BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

SIERRA CLUB, PRAIRIE RIVERS NETWORK, and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,	)	
Complainants,	)	
v.	)	**PCB 18-11 (Citizens Enforcement – Water)**
CITY WATER, LIGHT and POWER,	)	
Respondent.	)	

NOTICE OF FILING

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

And Attached Service List

Please take notice that on November 3, 2017, I filed electronically with the Office of the Clerk of the Illinois Pollution Control Board the attached **Appearances of James K. Zerkle and Deborah J. Williams** and **Motion to Dismiss and Strike of the City of Springfield, Office of Public Utilities d/b/a City Water, Light and Power**, a copy of which is attached and served upon you.

Respectfully submitted,

THE CITY OF SPRINGFIELD,
a municipal corporation

By _____
One of its Attorneys

Dated: November 3, 2017

Deborah J. Williams
Special Assistant Corporation Counsel
Office of Public Utilities
800 East Monroe, 4th Floor
Springfield, Illinois 62701
(217) 789-2116

BEFORE THE POLLUTION CONTROL BOARD
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SIERRA CLUB, PRAIRIE RIVERS NETWORK, and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,	)	
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CITY WATER, LIGHT and POWER,	)	
Respondent.	)	

APPEARANCE OF JAMES K. ZERKLE

The undersigned, as one of its attorneys, hereby enters his appearance on behalf of the City of Springfield, Office of Public Utilities d/b/a City Water, Light and Power (CWLP).

Respectfully submitted,

THE CITY OF SPRINGFIELD,
a municipal corporation

By _____
Corporation Counsel

Dated: November 3, 2017

James K. Zerkle
Corporation Counsel
City of Springfield
800 East Monroe, 3rd Floor
Springfield, Illinois 62701

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CITY WATER, LIGHT and POWER,	)	
Respondent.	)	

APPEARANCE OF DEBORAH J. WILLIAMS

The undersigned, as one of its attorneys, hereby enters her appearance on behalf of the City of Springfield, Office of Public Utilities d/b/a City Water, Light and Power (CWLP).

Respectfully submitted,

THE CITY OF SPRINGFIELD,
a municipal corporation

By _____
One of its Attorneys

Dated: November 3, 2017

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MOTION TO DISMISS AND STRIKE OF THE CITY OF SPRINGFIELD, OFFICE OF PUBLIC UTILITIES d/b/a CITY WATER, LIGHT AND POWER

NOW COMES Respondent, the City of Springfield, Office of Public Utilities d/b/a City Water, Light and Power ("CWLP"), by and through its counsel, and respectfully requests that the Board enter an order dismissing the Complaint brought by the Sierra Club, Prairie Rivers Network and National Association for the Advancement of Colored People ("Complainants"). In support of its Motion, the City of Springfield, Office of Public Utilities states as follows:

1. On September 27, 2017, Complainants filed a single Count Complaint with the Pollution Control Board ("Board") alleging violations of Sections 12(a) and 12(d) the Environment Protection Act ("Act") [415 ILCS 5/12(a) and(d)] and Sections 620.115, 620.301(a) and 620.405 of the Board's regulations. 35 Ill. Adm. Code 620.115, 620.301(a) and 620.405.

2. The complaint was served on the City of Springfield, Office of Public Utilities on October 5, 2017.

3. Pursuant to the Board's procedural rules, a Respondent shall file a motion to dismiss a citizen's enforcement complaint no later than 30 days following the date of service of the complaint upon respondent. 35 Ill. Adm. Code 103.212(b).

Legal Framework

4. Complaints' right to file its complaint is grounded in Section 31(d)(1) of the Act which provides that "Any person may file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order. The complainant shall immediately serve a copy of such complaint upon the person or persons named therein. Unless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing and serve written notice thereof upon the person or persons named therein, in accord with subsection (c) of this Section." 415 ILCS 5/31(d)(1).

5. In order to proceed to hearing on this complaint, the Board must find 1) that the complaint meets the requirements of Section 31(c) of the Act, and 2) that the complaint is not a) duplicative or b) frivolous.

6. The requirements of 31(c) of the Act that a citizen's complaint is expected to meet the requirements of are as follows:

> (1) 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 and shall require the person so complained against to answer the charges of such formal complaint at a hearing before the Board....
>
> 415 ILCS 5/31(c)(1).

7. The Board has provided additional guidance on the meaning of the complaint requirements of Section 31(c) of the Act in Section 103.204(c) of its procedural regulations, which provide that: "The complaint must be captioned in accordance with 35 Ill. Adm. Code 101.Appendix A, Illustration A and contain: 1) A reference to the provision of the Act and regulations that the respondents are alleged to be violating; 2) The dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations. The complaint must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense; and 3) A concise statement of the relief that the complainant seeks." 35 Ill. Administrative Code 103.204(c).

8. The provisions of Section 103.204 are intended to fulfill the requirement that an enforcement complaint be properly pled. Although an administrative complaint such as this citizen's enforcement complaint "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). *See*, *Sierra Club v. Midwest Generation*, PCB 13-15 (October 3, 2013), slip. Op at 17. In interpreting Section 31 of the Act, Illinois Courts have explained that "[c]harges in an administrative proceeding need not be drawn with the same refinements as pleadings in a court of law, but the charges must be sufficiently clear and specific to allow preparation of a defense, and this section requires notice of a specific violation charged and notice of the specific conduct constituting the violation. *Lloyd A. Fry Roofing Co. v. Pollution Control Bd.*, 20 Ill. App. 3d 301, 314 N.E.2d 350 (Ill. App. Ct.1st Dist. 1974), cert. denied, 420 U.S. 996, 95 S. Ct. 1438, 43 L. Ed. 2d 679, (U.S. 1975).

9. In addition to the requirement that a Complaint be properly pled under administrative law standards, the Board must find that the Complaint is not duplicative or frivolous in order to accept it for hearing. In determining whether a complaint is duplicative or frivolous, the Board procedural regulations provide that "'[d]uplicative' means the matter is identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. While "'[f]rivolous' means a request for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief." 35 Ill. Adm. Code 101.202.

10. Section 103.202(c) of the Board's regulations provides that "Misnomer of a party is not a ground for dismissal; the name of any party may be corrected at any time." Accordingly, Respondent moves that the caption in this matter be corrected by the

Board to identify Respondent as "CITY OF SPRINGFIELD, OFFICE OF PUBLIC UTILITIES d/b/a CITY WATER, LIGHT AND POWER." 35 Ill. Adm. Code 103.202(c).

Background

11. CWLP owns and operates the Dallman power generating stations pursuant to National Pollutant Discharge Elimination System ("NPDES") permit #IL0024767 and Municipal Solid Waste Landfill permit #1995-243-LFM. In 2010 and 2012, groundwater monitoring wells beyond those installed for purposes of the landfill permit were voluntarily installed by CWLP at request of the Illinois Environmental Protection Agency ("Illinois EPA"). These wells are those identified in the Complaint as AP-1, AP-2, AP-3, AP-4, and AP-5. The complaint also identifies groundwater monitoring well AW-3 which existed prior to the installation of these five wells. Complaint at ¶ 1, 3.

12 Subsequent to installation of these monitoring wells, Illinois EPA submitted the proposed Part 841 regulations to the Board on October 28, 2013. Complainants Sierra Club and Prairie Rivers Network have participated in the development of these regulations by the Board.

13. In 2015, the United States Environmental Protection Agency ("U.S. EPA") finalized federal Coal Combustion Residual rules under Subtitle D of the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq. ("RCRA"), entitled "Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities," 80 Fed. Reg. 21,302 (April 17, 2015) (the "CCR Rule"). Subtitle D of RCRA governs the disposal of solid waste presently classified as non-hazardous. The Rule sets forth a set of comprehensive requirements in the form of

nationally-applicable minimum criteria for the safe disposal of coal combustion residuals ("CCR"), a by-product of the operation of coal-fired power plants, in properly constructed and maintained landfills and impoundments. 80 Fed. Reg. at 21,302-03. These comprehensive requirements and criteria generally include: (a) location restrictions (40 C.F.R. §§ 257.60-64); (b) liner design criteria (40 C.F.R. §§ 257.70-72); (c) structural integrity requirements (40 C.F.R. §§ 257.73-74); (d) operating criteria (40 C.F.R. §§ 257.80-84); (e) groundwater monitoring and corrective action requirements; (40 C.F.R. §§ 257.90-98); (f) closure and post-closure requirements; (40 C.F.R. §§ 257.100-04); and (g) recordkeeping, notification and website posting requirements (40 C.F.R. §§ 257.105-07). Failure to comply with many of these criteria generally results in a covered facility being deemed an "open dump," which is thereby required to upgrade or close within specified time periods. 40 C.F.R. § 257.1(a); 80 Fed. Reg. at 21,468.

14. In addition, on December 16, 2016, twenty months after the CCR Rule was promulgated, Congress enacted the Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114-322, 130 Stat. 1628, which at section 2301 sets forth an amendment to Section 4005 of the Solid Waste Disposal Act, 42 U.S.C. § 6945. That amendment made several fundamental changes to Subtitle D of RCRA, by: (a) instituting a program under which States could seek U.S. EPA approval of a State permitting program that would allow the State to issue individualized facility permits that would operate in lieu of the national criteria in the Rule, provided U.S. EPA determines that the State program is at least as protective as the requirements/criteria set forth in the Rule; (b) granting U.S. EPA authority to issue permits, in the absence of an approved State program, subject to receiving a specific appropriation for that purpose;

and (c) granting U.S. EPA authority to institute administrative or judicial enforcement actions against facilities that are in violation of State or Federal requirements. 42 U.S.C. § 6945(d). Prior to this amendment, Subtitle D was generally described as "self-implementing," as EPA had no statutory authority to bring an enforcement action against a facility that was in violation of any federal criteria promulgated by U.S. EPA. 42 U.S.C. §6973; 80 Fed. Reg. at 21,309-11.

15. The Complaint alleges that "Since 2010, the groundwater at Dallman has exceeded the Class I GQSs for arsenic, boron, chromium, iron, lead, manganese, sulfate, and TDS, and the Class II GQSs for arsenic, boron, iron, lead, manganese, sulfate, and TDS. 35 Ill. Adm. Code 620.410, 620.420." Complaint at ¶29. Exhibit A alleges to represent data collected from CWLP's monitoring wells and compares the same data points to both the Class I and Class II standards in separate tables. The Tables do not identify which data points occur in upgradient (background) wells and which data points occur in the downgradient wells; but alleges that both sets of wells represent violations of the Act and 620 regulations somehow caused by CWLP "through its coal ash disposal ponds, landfill, unconsolidated coal ash fill, and/or other coal ash and coal combustion waste repositories at Dallman."

Complaint should be dismissed for failing to comply with Section 31(c) of the Act as being improperly pled and as duplicative and frivolous

16. In ruling on a motion to dismiss, the Board looks to Illinois civil practice law for guidance. See, e.g., *United City of Yorkville*, PCB 08-96, slip. op. at 14-15 (Oct.16, 2008); *People v. The Highlands, LLC*, PCB 00-104, slip op. at 4 (Oct. 20, 2005); Sierra *Club and Jim Bensman v. City of Wood River and Norton Environmental*, PCB 98-43,

slip op. at 2 (Nov. 6, 1997); *Loschen v. Grist Mill Confections, Inc.,* PCB 97-174, slip op. at 3-4 (June 5, 1997). The Board must take all well-pled allegations as true and draw 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); *Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428, 438, 546 N.E.2d 580, 584 (1989).

17. Even under the high hurdle of a motion to dismiss, this Complaint must be dismissed for failing to meet the requirements of Section 31 of the Act and Section 103.204 of the Board's regulations that serve to require a Complaint to be prepared with sufficient specificity to allow the Respondent to prepare a defense. The allegations in the Complaint, even if taken as true, to do not provide CWLP with notice of what actions it is alleged to have taken during what time period that resulted in a violation of the Act and Board regulations. The Complaint does not allege any practices or actions that CWLP has taken or failed to take that have resulted in a violation of the Act or regulations thereunder.

18. In addition, the Complaint fails to sufficiently plead the alleged violations with the specificity necessary for CWLP to prepare a defense when the Complainants allege 388 violations of Class I groundwater standards and 235 violations of Class II groundwater standards. Complaint at ¶28. It is not possible for CWLP to be violating both of these two mutually exclusive sets of groundwater standards. The Complaint must be dismissed for failure to provide CWLP notice of what standards the Complainant alleges are applicable to CWLP and how they are being violated. Complaint at ¶28, ¶ 29 and Exhibit A. The result of this failure is that Complainants

have failed to sufficiently allege "provision of the Act and regulations that the respondents are alleged to be violating" as required by the Act and Board procedural regulations. 35 Ill. Adm. Code 103.204(c)(1).

19. The Complaint also fails to sufficiently allege "the dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations." 35 Ill. Adm. 103.204(c)(2). Complainant alleges no specific dates, locations, or events that led to a violation of the Act and regulations thereunder. Nor does the complaint allege the strength of discharges that are alleged to constitute violations of the Act. Although CWLP's landfill and ash ponds are permitted by Illinois EPA, Complainants allege no violations of CWLP's landfill or NPDES permits that have led to any violations of the Act or Board regulations. Complaints simply provide a list of the alleged values of groundwater monitoring data taken both upgradient and downgradient of CWLP's facility and conclude that these numbers constitute exceedances or violations of the Act with no information as to how CWLP could have caused violations of standards in upgradient groundwater or how downgradient groundwater at values equivalent to background levels could violations of the Act caused by CWLP. In addition to resulting in a complaint that is insufficiently pled under Section 31(d) of the Act and 35 Ill. Adm. Code 103.204, these deficiencies also make this Complaint frivolous within the meaning of the Act and, accordingly, should be dismissed by the Board.

20. Complainant cites to three provisions in the Board's 620 regulations that Respondent is alleged to have violated: Sections 620.115, 620.301(a) and 620.405. Complaint at ¶28. Section 620.301(a) provides: "a) No person shall cause, threaten or

allow the release of any contaminant to a resource groundwater such that: 1) Treatment or additional treatment is necessary to continue an existing use or to assure a potential use of such groundwater; or 2) An existing or potential use of such groundwater is precluded." 35 Ill. Adm. Code 620.301(a). Complainant has alleged no facts that, if taken as true, would prove this provision has been violated. Even if the Board overlooks that the information presented in Exhibit A presents violations of mutually exclusive provisions of the 620 regulations and cites to information from wells that are both upgradient and downgradient of CWLP's landfill and ash ponds, no facts have been presented that allege the presence of elevated groundwater levels off-site of CWLP property or the actual or potential uses of the groundwater in the community that are precluded to result in a violation of this provision. In the event the Board finds this Complaint to be properly pled and not duplicative or frivolous, the Board should strike the alleged violation of 35 Ill. Adm. Code 620.301(a) for failure to allege facts that, if true, would lead to a violation of that provision.

21. Section 31(d) requires a citizen's enforcement complaint to meet the requirements of Section 31(c). 415 ILCS 5/31(d). For a complaint to be timely under Section 31(c), it must have been raised by the Agency through a violation notice within 180 days of discovery of the violation. The Act and Board regulations do not clearly specify a time period in which a citizen must file a complaint following becoming aware of the violation. The interpretation of this lack of a specification of a statute of limitation cannot be that citizen complaints can be raised at any time. It would be a logical reading of the Act, that a citizen's complaint must also be raised within 180 days of discovery of the violation. Complainants allege no violations that, if true, occurred less

than 180 days prior to the filing of its complaint. Respondent moves the Board should dismiss this complaint as untimely. In the event the Board is unwilling to do so without further information, it should order the Complainants to submit supplemental information documenting the date they became aware of the data giving rise to their complaint.

22. The plain language of Section 31(c) requires the alleged violation to be the subject of "disagreement between the Agency and the person complained against." However, the Board has held that the Respondent and the Agency may have reached an agreement on the same violations contained in the complaint without precluding a citizen's suit. As the Board found in *Sierra Club, et al v. Midwest Generation,* "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." PCB 13-15 (October 3, 2013) Slip op. at 18. This holding was an extension of the Board's findings in *People v. Freeman United Coal Co.* (PCB 10-61) where the Board explained that:

> *Under the plain language of Section 31(a)(10) of the Act (415 ILCS 5/31(a)(10) (2010)), the existence of a CCA prohibits the IEPA from referring a case. However, nothing in Section 31(a)(10) of the Act (415 ILCS 5/31(a)(10) (2010)) bars the People or a citizen's group from bringing an action. See PCB 10-61 & 11-02 slip op. 31-32 (Nov. 15, 2012). Further, in its November 15, 2013 order granting partial summary judgment to the People and ELPC, the Board found that the effects of CAAs are appropriate for consideration in determining penalties. See Id. at 63. The Board finds that other than declaring the novelty of their question, respondents present no basis for concluding that there are substantial grounds for difference of opinion on the relevance of the existence of a CCA in these proceedings.*
>
> *People v. Freeman United Coal Co.*, PCB 10-61, April 18, 2013 at slip op. at p. 9.

23. The City of Springfield argues the expansive rulings in these cases which apply the same standard to a Complaint brought by the Attorney General on behalf of

the People to any complaint brought by any party seeking to bring a citizen's enforcement action are wrongly decided and impermissibly expand the scope of citizen's enforcement process beyond the intention of the legislature. The City requests the Board grant a hearing or oral argument on the issue of whether this complaint is barred based on actions taken by the Agency to determine whether legitimate violations were found to exist and whether a disagreement as to the existence of violations or an appropriate remedy still exist. In determining whether a matter is duplicative for a citizen's suit (as opposed to a suit brought by the People) the intent of the duplicative limitation is mirror the provisions in federal environmental statutes with citizen's suit provisions, that the Agency must be failing to diligently prosecute a violation of the Act prior to bringing of a citizen action. A reading as expansive as that take by the Board in *Midwest Generation* would threaten to disrupt the process whereby the Agency achieves prompt compliance with the Act. If a resolution of violations issued by the Agency would not protect the party from additional complaints before the Board for the same violations, there would be no incentive to resolve violations with the Agency. There is also a very real danger, which the City argues was minimized in the Board's *Midwest Generation* opinion, of a facility investing large sums of money to achieve the compliance remedy demanded by the Agency, only to have the Board order a conflicting remedy. The City argues the Board should give weight consistent with the facts of the case at hand to whether the Agency is diligently addressing the issues raised by the Complaint in determining whether a complaint meets the requirements of Section 31(c) of the Act or is duplicative.

24. Finally, this Complaint should be dismissed as duplicative and frivolous because of its attempt to create an end run through the Board around the provisions of the CCR rule. Complaint is attempting to avoid the comprehensive regulatory structure set up to address CWLP's ash ponds and all similar facilities nation-wide. CWLP has been complying with the actions and timelines required by the federal CCR regulations including providing a publicly available website with relevant reports and information. *See,* https://www.cwlp.com/CCRCompliance.aspx. The Board should dismiss this complaint as premature and as a frivolous abuse of the Board's limited resources. The Complainants are asking the Board to spend time scrutinizing enormous amounts data and information to determine for themselves which groundwater wells are upgradient of the CWLP's ash ponds and which ones are downgradient, what the 'background' levels of various constituents are in the upgradient wells, whether the downgradient wells have levels of contaminants that exceed the background wells, whether there is evidence CWLP caused the groundwater to exceed background and whether there is any evidence contaminants attributable to CWLP's ash ponds or other activities have migrated off site or precluded any existing or potential uses of such off-site groundwater. It is frivolous for Sierra Club, Prairie Rivers Network and NAACP to ask the Board to make these complex technical determinations required to sustain a violation when the road-map provided by the CCR rules will conclusively and permanently address these issues in due time. In a short time CWLP will have developed information under these regulations which will be publically available that will establish background concentrations of various contaminants and evaluate what, if any, impacts CWLP ash ponds have on these background levels. Most importantly, the CCR

rules specify the remedy of actions that must be taken to address any issues that are found as a result of CWLP's activities. It is premature and frivolous to ask for this Complaint to be adjudicated by the Board until the relevant facts have been developed under the CCR rule.

Conclusion

For the reasons stated herein, Respondent, City of Springfield, Office of Public Utilities d/b/a City Water, Light and Power respectfully requests that the Board dismiss the Complaint, with prejudice.

Respectfully submitted,

THE CITY OF SPRINGFIELD,
a municipal corporation

By _____
One of its Attorneys

Dated: November 3, 2017

James K. Zerkle
Corporation Counsel
City of Springfield
800 East Monroe, 3rd Floor
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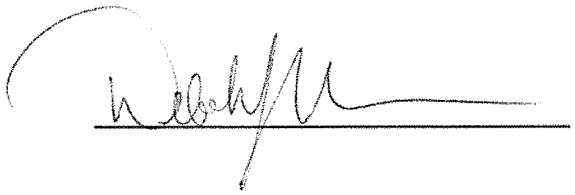
CERTIFICATE OF E-MAIL SERVICE

The undersigned, Deborah J. Williams, an attorney, certifies that I have served by email upon the individuals named on the attached Service List a true and correct copy of the **NOTICE OF FILING, APPEARANCE OF DEBORAH J. WILLIAMS and JAMES K. ZERKLE** and **MOTION TO DISMISS AND STRIKE OF THE CITY OF SPRINGFIELD, OFFICE OF PUBLIC UTILITIES d/b/a CITY WATER, LIGHT AND POWER** from the email address (deborah.williams@cwlp.com) of this 19 page document before 5:00 p.m. on November 3, 2017 at the address provided on the attached Service List.



SERVICE LIST PCB 18-11

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