

ILLINOIS POLLUTION CONTROL BOARD  
August 8, 2002

BRIAN FINLEY, individually, LOCAL 3315 )  
of the AMERICAN FEDERATION OF )  
STATE, COUNTY, & MUNICIPAL )  
EMPLOYEES (COOK COUNTY PUBLIC )  
DEFENDERS ASSOCIATION), and the )  
following additional individuals: LISA A. )  
KOSOWSKI, QUENTIN PITLUK, )  
MARTHA C. NEIRA, JOEL TOBIN, )  
TACYE VERSHER, SEAN VARGAS- )  
BARLOW, ROSA FLORES, DANITA )  
KIRK, JENNIFER BOROWITZ-GUTZKE, )  
OPHELIA BARNER-COLEMAN, KARIN )  
WENZEL, BARBARA A. BLAINE, )  
VALLERIA FORNEY, JAMES BURTON, )  
AMANDA LAMERATO, JENNIFER )  
HOMBURGER, THOMAS GRIPPANDO, )  
KATE HAARVEI, K. MARY FLYNN, )  
CHRIS WILLIAMS, ALPA J. PATEL, )  
PAMELA D. MOSS, LILIANA J. DAGO, )  
PATRICIA CINTRON-BASTIN, TAMMY )  
EVANS, CELESTE K. JONES, WILLIAM )  
A. GOMEZ, KAREN MAHER, TRESA )  
LOUISE JACKSON, MARCIA G. HAWK, )  
MARIZOL RODRIGUEZ, MODHURI K. )  
PATEL, JOSE A. PEREZ, NICHOLAS A. )  
YOUNGBLOOD, CATHLEEN REYNOLDS,) )  
DAWN M. ROESENER, KIMBERLIE )  
BOONE, AMY E. McCARTHY, QUENTIN )  
HALL, GWENDALYN GRANT, GAIL )  
DAILY, COREY E. MYERS, MARIA DI )  
CRESCENZO, MARIBEL RODRIGUEZ, )  
FELICIA BATES, DARNELL TROTTER, )  
HATTIE MARTIN, AUGUSTUS )  
PINCKNEY, GEORGE SANCHEZ, )  
LIZETTE U. McBRIDE, DEBORAH )  
BUFFKIN, RONALD JACKSON, JOANNE )  
MORRISON, VALARIE M. COURTO- )  
HILL, KIMBERLY TURNER, )  
CONSTANCE L. HARRIS, STEPHANIE )  
FLOWERS, B. YVONNE YOUNGER, )  
DORIS J. YUFUF, LUCRETIA ROGERS, )

DANA N. LOCKETT, TAMARA BRASS, )  
 JAMES COLEMAN, SIDNEY TYUS, JACK )  
 L. McBRIDE, PHYLLIS RYAN, DORIS )  
 LOPEZ, SHIRLEY A. VESSEL, MARY )  
 PEARSON, ANGELINE RECANDEZ, )  
 DELORES WASHINGTON, PATRICIA M. )  
 SALORIO, MICHELLE E. HOLMES, RY )  
 HANNAH, ADDIE HAWKINS, RONALD )  
 DOZIER, BARBARA GORDON, RALPH )  
 LEAKES, WILLIE LEAKS, JR., )  
 THEODORE SHORTER, JR., QUDALLA )  
 WARD, MICHAEL JONES, PEARLIE MAE )  
 MOSS, SHEILA DUNN, SHARON LEE, )  
 LAVERNE BULLOCK, HELEN CHARLES, )  
 EDWARD J. POE, ANTHONY BINGHAN, )  
 RENETTA GLASS WARD, LILLIAN )  
 OWENS, FREDDIE JOHNSON, MINNIE )  
 HORTON, CARL TRIBBLE, SR., CLAY )  
 APPLETON, SAM JOHNSON, GENEVA L. )  
 CHARLES and NATHANIEL CHARLES, )

Complainants, )

v. )

IFCO ICS-CHICAGO, INC., )

Respondent. )

PCB 02-208  
(Citizens Enforcement - Air)

ORDER OF THE BOARD (by C.A. Manning):

Today the Board decides whether to accept a citizen complaint for hearing or dismiss it. The complaint was filed by Local 3315 of the American Federation of State, County, & Municipal Employees (AFSCME), Brian Finley, and numerous other individuals in the caption above (complainants). Complainants allege that IFCO ICS-Chicago, Inc. (IFCO) has violated Section 9(a) of the Environmental Protection Act (Act) (415 ILCS 5/9(a) (2000)), which prohibits persons from causing or allowing air pollution.

Specifically, complainants assert that IFCO has emitted chemicals, odors, and smoke into the air from its used drum reconditioning plant at 2300 West 13th Street, Chicago, Cook County. These emissions, according to complainants, have injured human health and unreasonably interfered with the enjoyment of life and property. Complainants ask the Board to order IFCO to stop polluting and to provide any other relief that the Board finds

appropriate. IFCO has moved the Board to dismiss the complaint as both frivolous and duplicative.

As discussed below, the Board finds that the complaint is not frivolous. The Board also finds that the complaint is not duplicative of environmental enforcement matters initiated against IFCO by the United States Environmental Protection Agency (USEPA) or the Chicago Department of Environment (Chicago DOE). The Board therefore denies IFCO's motion to dismiss and accepts the complaint for hearing.

In this order, the Board first addresses procedural matters and then sets forth the applicable law, including the Act's provisions on citizens enforcement actions and air pollution. Next, the Board determines whether the complaint is frivolous or duplicative, as IFCO asserts in its motion to dismiss. Last, the Board rules on IFCO's motion to strike.

### **PROCEDURAL MATTERS**

On May 21, 2002, complainants filed a complaint against IFCO.<sup>1</sup> IFCO filed a motion to dismiss the complaint on June 19, 2002, which complainants opposed in a July 5, 2002 response. On July 9, 2002, IFCO filed a motion for leave to file a reply to complainants' response, attaching the reply. The hearing officer granted IFCO's motion for leave.<sup>2</sup>

On July 23, 2002, complainants filed a motion for leave to file a surreply, attaching the surreply. On August 2, 2002, IFCO opposed complainants' motion for leave to file a surreply. The Board denies complainants' motion for leave. On July 9, 2002, IFCO filed a motion to strike portions of complainants' July 5, 2002 response to the motion to dismiss. Complainants opposed the motion to strike on July 23, 2002.<sup>3</sup>

Also, complainants argue that IFCO, in its motion to dismiss, violates the Board's procedural rule (35 Ill. Adm. Code 101.504) against asserting facts that are not in the record without also providing an oath, affidavit, or certificate to support the assertions. Comp. Resp. Dism. at 15. Complainants are correct. However, in the interest of administrative economy, the Board will consider IFCO's factual assertions solely to rule on the motion to dismiss. If

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<sup>1</sup> The Board cites the complaint as "Comp. at \_." The complaint designates respondent as "Acme Barrel Company" and as "IFCO ICS-Chicago, Inc.," along with other names involving "Acme" and "IFCO." The Board has captioned respondent's name as it appears in its motion to dismiss and will refer to "IFCO" throughout this order.

<sup>2</sup> The Board cites IFCO's motion to dismiss as "IFCO Mot. Dism. at \_"; complainants' response to the motion to dismiss as "Comp. Resp. Dism. at \_"; and IFCO's reply as "IFCO Reply Dism. at \_."

<sup>3</sup> The Board cites IFCO's response to the motion for leave to file a surreply as "IFCO Resp. Surr. at \_"; and IFCO's motion to strike as "IFCO Mot. Str. at \_."

IFCO wishes the Board to consider the asserted facts for any other reason, IFCO must provide proper support.

## APPLICABLE LAW

### Citizens Enforcement Actions

In addition to providing that the Illinois Attorney General and the State's Attorneys may file complaints with the Board, the Act authorizes *citizens* to bring enforcement actions before the Board, alleging violations of the Act or Board regulations. Section 31(d) of the Act provides:

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 or any rule or regulation thereunder . . . . \*\*\* Unless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing . . . . 415 ILCS 5/31(d) (2000) *amended by P.A. 92-0574, eff. June 26, 2002.*<sup>4</sup>

Section 31(c), referred to in the quoted passage, in turn states that the complaint “shall specify the provision of the Act or the rule or regulation . . . under which such person is said to be in violation, and a statement of the manner in, and the extent to which such person is said to violate the Act or such rule or regulation . . . .” 415 ILCS 5/31(c) (2000). The Board's procedural rules codify the requirements for the contents of a complaint, including the “dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations” and a “concise statement of the relief that the complainant seeks.” 35 Ill. Adm. Code 103.204(c).

Within 30 days after being served with a complaint, a respondent may file a motion with the Board to dismiss the complaint on the grounds that the complaint is frivolous or duplicative. 35 Ill. Adm. Code 103.212(b). The Board's procedural rules define “frivolous” and “duplicative” as follows:

“Frivolous” 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.

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<sup>4</sup> Public Act 92-0574 amended Section 31(d) by substituting the word “duplicative” for “duplicitous.” The Board and the courts had consistently interpreted “duplicitous” to mean “duplicative.” *See, e.g., Winnetkans Interested in Protecting the Environment v. PCB*, 55 Ill. App. 3d 475, 478, 370 N.E.2d 1176, 1179 (1st Dist. 1977); *People v. State Oil Co.*, PCB 97-103, slip op. at \_\_, n.2 (Aug. 19, 1999).

“Duplicitous” or “Duplicative” means the matter is identical or substantially similar to one brought before the Board or another forum. 35 Ill. Adm. Code 101.202.

### Air Pollution

Section 9(a) of the Act provides that no person shall:

Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois . . . . 415 ILCS 5/9(a) (2000).

Section 201.141 of the Board’s regulations likewise provides:

No person shall cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as . . . to cause or tend to cause air pollution in Illinois . . . . 35 Ill. Adm. Code 201.141.

Section 3.115 of the Act defines “air pollution” as:

[T]he presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property. 415 ILCS 5/3.02 (2000) *amended* by P.A. 92-0574, eff. June 26, 2002 (by renumbering as Section 3.115); *see also* 35 Ill. Adm. Code 201.102 (like definition of “air pollution”).

“Contaminant” is defined in the Act as “any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.” 415 ILCS 5/3.06 (2000) *amended* by P.A. 92-0574, eff. June 26, 2002 (by renumbering as Section 3.165); *see also* 35 Ill. Adm. Code 201.101(a) (definitions in Act apply in Part 201).

### LEGAL ISSUES AND ANALYSIS

Below, the Board addresses whether the complaint is frivolous or duplicative, and in so doing rules on IFCO’s motion to dismiss. The Board then rules on IFCO’s motion to strike.

#### IFCO’s Motion to Dismiss

##### Frivolous

IFCO moves the Board to dismiss the complaint as frivolous, asserting that the complaint is legally deficient because it fails to identify the provision of the Act allegedly violated and requests relief beyond the Board’s authority to grant. IFCO Mot. Dism. at 3-5.

IFCO further argues that the complaint is factually insufficient in that it lacks enough detail about the alleged emissions to allow IFCO to prepare a defense. *Id.* at 2-4.

**Legal Sufficiency.** IFCO asserts that the complaint is deficient because it fails to expressly identify, by letter, the *specific subsection* of Section 9 that IFCO has allegedly violated. IFCO Mot. Dism. at 3. The complaint states:

The violations claimed are the causing and allowing the discharge and emissions into the environment so as to cause and tend to cause air pollution in the area of the plant at 2300 West 13th St., Chicago, Illinois in violation of 415 ILCS 5/9 . . . . Comp. at 3.

IFCO is correct that the complaint does not explicitly refer to the lettered subsection “(a)” of Section 9. The complaint does, however, closely paraphrase subsection (a). The Board finds that the complaint adequately notifies IFCO that complainants allege IFCO violated Section 9(a) of the Act.

IFCO also argues that the complaint seeks relief beyond what the Act authorizes the Board to grant. IFCO Mot. Dism. at 4. The complaint seeks “a cease and desist order to stop all activities generating air pollution.” Comp. at 3. IFCO asserts that “the complaint appears to ask the Board to order IFCO to cease and desist from operating its facility,” which IFCO maintains is beyond the Board’s authority. IFCO Mot. Dism. at 4-5.

At this stage of the proceeding, the Board need not decide, and indeed lacks a record to consider, whether ordering IFCO to stop the alleged polluting may result in IFCO closing its plant. Section 33(b) of the Act authorizes the Board to order a respondent to “cease and desist from violations of the Act.” 415 ILCS 5/33(b) (2000). The Board does not construe the complaint as requesting a cease and desist order to accomplish any more than this. Moreover, before the Board orders any respondent to cease and desist from a violation, the Board must consider, among other things, “the technical practicability and economic reasonableness of reducing or eliminating the emissions.” 415 ILCS 5/33(c)(iv) (2000).

**Factual Sufficiency.** IFCO argues that the complaint is frivolous because it lacks sufficient factual detail for IFCO to plan a defense. IFCO Mot. Dism. at 2. Specifically, IFCO asserts that the complaint fails to allege “specific emissions on specific days from specific operations” or “the quantity, characteristics, or specific identities of any contaminants” from the plant. *Id.* at 2-3.

The complaint describes two processes at IFCO’s plant for reconditioning used drums, which, according to the complaint, arrive at the plant containing residual chemicals. Comp. at 1-2. The first process, referred to as the “tight head drum” reconditioning process, allegedly cleans the drum interiors chemically, followed by drying and eventually shot blasting, painting, and oven baking. *Id.* at 1. The second process, referred to as the “open head drum” process, allegedly incinerates drum residue and paint, followed by shot blasting, painting, and oven

baking. *Id.* According to the complaint, the second process also involves a furnace “used to burn off drum lids prior to painting.” *Id.* at 2.

The complaint alleges that the plant emits “chemical products, noxious odors and smoke,” including odors “from the barrel contents and the barrel reconditioning.” Comp. at 2. The complaint further alleges that the emissions are “of such characteristics and duration as to be injurious to human life and health and to unreasonably interfere with the enjoyment of life and property of complainants.” *Id.* The complaint elaborates that the alleged injuries and interference include:

Nausea, dizziness, lightheadedness, headaches, sinus pain, sore throats, eye irritation, chest pain, adverse effects on those with asthma, coughing, adverse effects on work efficiency and enjoyment of residences, fatigue, breathing difficulty, irritation of upper respiratory tract and lower respiratory tract, causing the evacuation of office buildings, causing other health problems and effects. *Id.*

The complaint alleges that the “pollution covered by this complaint”: (1) began on January 1, 2000, and was continuing when the complaint was filed on May 21, 2002; and (2) occurs “generally daily during the plant work day operations which process thousands of barrels per work day.” *Id.*

The Board finds that the complaint alleges facts in sufficient detail. It provides many of the details that IFCO asserts the complaint lacks. IFCO’s other suggested requirements for factual specificity in a complaint are not based on the Act or the Board’s procedural rules. *See* 415 ILCS 5/31(c), (d) (2000); 35 Ill. Adm. Code 103.204(c). A complainant can allege air pollution, as complainants have here, and be heard by the Board without having to identify the name of the chemical emitted, the specific operation in a plant that emitted the chemical on a specific day, and the precise quantity of the chemical emitted. It would be the rare complaint, citizen-initiated or otherwise, that could be pled in such detail. Holding complaints to the pleading standards IFCO suggests would severely erode citizen enforcement under the Act.

**Conclusion.** The Board finds that the complaint adequately identifies the provision of the Act allegedly violated, requests relief that the Board can grant, and sufficiently advises IFCO of the extent and nature of the alleged violations to reasonably allow IFCO to prepare a defense. The Board therefore holds that the complaint is not frivolous. Accordingly, the Board will not dismiss the complaint on that basis as IFCO requests.

### **Duplicative**

IFCO argues that the complaint is duplicative, claiming that it is identical to enforcement matters initiated by USEPA and the Chicago DOE. IFCO Mot. Dism. at 5-8.

**USEPA Notice of Violation.** According to IFCO, the complaint is duplicative of the January 28, 2002 “Notice of Violation” (NOV) that USEPA issued to IFCO. IFCO Mot.

Dism. at 7-8. The NOV states that IFCO has “allowed the emission of VOM [volatile organic material] and odors into the environment in sufficient quantities and of such characteristics and duration as to unreasonably interfere with the enjoyment of life or property, in violation of [35 Ill. Adm. Code 201.141].” *Id.*, Exh. B (NOV at 6).

USEPA’s cover letter for the NOV offers IFCO “an opportunity to confer with [USEPA] about the violations alleged in the NOV” at a “conference” within 30 days after IFCO received the letter. IFCO Mot. Dism., Exh. B (letter at 1). USEPA explains that it has “several enforcement options” under Section 113 of the federal Clean Air Act (42 U.S.C. § 7413), including “issuing an administrative compliance order, issuing an administrative penalty order, and bringing a judicial civil or criminal action.” *Id.* The cover letter advises IFCO that the manner in which USEPA proceeds may depend on how IFCO responds to the NOV. *Id.*

As the Board noted above, a complaint is “duplicative” if the “matter is identical or substantially similar to one brought before the Board or another forum.” 35 Ill. Adm. Code 101.202. Unlike the complaint before the Board, the NOV does not purport to enforce Section 9(a) of the Act. *See League of Women Voters v. North Shore Sanitary District*, PCB 70-7 (Oct. 8, 1970) (“a complaint alleging a violation of one [law against pollution] does not preclude a complaint by another party alleging violation of another law [against the pollution]”). USEPA instead refers to violations of the Illinois State Implementation Plan (SIP), which was approved by USEPA under the federal Clean Air Act. Section 201.141 of the Board’s air pollution regulations is part of the Illinois SIP. IFCO Mot. Dism., Exh. B (letter at 1; USEPA NOV at 1).

It is true that the Board regulation, like Section 9(a) of the Act, prohibits persons from emitting contaminants into the air so as: (1) to be injurious to human, plant, or animal life, to health, or to property; or (2) to unreasonably interfere with the enjoyment of life or property. *See* 35 Ill. Adm. Code 201.141. The NOV, however, does not refer to any *injury* to human health from IFCO’s emissions, as does the complaint. A person may violate Section 9(a), or Section 201.141 of the Board’s regulation, by allowing *either* emissions that injure *or* emissions that unreasonably interfere. *See Incinerator, Inc. v. PCB*, 59 Ill. 2d 290, 295, 319 N.E.2d 794, 799 (1974) (“the legislature has by definition created two categories of ‘air pollution’”). The complaint contains extensive allegations of injury.

In addition, the NOV refers to VOM and odor emissions resulting in air pollution, but does not explicitly refer to smoke emissions, which the complaint does. Nor is there any indication that the *timing* of the alleged violations is the same in each. The NOV specifies no time during which IFCO was violating the Board regulation. The NOV refers only to a March 1, 2001 inspection of the plant by USEPA, which was followed by IFCO’s March 17, 2001 submittal to USEPA of information requested at the inspection. IFCO Mot. Dism., Exh. B (NOV at 4). The complaint, on the other hand, alleges that the air pollution began *over a year before* the date of USEPA’s inspection and was continuing *over a year after* it. *See Winnetkans Interested in Protecting the Environment v. PCB*, 55 Ill. App. 3d 475, 478, 370



N.E.2d 1176, 1179 (1st Dist. 1977) (complaint not duplicative when its critical events occurred during a time period different from that involved in another complaint).

Perhaps most importantly, however, USEPA's issuance of the NOV is only a preliminary enforcement step following a plant inspection. It does not mean that the matter is before "another forum" within the meaning of "duplicative." The NOV does not purport to commence, or to be the product of, an adjudicatory proceeding by a tribunal, either administrative or judicial. Investigation by the government of potential violations does not render duplicative a citizen complaint, formally filed with the Board under Section 31(d) of the Act. See UAW v. Caterpillar, Inc., PCB 94-240, slip op. at 5 (Nov. 3, 1994) (Illinois Environmental Protection Agency's (IEPA) voluntary cleanup program is not another "forum"); White v. Van Tine, PCB 94-150, slip op. at 2 (June 23, 1994) ("investigation by [IEPA] or a municipality does not preclude the matter from being brought before the Board"); Gardner v. Twp. High School District 211, PCB 01-86, slip op. at 3 (Jan. 4, 2001) (Cook County Department of Environmental Control's investigation of county code compliance not duplicative). The Board is not precluded from accepting complaints merely because it is possible that another matter may, at some later date, end up in court or before a USEPA administrative law judge or review panel. The Board finds that the complaint is not duplicative of USEPA's NOV.

**Chicago DOE Order.** On February 14, 2002, the Chicago DOE issued an order entitled "Order: Limited and Conditional Approval to Continue Operations" (Chicago DOE Order). Before that, on December 26, 2001, the Chicago DOE had issued a "Show Cause Order" requiring IFCO to show cause why the Chicago DOE "should not immediately abate the continuing nuisance conditions caused by the noxious odors and acrid smoke" from IFCO's plant. IFCO Mot. Dism., Exh. A (Chicago DOE Order at 1). On January 15, 2002, the Chicago DOE held a public hearing during which it presented records revealing the following:

- Between March 1997 and December 2001, the Chicago DOE received 152 complaints about smoke or odors emanating from the IFCO plant.
- From July 2000 through December 2001, the Chicago DOE inspected the IFCO plant 53 times.
- On July 13, 2001, IFCO "shut down its tight head drum processing operations" in response to a "Cease & Desist Order" issued by the Chicago DOE on June 4, 2001. *Id.*

At the public hearing, IFCO proposed to: (1) install a "thermal oxidizer designed to abate odor-related nuisance conditions"; and (2) cease all operations at the plant by May 31, 2003. IFCO Mot. Dism., Exh. A (Chicago DOE Order at 1). On February 14, 2002, when the Chicago DOE Order was issued, it had a cover letter of that date requesting that IFCO sign the order to accept its provisions, which IFCO did the next day. IFCO Mot. Dism., Exh. A. By accepting the terms of the Chicago DOE Order, IFCO was allowed "to continue operating

under the certificate(s) of operation issued by [the Chicago DOE] as modified by the [Chicago DOE Order].” IFCO Mot. Dism., Exh. A (Chicago DOE Order at 2).

The Chicago DOE Order, which is eight pages long, has seven main components designed to address “the nuisance allegations made by [Chicago DOE].” IFCO Mot. Dism., Exh. A (Chicago DOE Order at 7). First, the Chicago DOE Order provides that if IFCO fails to close all of the plant’s operations by May 31, 2003, then it will stipulate to a permanent injunction and the loss of all city permits, both at the Chicago DOE’s sole discretion. *Id.* at 2.

Second, the Chicago DOE Order requires IFCO to: (1) install a thermal oxidizer system to control emissions from IFCO’s “painting and curing oven operation”; (2) enclose certain “external and internal painting booths for drum body painting”; and (3) install a “lock-out arm that is linked to the operating temperature of the drum oxidizer furnace that will prevent drums from entering the furnace if the furnace temperature is not operating at its design temperature.” IFCO Mot. Dism., Exh. A (Chicago DOE Order at 3). IFCO is to finish the work within 90 days after the Chicago DOE approves plans, specifications, and a milestone schedule. *Id.* For any missed deadline, the Chicago DOE Order requires IFCO to pay stipulated penalties of \$2,500 or \$5,000 per business day for up to five business days, and after that, provides that the Chicago DOE may shut down all operations until the late item is finished. *Id.* at 4.

Third, the Chicago DOE Order sets forth interim limits on how many drums IFCO can incinerate, paint, and coat while implementing the improvements described above. IFCO Mot. Dism., Exh. A (Chicago DOE Order at 5-6). IFCO is subject to stipulated penalties of \$5,000 per business day for each day that it exceeds an interim limit. *Id.* at 5-6. Fourth, the Chicago DOE Order requires that IFCO employees approved by the Chicago DOE serve as compliance officers and be on-site during operations. IFCO is subject to stipulated penalties of \$5,000 per business day for each day that it operates without the approved compliance officer on-site. *Id.* at 6. Fifth, IFCO must have a Chicago DOE-approved contingency plan that sets forth the steps IFCO will take if the improvements “do not abate the nuisance conditions.” *Id.* at 7. Sixth, the Chicago DOE Order states that IFCO’s “tight-head plant shall remain closed for the duration of [IFCO’s] presence” at the plant. *Id.* at 7.

Seventh and last, the Chicago DOE Order requires IFCO to “re-commit to comply” with a compliance plan developed under a Cook County Circuit Court “Consent Decree and Order” (consent order) in City of Chicago v. Acme Barrel Co., 99 CH 02943 (July 14, 2000).<sup>5</sup> IFCO Mot. Dism., Exh. A (Chicago DOE Order at 6); Comp. Resp. Dism., Exh. A at 1. The Chicago DOE Order requires IFCO and the Chicago DOE to file the order with the circuit court as an amendment to the consent order. *Id.* at 7. On July 22, 2002, the Cook County Circuit Court entered a “First Amended Consent Decree and Order” (amended consent order) based largely on the Chicago DOE Order. IFCO Resp. Surr. at 3-4, Exh. A.

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<sup>5</sup> IFCO states that it is the “same corporate entity” as Acme Barrel Company. IFCO Reply Dism. at 5.

IFCO argues that the Chicago DOE Order makes the complaint duplicative, citing the Board's decision in Lefton Iron and Metal Co. v. Moss American Corp., PCB 87-191 (Nov. 29, 1990). IFCO Mot. Dism. at 7. However, in Lefton Iron, the Board declined to proceed with a citizen complaint because the Illinois Attorney General, in circuit court, entered into a consent order after alleging the *same violations* of the Act and seeking the *same relief* as did the citizen complainant. Lefton Iron, PCB 87-191, slip op. at 5. Here, the Chicago DOE Order references no specific statutory or regulatory violation. The consent order and amended consent order refer only to alleged violations of common law public nuisance, statutory public nuisance, and the Chicago Municipal Code. Comp. Resp. Dism., Exh. A at 1; IFCO Resp. Surr., Exh. at 1-2.

Early in its history, the Board held that allegations in court of violations of a statute other than the Act do not make a citizens complaint before the Board duplicative, even if the same relief is sought. In League of Women Voters, PCB 70-7 (Oct. 8, 1970), the Board ruled that a citizens complaint was not duplicative of a Lake County Circuit Court action initiated by the Illinois Attorney General against the same respondent. The Board stated:

[T]he Attorney General's court suit does not allege a violation of the same statute or regulations . . . . It is no answer that in a sense both complaints seek the same relief, namely, an order forbidding water pollution by the District. The State has several laws against pollution, and a complaint alleging a violation of one of them does not preclude a complaint by another party alleging violation of another law. League of Women Voters, PCB 70-7, slip op. at 2.

The Chicago DOE Order and the Cook County Circuit Court orders simply do not involve alleged violations of the Act. The complaint before the Board is not duplicative of these matters. Indeed, the Board has exclusive jurisdiction over actions to enforce the Act that are initiated by citizens, whether individuals, corporations, or municipalities. See People v. State Oil Co., PCB 97-103, slip op. at 7 (Aug. 19, 1999).

Moreover, the remedy called for in the Chicago DOE Order may not be substantially coextensive with either the cease and desist remedy complainants request for IFCO's on-going operations, or with a remedy that the Board could fashion under the Act. Though the Chicago DOE Order is detailed and comprehensive, it was not designed to address "air pollution" under the Act. Additionally, though the Board's remedial authority under the Act is in no way limited to the relief that a complainant requests, complainants here request not only a cease and desist order, but also such other relief as the Board deems appropriate, which could include civil penalties for past violations if the record warrants. See 415 ILCS 5/42(a), (h) (2000).

The Board finds that the complaint is not duplicative of the Chicago DOE Order. Of course, nothing in the Board's rulings today precludes IFCO, or complainants for that matter, from presenting evidence on any abatement measures IFCO has taken under the Chicago DOE Order or otherwise.

**Conclusion.** The citizens complaint filed with the Board under the Act is not duplicative of either the USEPA NOV or the Chicago DOE Order. The Board therefore will not dismiss the complaint on that basis as IFCO requests.

### **IFCO's Motion to Strike**

On July 9, 2002, IFCO moved the Board to strike portions of complainants' response to IFCO's motion to dismiss the complaint. Specifically, IFCO objects to complainants' discussion of: (1) previous Board decisions finding Section 9(a) violations at IFCO's plant; and (2) the Cook County Circuit Court action and consent order described above. IFCO Mot. Str. at 1. IFCO argues that these cases were not raised in its motion to dismiss, are irrelevant to whether the complaint is frivolous or duplicative, and unfairly prejudice IFCO. *Id.* at 1-2.

Though they may be relevant in crafting a remedy, if any, the Board agrees that the information supplied on IFCO's prior violations of the Act is irrelevant to deciding whether the complaint is frivolous or duplicative. The Board accordingly grants IFCO's motion to strike those parts of complainants' response. However, the information on the circuit court consent order is relevant to the Board's decision today, as noted above, and fairly responds to IFCO's motion to dismiss, which attached the Chicago DOE Order referencing the consent order. The Board therefore denies that part of IFCO's motion to strike.

### **CONCLUSION**

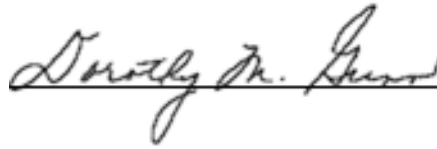
The Board finds the complaint neither frivolous nor duplicative, accordingly denies IFCO's motion to dismiss, and accepts the case for hearing. IFCO's filing of the motion to dismiss automatically stayed the 60-day period to file an answer to the complaint. The stay ends today with the Board disposing of the motion to dismiss. *See* 35 Ill. Adm. Code 103.204(e). IFCO's answer to the complaint is therefore due by October 7, 2002.

Missing this deadline may have severe consequences. If a respondent fails to timely file an answer specifically denying, or asserting insufficient knowledge to form a belief of, a material allegation in the complaint, the Board considers the respondent to have admitted the allegation. *See* 35 Ill. Adm. Code 103.204(d). The Board directs the hearing officer to proceed expeditiously to hearing.

Last, the Board grants IFCO's motion to strike those parts of complainants' response to the motion to dismiss the complaint that discuss past Board decisions finding Section 9(a) violations at IFCO's plant. However, the Board denies IFCO's motion to strike information relating to the Cook County Circuit Court consent order.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 8, 2002, by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board