 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 5/5(d)

The Board does not have the authority to implement or enforce federal statutes or regulations. *Peter Arendovich v. Illinois State Toll Highway Authority*, PCB 09-102, slip op. at 2, December 17, 2009 (Board dismissed federal noise regulations allegations because it did not have the authority to enforce the federal regulations); *Hurley Rulon, et al. v. Double D Gun Club*, PCB 03-7 (Board dismissed RCRA and Clean Water Act allegations because they were outside the Board's authority).

The federal regulations cited in the Complaint, 40 CFR §§ 257.1 and 257.3-4, are not incorporated by reference into the Board regulations and the Board does not have "identical in substance" authority over them. Pursuant to Sections 7.2, 22.4, and 22.40 of the Act, 415 ILCS 5/7.2, 22.4, 22.40, the Board has the authority to quickly adopt new regulations that are identical in substance to certain parts of the federal environmental statutes.[10] The Board has specifically refrained from adopting regulations that are identical in substance to 40 CFR 257, the provisions cited by Complainants. The Board stated that the mandate under Section 22.40 of the Act "clearly focuses on the federal rules of 40 CFR 258, not 40 CFR 257 or RCRA Subtitle D. *We view the 40 CFR 257 requirements as outside the scope of our mandate."* *In the Matter of: RCRA Subtitle D Update, USEPA Regulations (July 1, 1996 through December 31, 1996)*, R97-

[10] The federal environmental statutes the Board is mandated to adopt as it relates to hazardous substances and waste are: Sections 3001 through 3005 of RCRA, 42 USC §§6921-6925, Section 4004 and 4010 of RCRA insofar as those regulations relate to a municipal solid waste landfill unit program.

20, Final Order, November 20, 1997, slip op. p. 2. (*emphasis added*).[11] The Board has neither general authority over the federal regulations, nor specific identical in substance authority. In this case, Complainants improperly rely on RCRA regulations to establish open dumping based on groundwater contamination. Because the Board lacks the statutory authority to enforce federal regulations, the Board should strike paragraphs 33-35 relating to federal regulations and should dismiss Counts 1, 2 and 3 of the Complaint.

2. The Open Dumping Counts Have No Basis in Fact as Required by Section 31(c) of the Act

Without the open dumping allegations that rely on federal regulations, Counts 1, 2, and 3 should be dismissed because they fail to include any facts or description as required by Section 31(c) of the Act. Counts 1, 2 and 3 do not state a claim as a matter of law because they do not include any facts or description as to how the ash treatment ponds are open dumps under the Act.

As stated above, a complaint filed pursuant to Section 31(d) must meet the requirements of Section 31(c) of the Act. (415 ILCS 5/31(c), (d)). Section 31(c) states that a complaint filed with the Board: "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, rule, regulation, permit, or term or condition thereof…". (415 ILCS 5/31(c)). The Board's procedural rules codify this requirement and state that a complaint must include the location, events and nature alleged to constitute violations of the Act and regulations. (35 Ill. Adm. Code 103.204). *See also, United City of Yorkville v. Hamman Farms*, PCB 08-96, slip op at 11, October 16, 2008 (The Act and the Board's procedural rules

[11] In a later rulemaking, the Board considered whether to add the newly promulgated subpart B, 40 CFR 257.5-257.30, as an identical-in-substance rulemaking. *In the Matter of: RCRA Update, USEPA Regulations*, R97-21, R98-3, and R98-5, Final Order, August 20, 1998, slip op. at p. 11. The Board stated that the Illinois counterparts to subpart A, 40 CFR 257.1-257.4, were the open dumping sections in the Act, and subpart B fell outside the scope of the Board's identical in substance mandate because it was not a part of RCRA Subtitle C or a part of the municipal solid waste landfill rules. *Id.*

provide for specificity in pleadings). The allegations of a complaint must be sufficiently clear and specific to allow preparation of a defense. *Id, citing Lloyd A. Fry Roofing Co. v. Pollution Control Board*, 20 Ill.App.3d 301, 305, 314 N.E.2d 350, 354 (1st Dist. 1974).

Here, Complainants merely repeat the statutory definitions of each element of an open dumping claim under Section 21(a) of the Act without stating how MWG's ash ponds fit within those definitions. (Complaint ¶33). Specifically, Complainants repeat the definitions of "open dumping," "refuse," "waste," and "sanitary landfill." but do not include any facts or statements to establish that the ash ponds fall within those definitions. (Complaint ¶33). By failing to include any facts or statements to support their allegations, Complainants have not met the requirements under Section 31(c) of the Act and the Board's procedural rules. (415 ILCS 5/31(c); 35 Ill. Adm. Code 103.204).

3. The Ash Ponds are Surface Impoundments, Not Open Dumps

Complainants do not and, in fact, cannot include any facts or statements to support a claim of open dumping because the ash ponds are classified as surface impoundments that are properly permitted and regulated as water pollution treatment units. As such, the ponds are not disposal sites and do not meet the definition of open dumping. (415 ILCS 5/21(a)).

The Board has never extended the scope of open dumping to an active part of a water pollution treatment process. *See, e.g., People of the State of Illinois v. Altivity Packaging, LLC et al.*, PCB 12-21, July 12, 2012 (open dumping found for disposal of wastes generated during construction of treatment plant); *People of the State of Illinois v. Community Landfill Community, Inc.*, PCB 97-193, October 3, 2002 (open dumping found where permitted landfill deposited waste above the permitted elevation); *Donald McCarrell et al. v. Air Distribution*

Associates, Inc., PCB 98-55, March 6, 2003 (open dumping found for release of TCE from 55-gallon drums).

Illinois EPA has specifically stated that MWG's ash ponds are surface impoundments and operate as a part of each station's wastewater treatment plant pursuant to its NDPES permits. (Ex. 5 at 1-2; Ex. 6 at 4; Ex. 7 at 5; Ex. 8 at 4)). This is consistent with the Board's finding in *Ameren's Petition for an Adjusted Standard, In the Matter of: Petition of Ameren Energy Generating Company for Adjusted Standards from 35 Ill. Adm. Code Parts 811, 814, 815,* AS09-1, August 11, 2008, where the Board noted that Ameren's ash pond, a permitted water pollution treatment facility, was a surface impoundment, not a landfill.[12] *Id.* at slip op. 4. The MWG ash ponds are and will continue to be operated as a part of the water treatment system permitted by the stations' NPDES permits. (Ex. 5 at 1-2; Ex. 6 at 4; Ex. 7 at 5; Ex. 8 at 4; Ex. 13-16 at 2-3). Illinois EPA agreed that the ash ponds are part of MWG's treatment systems and included a directive in each of the CCAs for the ash ponds to "continue to function as treatment ponds to precipitate ash" in the CCAs. (Ex. 1-4, ¶ 5.a). Pursuant to the CCAs, MWG will continue to periodically remove the ash from the ponds and protect the integrity of the existing liners during the removal of ash at each of the stations. (Ex. 1-4, ¶¶ 5.a and 5.b). Because MWG's ash ponds are permitted wastewater treatment facilities in which the ash is routinely removed, they are not disposal sites as required for an allegation of open dumping. For all of the above reasons, the Board should dismiss Counts 1, 2, and 3 and strike paragraphs 33 though 35 of the Complaint.

C. The Complaint Should be Dismissed Because it is Duplicative

The Complaint should be dismissed as duplicative because it is based on the same facts, alleges the same violations, and requests the same relief as the VNs and resulting CCAs. A

[12] The Board looked to the statutory definition of surface impoundments which states a surface impoundment is not a landfill and recommended looking to other Board regulations that may apply, including the NPDES regulations. 35 Ill. Adm. Code 810.103.

complaint is duplicative if it is the same or substantially similar to one brought before the Board or another forum. (35 Ill.Adm. Code 101.202). The intent behind this prohibition against duplicative complaints "is to avoid the situation where private citizen's complaints raise the same issue and unduly harass a respondent." *Northern Illinois Anglers' Assoc. v. The City of Kankakee*, PCB 88-183, slip op. at 3, January 5, 1989 (citizen's suit was duplicative of a consent order that settled a circuit court action covering same time period and same constituents). In this case, the Complaint is duplicative because it is the same or substantially similar to the Illinois EPA VNs and subsequent CCAs, and the CCAs meet the Board requirement of "another forum."

1. The Complaint Alleges the Same Facts and Violations and Requests the Same Relief as the Illinois EPA VNs and CCAs

The Complaint and the supporting facts are almost identical to the violations alleged in the Illinois EPA's VNs. Counts 4, 5, 6 and 7 of the Complaint claim a violation of Section 12 and a violation of 35 Ill. Adm. Code §§620.115, 620.301, and 620.405 for each of the stations. (Complaint, ¶¶ 52, 53, 55, 56, 58, 59, 61, 60). These are the same statutes and regulations that the Illinois EPA asserted in the VNs it issued to MWG. (Complaint, Ex. K-N).[13] In addition, both the Complaint and the VNs are based solely on alleged groundwater contamination from the exact same groundwater sampling data. (Complaint, Ex. D, F, H, J-N). In fact, Complainants attach the most recent MWG monitoring results submitted to the Illinois EPA as exhibits to their Complaint.[14] (Complaint, Ex. D, F, H, J). Complainants do not include any other facts or information to support their allegations.

[13] As noted in Section III.B, supra, Complainant's open dumping counts are also based on allegations of groundwater exceedances. The open dumping counts should be dismissed because they improperly rely on federal regulations and because they contain no supporting facts in violation of Section 31 of the Act.

[14] It appears that Complainants obtained Exhibits D, F, H, and J from MWG's July 27, 2012 Response to the VN because the tables are identical to the attachments to the response. (Ex. 9-12, attachments).

Complainants request substantially similar relief as is provided for in the CCAs. (Complaint, Relief Requested, Ex. 1-4). Complainants request that the Board order MWG to modify the coal ash practices to avoid future groundwater contamination, and order MWG to remediate the groundwater so that it meets applicable Illinois groundwater standards.[15] (Complaint, Relief Requested). MWG has already agreed to perform those actions in the CCAs. MWG is taking measures at the stations to avoid any potential impacts to the groundwater. At the Powerton, Will County, and Joliet #29 Stations, MWG will take action to replace its existing geocomposite liners with HDPE liners.[16] (Ex. 1, ¶5.e, Ex. 2, ¶5.f, Ex. 3, ¶5.e). MWG is significantly altering its operations at Will County by taking two of the ash ponds out of service. (Ex. 2, ¶5.e). MWG is taking measures at each of the stations to remediate the groundwater so it meets applicable Illinois groundwater standards. MWG is installing additional groundwater monitoring wells at the Powerton and Waukegan stations to further delineate groundwater quality. (Ex. 1, ¶5.f, Ex. 4, ¶5.d). MWG will continue to monitor all of the wells on a quarterly basis. (Ex. 1, ¶¶ 5.d, Ex. 2, ¶5.d, Ex. 3, ¶5.d, Ex. 4, ¶5.e). MWG also will establish a groundwater management zone at Powerton, Will County, and Joliet #29 pursuant to 620 Ill. Adm. Code 620.250(a) as part of its remediation activities. (Ex. 1, ¶¶5.g, 5.j, Ex. 2, ¶¶5.g, 5.i, Ex. 3, ¶¶5.f, 5.g). Additional remedial activities include entering into environmental land use controls at the Waukegan and Powerton stations. (Ex. 1, ¶¶5.h, 5.i, Ex. 4, ¶¶5.f, 5.g). Illinois EPA has determined that all of these remedial activities resolve the groundwater violations. Because the allegations of the Complaint are substantially similar to the VNs, the remedies also

[15] Complainants' request that the Board order respondent to "cease and desist from open dumping of coal ash" is addressed in Section III.B, infra, Illinois EPA has determined that the ash ponds are part of a permitted treatment unit and not disposal units (*i.e.*, landfills) as is required for a finding of open dumping.
[16] The ash ponds at Waukegan are already lined with an HDPE liner.

fulfill Complainants' request to modify coal ash practices to avoid future groundwater contamination and to remediate the groundwater.

2. A Section 31 Administrative Process which Results in a CCA is "Another Forum" Under the Board Regulations

A Section 31 administrative process which results in a CCA is "another forum" as that term is used in Section 101.202 of the Board Regulations because it results in a binding enforcement agreement similar to a settlement filed in enforcement cases brought before a circuit court. Although the Board has previously held that pre-enforcement steps, such as a violation notice, do not fall within the meaning of "another forum" (*see, e.g., Brian Finley et al. v. IFCO ICS-Chicago, Inc.*, PCB 02-208, slip op at 9, August 8, 2002), those holdings related to Illinois EPA proceedings *before* the 2011 amendments to Section 31, and a CCA is far beyond a pre-enforcement step. Instead, a CCA is just like a settlement agreement entered into with the Illinois EPA because it is a binding and enforceable document. (*See* Section III.A.2, supra, describing the 2011 amendments to the CCA process under Section 31 of the Act, making CCAs binding and enforceable documents). As in *Northern Illinois Anglers' Assoc,* when a Respondent settles with the State, a private citizen's complaint raising the same issues should be dismissed as duplicative. *Id.*

Pursuant to Section 31(a)(7.6) of the Act, MWG cannot violate any of the terms or conditions within the CCA. (415 ILCS 5/31(a)(7.6)). As long as MWG complies with the CCAs, the Agency shall not refer the alleged violations to the Attorney General or the State's Attorney's office. (415 ILCS 5/31(a)(10)). Moreover, a violation of a term or condition in the CCA is considered an additional violation, subject to an automatic penalty, beyond any of the alleged violations in the VN and the other penalties and remedies that may also apply. (415 ILCS 5/42(k), Ex. 17). All of these statutory characteristics show that the CCA is not merely a

pre-enforcement step but is an enforceable, binding document. The MWG CCAs, promulgated under the amended Section 31(a), qualify as "another forum" under the Board's regulations. Therefore, pursuant to 35 Ill. Adm. Code 101.202, the Complaint is duplicative because it is the same or substantially similar to one brought before another forum, and should be dismissed.

IV. CONCLUSION

For the reasons stated herein, Respondent, Midwest Generation, LLC, respectfully requests that the Board dismiss the Complaint, with prejudice.

Respectfully submitted,

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman
One of Its Attorneys

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CERTIFICATE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument and in the attached exhibits are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that it verily believes the same to be true.

Respectfully submitted,

MIDWEST GENERATION, LLC

By: 

List of Exhibits

1. Powerton Generating Station Compliance Commitment Agreement
2. Will County Generating Station Compliance Commitment Agreement
3. Joliet #29 Generating Station Compliance Commitment Agreement
4. Waukegan Generating Station Compliance Commitment Agreement
5. Powerton Generating Station NPDES Permit #IL0002232
6. Will County Generating Station NPDES Permit #IL0002208
7. Joliet #29 Generating Station NPDES Permit #0064254
8. Waukegan Generating Station NPDES Permit #0002259
9. MWG Response to Illinois EPA Violation Notice for the Powerton Generating Station, July 27, 2012
10. MWG Response to Illinois EPA Violation Notice for the Will County Generating Station, July 27, 2012
11. MWG Response to Illinois EPA Violation Notice for the Joliet #29 Generating Station, July 27, 2012
12. MWG Response to Illinois EPA Violation Notice for the Waukegan Generating Station, July 27, 2012
13. MWG Supplemental Response to Illinois EPA Violation Notice for the Powerton Generating Station, September 4, 2012
14. MWG Supplemental Response to Illinois EPA Violation Notice for the Will County Generating Station, September 4, 2012
15. MWG Supplemental Response to Illinois EPA Violation Notice for the Joliet #29 Generating Station, August 31, 2012
16. MWG Supplemental Response to Illinois EPA Violation Notice for the Waukegan Generating Station, September 4, 2012
17. Illinois EPA Compliance Commitment Agreement webpage, www.epa.state.il.us/enforcement/compliance-commitment
18. 97th Ill. Gen. Assembly, House Proceedings, April 13, 2011, p. 90 (Statement of Senator Wilhelmi)

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, Appearances, Respondent's Motion to Dismiss and Respondent's Memorandum in Support of Its Motion to Dismiss were filed electronically on November 5, 2012 with the following:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

and that true copies were mailed by First Class Mail, postage prepaid, on November 5, 2012 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman