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,	)	**PCB 18-11**
	)	**(Citizens Enforcement - Water)**
v.	)	
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 note that on November 17, 2017, I filed electronically with the Office of the Clerk of the Illinois Pollution Control Board the attached Complainants' Response to Respondent's Motion to Dismiss, a copy of which is attached and served upon you.

Respectfully submitted,

/s/ Akriti Bhargava

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COMPLAINANTS' REPSONSE TO RESPONDENT'S MOTION TO DISMISS

City of Springfield, Office of Public Utilities d/b/a City Water, Light and Power, ("CWLP" or "Respondent") raises at least seven different arguments supporting its contention that the Complaint filed by Sierra Club, Prairie Rivers Network, and National Association for the Advancement of Colored People ("Citizen Groups" or "Complainants") should be dismissed. It is telling, however, that aside from pointing out the standard on a motion to dismiss and making an argument that the Pollution Control Board ("PCB" or "Board") should not follow its own legal precedent, CWLP's motion is devoid of citations to case law. In fact, disregarding the two cases that CWLP argues should be reversed, CWLP does not cite a single case—either at the PCB or elsewhere in Illinois state courts—in support of any of its seven arguments to dismiss Citizens Groups' Complaint. This fact alone demonstrates the weakness of CWLP's arguments, which is confirmed by a close examination of each argument: as explained further below, PCB's

own decisions confirm that none of the several arguments CWLP raises provide any valid basis to dismiss Citizen Groups' Complaint.

I. STANDARD OF REVIEW

In assessing the adequacy of pleadings in a complaint, the Board has pointed out that "Illinois is a fact-pleading state." *Grist Mill Confections*, PCB 97-174, (June 5, 1997) slip op. at 4 (*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)). This requires the complainant to "set out the ultimate facts that support his cause of action." *Id.* The allegations in a complaint are "sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action." *Schilling v. Hill*, PCB 10-100 (2010), (March 15, 2012), slip op. at 7 (quoting *People v. College Hills Co.*, 91 Ill. 2d 138, 145, 435 N.E.2d 463, 467 (March 16, 1982)). Despite Illinois being a fact-pleading state, this does not require a complainant to include all the evidence in support of its claims in the complaint. "To the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts." *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 308, 430 N.E.2d 1005, 1008-09 (1981) (*quoting Board of Education v. Kankakee Federation of Teachers Local No. 886*, 46 Ill. 2d 439, 446-47, 264 N.E.2d 18 (1970)). Finally, "dismissal of a complaint is appropriate only when it is clear that a complainant cannot prove any set of facts that would entitle it to relief." *People of the State of Illinois, Complainant V. Sheridan Sand & Gravel Co., Respondent*, PCB 06-177 (September 7, 2006), slip op. at 4 (citations omitted).

II. ARGUMENT

Respondent's arguments fall into three general categories: first, Respondent argues that the Complaint fails in some way to meet applicable factual or legal standards; second,

Respondent argues that Complainants' claims are barred by the passage of time; and third, Respondent argues that other developments in Illinois and nationally have precluded this case in some way. None of these arguments presents a valid reason to dismiss this case, nor do (or could) any of them act in concert with each other to justify such a dismissal.

A. The Complaint Adequately States A Valid Claim for Relief

CWLP's arguments relating to the form and sufficiency of the Complaint rest on an apparent misunderstanding of what is required under Illinois law at the Motion to Dismiss stage. Each of the specific arguments is addressed below, but more broadly, Illinois Law and PCB's own precedent indicate clearly that complainants do no need to identify specific facts or evidence beyond those facts necessary to allege a statutory violation. CWLP seems to be expecting Complainants to already have had access to internal information of the nature that one doesn't obtain until discovery before filing a Complaint; in addition to being unsupported by the law, these arguments are inconsistent with the purpose and function of complaints at the PCB.

i. The Complaint Provides a Sufficient Factual Basis for Its Claims

CWLP first argues that the Complaint must provide "notice of what actions it is alleged to have taken during what time period that resulted in a violation . . ." and allege "practices or actions that CWLP has taken or failed to take that have resulted in a violation . . . ." (Mot. to Dismiss at Par 17.) As an initial matter, this argument ignores the fact that the Complaint already identifies CWLP's coal ash storage and disposal practices as being the cause of the violations. Count 1—the first and only count of the Complaint—identifies the source of the contamination as "coal ash disposal ponds, landfill, unconsolidated coal ash fill, and/or other coal ash and CCW waste repositories at Dallman." Compl. Par 28. Count 1 goes on to indicate that how those coal ash storage and disposal practices caused violations of the Environmental

Protection Act and regulations: the identified sources "discharged contaminants into the environment and thereby caused water pollution in violation of 415 ILCS 5/12(a) and (d), and 35 Ill. Admin. Code §§ 620.115, 620.301(a), and 620.405." Compl. Par 28. Further, the Complaint specifically identifies the relevant contaminants—arsenic, boron, chromium, iron, lead, manganese, sulfate, and total dissolved solids ("TDS") (Compl. Par 8)—and indicates that those contaminants are constituents of coal ash. "Many of the contaminants found at elevated concentrations in the groundwater monitoring results at Dallman are constituents of coal ash.[1] Boron is a primary indicator of potential coal ash impacts to groundwater." Compl. Par. 9-10. In short, CWLP's failure to properly shield these impoundments from nearby groundwater has created the contamination that led to the violations at issue in this case.

To the extent these allegations do not fit CWLP's definition of what it means to identify "practices or actions" that resulted in the violations, CWLP is trying to add a requirement that simply does not exist in state law.[2] See 35 Ill. Adm. Code 103.204. The Parties agree that Section 103.204 provides for what a complaint must contain:

> 1) A reference to the provision of the Act and regulations that the respondents are alleged to be violating;
>
> 2) The dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations. The complaint must advise respondents of the

[1] *See, e.g.*, U.S. EPA, Human and Ecological Risk Assessment of Coal Combustion Wastes at 2-4 (Draft, April 2010) (listing Coal Combustion Waste constituents), *available at* http://earthjustice.org/sites/default/files/library/reports/epa-coal-combustion-waste-risk-assessment.pdf (last visited Jun. 22, 2017).

[2] In fact, for some environmental regulations, liability lies in the failure to act. *People v. ESG Watts*, PCB 96-233, 1998 Ill. Env. Lexis 43, at *35-36 (Feb. 5, 1998) (holding that failing to perform monitoring threatened groundwater pollution in violation of 415 ILCS 5/12(a)). This further undermines CWLP's claim that complaints must identify "practices and actions."

extent and nature of the alleged violations to reasonably allow preparation of a defense; and

3) A concise statement of the relief that the complainant seeks.

35 Ill. Adm. Code 103.204(c). Aside from the legal provisions and relief that must be identified in the complaint, the only facts a complaint must identify are "dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences." Nowhere does this provision require a complaint to identify "practices or acts."

For these reasons, CWLP's first argument in support of its Motion to Dismiss must fail.

ii. Identification of Two Separate Regulations as the Basis for Violations Is Not Grounds for Dismissal

CWLP also argues in Paragraph 18 of its response that we have failed to "sufficiently plead the alleged violations with the specificity necessary for CWLP to prepare a defense" because Complainants identified both Class I and Class II groundwater standards, and it is not possible to violate "both of these two mutually exclusive sets of groundwater standards." (Mot. to Dismiss, Par 18.) While CWLP is correct that the Class I and Class II standards are separate provisions of law, their argument fails because the Complaint merely pleads in the alternative that the two sets of standards were violated, which is both permissible under Illinois law and consistent with standard pleading practice.

The Illinois Code of Civil Procedure provides that pleading in the alternative is fully permissible, even in the same count, and even if inconsistent. "When a party is in doubt as to which of two or more statements of fact is true, he or she may, regardless of consistency, state them in the alternative or hypothetically in the same or different counts or defenses." 735 ILCS

5/2-613(b). Illinois courts have held that this does not apply to just statements of fact but legal theories as well:

> It is well-settled that at the pleading stage of the proceedings, where the issue is solely the sufficiency of the pleadings and whether plaintiffs can conceivably prove a set of facts which would entitle them to recovery, plaintiffs may plead factual allegations and legal theories in the alternative and, at trial, choose which theories of recovery to pursue.

Bureau Serv. Co. v. King, 308 Ill. App. 3d 835, 841, 721 N.E.2d 159, 163 (1999) (citing *Wegman v. Pratt*, 219 Ill.App.3d 883, 895–96, 162 Ill. Dec. 221, 579 N.E.2d 1035 (1991)).

In this case, Complainants' decision to plead in the alternative is justified because Complainants do not yet have access to the factual information that would indicate whether the Class I or Class II groundwater standards apply. As stated in the Complaint:

> Section 620.410 establishes Class I GQSs that cannot be exceeded in potable resource groundwater. 35 Ill. Admin. Code § 620.410. "Potable resource groundwater" is defined as:
>
> > Groundwater located 10 feet or more below the land surface and within: (1) The minimum setback zone of a well which serves as a potable water supply and to the bottom of such well; (2) Unconsolidated sand, gravel or sand and gravel which is 5 feet or more in thickness and that contains 12 percent or less of fines . . . ; (3) Sandstone which is 10 feet or more in thickness, or fractured carbonate which is 15 feet or more in thickness; or (4) Any geologic material which is capable of a: (A) sustained groundwater yield, from up to a 12 inch borehole, of 150 gallons per day or more from a thickness of 15 feet or less; or (B) Hydraulic conductivity of 1 x 10(-4) cm/sec or greater using one of the following test methods or its equivalent: (i) Permeameter; (ii) Slug test; or (iii) Pump test. 35 Ill. Admin. Code § 620.210(a).

(Complaint, Par. 23.) Complainants do not have access to the property or to hydrogeological analyses of the site sufficiently specific to allow them to determine whether the groundwater is "10 feet or more below the land surface," within "[u]nconsolidated sand, gravel or sand," within "[s]andstone," or qualifying Class I groundwater under any of the other criteria. "The Illinois Code of Civil Procedure (735 ILCS 5/2–613(b) (West 1996)) clearly authorizes alternative

pleading, regardless of the consistency of the allegations, as long as the alternative factual statements are made in good faith and with genuine doubt as to which contradictory allegation is true." *Bureau Serv. Co. v. King*, 308 Ill. App. 3d 835, 841, 721 N.E.2d 159, 163 (1999) (citing *Wegman*, 219 Ill.App.3d at 895, 162 Ill. Dec. 221, 579 N.E.2d 1035 (1991)). Since Complainants do not have access to the property to obtain the necessary information about the groundwater, Complainants made good faith claims that the groundwater at Dallman exceeded both Class I and Class II groundwater quality standards. (Compl. Par 29.)

For these reasons, CWLP's second argument in support of its Motion to Dismiss is without merit.[3]

iii. The Complaint Sufficiently Identifies the Details of the Contamination

Next, CWLP argues that the Complaint failed 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." (Mot. to Dismiss at Par. 19 (quoting 35 Ill. Adm. Code 103.204(c)(2)). Respondent goes on to argue that this renders the Complaint "insufficiently pled" and "frivolous within the meaning of the Act." (Mot. to Dismiss at Par 19.) This argument completely ignores the substance of the actual Complaint, which includes the exact type of information that the Board has found adequate in previous cases. "Fact-pleading does not require a complainant to set out its evidence: '[t]o the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts."' *Schilling v. Hill*, PCB 10-100 (March 15, 2012), slip op. at 7 (quoting *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 308, 430 N.E.2d 1005, 1008-09 (1981).

[3] Even though Complainants used "and" instead of "or" when pleading in the alternative, this would not be grounds for dismissal. "[P]leadings are not intended to create technical obstacles to reaching the merits of a case at trial; rather, their purpose is to facilitate the resolution of real and substantial controversies." *Village of Mettawa*, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303, *quoted in People v. Waste Hauling Landfill, Inc.*, PCB 10-09 (December 3, 2009), slip op. at 12.

Consistent with this mandate, the Complaint includes a list of coal ash contaminants that were found in the groundwater at every individual monitoring well and on every date when the concentration of those contaminants was measured to be in excess of Class I and/or Class II groundwater standards. This list provides to CWLP the date, locations, nature, and strength of the discharges at issue here.[4]

The Complaint's adequacy is demonstrated in particular by comparison to the factually similar case, *People v. Prior*. PCB 97-111, 1997 WL 735036 at *4. In *Prior*, the PCB concluded that there were violations of 35 Ill. Adm. Code 620.115, 620.405, 620.410, and 620.301(a) based on results from groundwater monitoring wells located at each of the three sources. The evidence summarized in the opinion was very similar to the evidence alleged in this Complaint: groundwater monitoring wells at three sources were sampled on four consecutive dates, and the resulting lab reports showed thirty-two separate exceedances of the Part 620 Class I Groundwater standards. *Id.* Furthermore, based on this evidence, the Board found that "by causing, threatening, or allowing the release of contaminants to the groundwater so as to cause exceedances of the groundwater quality standards, respondents [had] violated 35 Ill. Adm. Code 620.115, 620.405, 620.410." *Id.* at *7. The charts attached to Citizens Groups' complaint provide the same quantity and type of information as the simple chart in *Prior* that PCB deemed sufficient to meet the requirements of 35 Ill. Adm. Code 103.204(c). This is in direct contrast to the complaint that was found to be insufficient in *People v. Waste Hauling Landfill, Inc.*, PCB 10-09 (December 3, 2009),slip op. at 15. ("The complaint contains no dates as to the life of the facility, facts as to when Caterpillar allegedly sent waste, or what hazardous substance may have been involved.").

[4] Compliance with their existing NPDES and landfill permits is irrelevant because those permits do not cover discharges to groundwater. The issue of which wells are upgradient and downgradient is one that requires expert testimony in order to make a determination and therefore is not necessary in notice pleading.

For these reasons, CWLP's third argument in support of its Motion to Dismiss must fail.

iv. The Complaint's Allegations Are Sufficient to Allege a Violation of 35 Ill. Adm. Code 620.301(a)

Another CWLP critique of the Complaint is its claim that Complainants failed to sufficiently allege a violation of 35 Ill. Adm. Code 620.301(a). (Mot. to Dismiss at Par. 20.) In particular, CWLP argues that "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." (Mot. to Dismiss at Par. 20.)

Once again, CWLP is manufacturing requirements—here, elements of a Section 620.301(a) violation—that do not actually exist in the regulation. Section 620.301(a) provides

> 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) (emphasis added). Nothing in Section 620.301(a) requires that a contamination level be elevated "off-site" of the source property, or that any immediate uses of the groundwater "off-site" (or "in the community") be precluded. To the contrary, in *People v. ESG Watts, Inc.*, the Board concluded that there was a violation of 35 Ill. Adm. Code 620.301(a) when "treatment would be necessary before the groundwater could be used for consumption (*i.e.*, to assure a potential use)." PCB 96-233 (February 5, 1998), slip. op. at 20. Notably, that case also involved contamination of on-site groundwater reserves: the sampled groundwater was

"underlying" a landfill on the site property. Thus, there is no basis for CWLP's attempt to add requirements as to where contamination must be located.

People v. Prior is also on point with present case. 1997 WL 735036, at *4. In *Prior*, as with *ESG Watts*, the PCB concluded that there were violations of Section 620.301(a) based on results from groundwater monitoring wells located at each of the three sources, in a case where neither off-site monitoring results nor off-site uses of groundwater were alleged by any party. In so ruling, the Board concluded that "by causing, threatening, or allowing the release of contaminants to the groundwater such that treatment is necessary, respondents have violated 35 Ill. Adm. Code 620.301 (a)." *Id.* at *7.

In the present case, as in *Prior* and *ESG Watts*, Complainants have included groundwater-monitoring results from onsite groundwater monitoring wells indicating that Class I and/or Class II standards were exceeded on site. Complainants have also alleged that

> [t]he contaminants listed in this Complaint, when present at the concentrations found in CWLP's groundwater wells, make the groundwater unusable. Many of these contaminants are toxic and have been found at concentrations that present a human health risk. Others are dangerous to aquatic ecosystems; this is a significant concern to the extent that contaminated groundwater is migrating into adjacent surface water bodies.

(Compl. at Par. 11.) Thus, Complainants have included sufficient facts in the Complaint to support their claim that treatment is necessary and that Respondent has violated 35 Ill. Adm. Code 620.301 (a). For these reasons, CWLP's fourth argument in support of its Motion to Dismiss is unpersuasive.

B. The Complaint Was Timely Filed

CWLP's next attempt to impose novel pleading requirements on Complainants centers on an argument that a 180-day statute of limitations applies to preclude Citizens Groups' Complaint. (Mot. to Dismiss, Par 21.) CWLP's logic here is based on the Section 5/31(a) requirement that the Illinois Environmental Protection Agency ("IEPA" or "Agency") issue violation notices

within 180 days of discovering a violation. 415 ILCS 5/31(a). CWLP reasons that because a violation notice is a prerequisite to the Agency filing a complaint (415 ILCS 5/31(c)), citizen groups must also file their complaints within 180 days of learning of the existence of violations.

Once again, CWLP's arguments are not supported by any citations to relevant caselaw, and PCB precedent clearly contradicts those arguments. The Parties agree that 415 ILCS 5/31(d) governs the present Complaint and citizens have to comply with 415 ILCS 5/31(c) when filing under 5/31(d). But the Board has consistently held that there is no statute of limitations that applies to enforcement actions under 5/31(d). *People v. John Crane, Inc.*, PCB 01-76 (May 17, 2001), slip op. at 5 (noting that "Section 31 is not a statute of limitations," and that "there is no statute of limitations that applies to enforcement actions brought by the State pursuant to Section 31 of the Act"); *see also Pielet Bros. Trading, Inc. v. Pollution Control Bd.* 110 Ill App. 3d 752, 758 (5th Dist. 1982); *People v. Am. Disposal Co. and Consol. Rail Corp.*, PCB 00-67 (May 18, 2000), slip op. at 3. The PCB also has not held the Illinois Attorney General to 415 ILCS 5/31(a) pre-referral requirements imposed on the Illinois Environmental Protection Agency when the Attorney General brings an enforcement case on its own motion. "The Board has consistently held that the procedures of Section 31(a) and (b), while being a precondition for referral by the Agency to the Attorney General, are not a limitation on the Attorney General." *People v. Chiquita Processed Foods L.L.C.*, PCB 02-56 (Nov. 21, 2002) (quoted in *People v. Waste Hauling Landfill, Inc.*, PCB 10-09 (December 3, 2009) , slip op. at 13. Thus, by clear application of PCB precedent, based on a clear statutory analysis, 5/31(a) pre-referral timing requirements do not apply Citizen Groups proceeding under 5/31(d). The Complaint was timely filed and CWLP's fifth argument in support of its Motion to Dismiss is without merit.

C. Other Enforcement and Monitoring Regimes In State or Federal Law Do Not Preclude the Availability of Citizen Groups' Direct Enforcement Rights Under Illinois Law

CWLP's final set of arguments make the strange claim that, because other avenues (both potential and ongoing) are available to monitor and clean up the contamination at issue here, Complainants should somehow be precluded from bringing a direct enforcement case. As explained in more detail in the two sections below, these arguments have no basis because neither of the alternate enforcement avenues mentioned was ever intended to preclude direct enforcement claims like this one.

i. IEPA's Purported Independent Actions on Violations Alleged in the Complaint Do Not Preclude Citizen Enforcement

The first argument CWLP raises in an attempt to preclude Citizen Groups from enforcing the state groundwater standards focuses on actions taken by IEPA and requests that the PCB reverse its own well-reasoned interpretations of state law. Specifically, CWLP argues that the Board should reconsider *Freeman United*, PCB 10-61, 11-02 (cons.), reconfirmed by *Sierra Club, et al. v. Midwest Generation*, PCB 13-15. (Mot. to Dismiss, Par. 22-23.) These cases confirm the plain language of Illinois law explicitly separating IEPA enforcement, which is tied in to the creation of CCAs, and citizen enforcement claims. In its motion, CWLP argues that these cases improperly expand the scope of citizen's enforcement proceedings beyond the intent of the legislature, and that CWLP argues that the Complaint is barred "based on actions taken by the Agency" to examine potential violations. (Mot. to Dismiss, Par. 23.)[5]

[5] Citizens Groups oppose CWLP's request for oral argument or a hearing on this issue. CWLP has presented no new argument to support overturning Board precedent.

There are several problems with CWLP's argument here, the most obvious of which can be seen directly in the Board's decision in *Sierra Club v. Midwest Generation.* Namely, the Board has never held that IEPA's enforcement role is exclusive, because there is no basis in Illinois law for that position. As a result, the Board has appropriately never treated the existence of a disagreement between the Agency and the Respondent as a requirement for citizen's suits. *Sierra Club v. Midwest Generation,* PCB 13-15, (October 3, 2013) slip op. at 18 (citing *Freeman United*, PCB 10-61, 11-02 (cons.), (Apr. 18, 2013) slip op. at 9. "[T]he Agency's role in pursuing enforcement against alleged violations of the Act or Board regulations plainly *is not* exclusive." *Sierra Club v. Midwest Generation,* PCB 13-15, (October 3, 2013) slip op. at 20.

Furthermore, even were there a meaningful issue with the Board's previous decisions (which there is not), the circumstances in this case do not even support the "problem" CWLP has identified. In both *Freeman United* and *Sierra Club. v. Midwest Generation,* the basis for each Respondent's Motion to Dismiss was a CCA. In the present case, by contrast, there was no CCA. All the Agency actions that CWLP suggests resolved the violations at issue are informal and not publicly noticed. Citizens wouldn't be (and in fact were not in the present case) aware of such actions, especially since they were not memorialized by a CCA. This tension is also acknowledged by the PCB:

> 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.

Sierra Club v. Midwest Generation, PCB 13-15, (October 3, 2013) slip op. at 18. This is exactly the case here and, therefore, such informal and non-public resolution of violations cannot

preclude a citizen's enforcement action. The Board, in its wisdom, previewed this very case when discussing whether a disagreement between the Agency and a respondent is a prerequisite to a citizen's enforcement action:

> 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").

Sierra Club v. Midwest Generation, PCB 13-15 , (October 3, 2013) slip op. at 18.

CWLP also discusses the possibility that citizen enforcement actions will act as a deterrent to parties resolving violations with the Agency. "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." (Mot. to Dismiss, par 23.) The PCB addressed virtually the same argument in *Sierra Club v. Midwest Generation*. "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." *Sierra Club v. Midwest Generation,* PCB 13-15 , (October 3, 2013) slip op. at 21. In so holding, the Board is appropriately recognizing the limits of its authority to rewrite state law; it should continue to do so here.

ii. Actions CWLP May Be Taking Pursuant to the CCR Federal Rule Do Not Preclude Citizen Enforcement

Finally, Respondent argues that the Complaint should be dismissed as "duplicative and frivolous" because CWLP is purportedly complying with monitoring and remediation timelines

established in the national Coal Combustion Residuals ("CCR") Rule. (Mot. To Dismiss, par. 24.) In so arguing, CWLP claims that, because CWLP will "develop" information under the CCR rule establishing which wells are upgradient of various ash impoundments, it is improper for Citizen Groups to bring an enforcement case that would require the Board to make those determinations. *Id.*

Once again, CWLP appears to be inventing new legal barriers from whole cloth. First, and perhaps most obviously, there is no basis for CWLP's contention that operation of the CCR Rule overrides, precludes, or otherwise was intended to interfere with the completely separate groundwater regime established under Illinois Law that forms the basis for this Complaint. As an initial matter, there is no basis for claiming that the CCR Rule preempts enforcement of Illinois law, because neither the CCR Rule, nor the Resource Conservation and Recovery Act ("RCRA"), under which the CCR Rule was promulgated, contain an express preemption or claim in any way to preclude state enforcement of contamination due to solid or hazardous waste. *See generally* 42 U.S.C. § 6901, et seq. (1976); 80 Fed. Reg. 21,301 (Apr. 17, 2015).

As such, the only possible preemption argument CWLP might be making is that the CCR Rule should implicitly or impliedly prevent Complainants from bringing this case. On that front, as the Supreme Court has held:

> We have recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law. We have found implied conflict pre-emption where it is "impossible for a private party to comply with both state and federal requirements," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995) (citations omitted). None of these circumstances applies here: the scope of RCRA does not demonstrate any Congressional intent

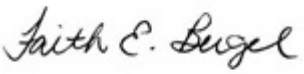
to occupy the field of solid and hazardous waste regulation exclusively, which can be seen most clearly because Illinois's groundwater regulations have remained in place for decades. CWLP has not identified, nor could it identify, any conflict between its compliance with CCR ash impoundment site remediation timelines and the enforcement case here; the CCR Rule's compliance timeline sets forth a process by which companies can clean up old ash sites, but it has no relevance to the state groundwater standards that are at issue here. It is certainly not impossible for CWLP to comply both with the CCR Rule and the applicable state groundwater standards—to the contrary, compliance with one will help CWLP comply with the other. And enforcement of state groundwater standards does not "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of" RCRA, as implemented most recently by the CCR Rule. *Id.* Again, actions CWLP might take here to comply with the state standards that Complainants have alleged are being violated, will only help CWLP achieve its cleanup obligations under RCRA.

Furthermore, even putting aside the fact that the CCR Rule and state groundwater standards at issue in this case stem from entirely distinct statutory regimes, CWLP appears to be arguing that, because it plans to assess groundwater gradients and contamination profiles at its property, the Board should be prevented from analyzing those same gradients and profiles in the course of this case. Complainants do not yet know what CWLP's assessment is or will be of the Dallman site, but Complainants' assessment, based on publicly available documents, is that the current monitoring regime demonstrates violations of state law. Therefore, as a factual matter Complainants have no reason to believe CWLP's assessment and remediation process under the CCR Rule will meet its state compliance obligations at issue in this case.

III. CONCLUSION

For the reasons stated herein, Citizen Groups respectfully request that the Board deny CWLP's Motion to Dismiss.

Respectfully Submitted,



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Dated: November 17, 2017

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