ILLINOIS POLLUTION CONTROL BOARD
January 9, 2014

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 13-28
	)	(Enforcement - Water)
ATKINSON LANDFILL CO., an Illinois corporation,	)	
	)	
	)	
Respondent.	)	

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

Today the Board denies the motion of Atkinson Landfill Company (ALC) to strike or dismiss the first amended water pollution complaint in this enforcement action brought by the Office of the Attorney General on behalf of the People of the State of Illinois (People). The Board also rules upon all other pending motions. ALC has 60 days from the date of this order to file any answer to the first amended complaint.

The four-count amended complaint concerns ALC's disposal of leachate from its active municipal solid waste landfill at publicly owned wastewater treatment facilities owned by the Village of Atkinson (Village) and the City of Galva (Galva). ALC's landfill is located at 1378 Commercial Drive in Atkinson, Henry County.

In this order, the Board first addresses procedural matters, including a summary of the procedural history and rulings on pending motions for leave to file *instanter* a reply and a surreply. Next, the Board discusses and rules upon the People's motion to strike affidavits attached to ALC's dismissal motion and portions of the motion relying on the affidavits. Finally, the Board discusses and rules upon ALC's dismissal motion, and addresses the deadline for any answer from ALC to the first amended complaint.

PROCEDURAL MATTERS

Procedural History

On December 17, 2012, the People filed the original complaint against ALC, which the Board accepted for hearing on December 20, 2012. The complaint alleges violations of Sections 12(a) and (b) of the Environmental Protection Act, 415 ILCS 5/12(a) and (b) (2012), and Section 309.204(a) of the Board's water pollution regulations (35 Ill. Adm. Code 309.204(a)).

With leave of the hearing officer, on January 28, 2013, ALC filed a motion to strike or dismiss the original complaint, as well as a motion for joinder of the Village and Galva as

respondents in this case. The People later filed separate one-count water pollution enforcement actions against the Village and Galva, along with stipulations and proposals for settlement and motions for relief from the hearing requirement. *See* People v. Village of Atkinson, PCB 13-60 (Apr. 30, 2013) and People v. City of Galva, PCB 13-61 (May 3, 2013).

On June 28, 2013, ALC filed a motion to consolidate this case with PCB 13-60 and 13-61 and to deny or stay the motions for relief from the hearing requirement in those cases. On July 12, 2013, the People filed a response in opposition to that motion. By order of August 8, 2013, the Board denied the consolidation and stay motion, and granted hearing relief and accepted the proposed settlements in PCB 13-60 and 13-61.

By order of April 18, 2013, the Board granted the parties' March 15, 2013 agreed motion for leave to file the People's first amended complaint (1st Am. Comp.), and accepted it for hearing. Count I of the first amended complaint alleges ALC disposed of leachate at the Village Sewage Treatment Plant (Village STP) in excess of the daily limit imposed by the landfill's permit to operate a wastewater source (operating permit or water pollution control permit), thereby threatening the pass through of untreated wastewater into Green River. In count II, the People allege that ALC operated equipment to dispose of wastewater at the Village STP in excess of permit limits and thus without an operating permit issued by the Illinois Environmental Protection Agency (Agency). Count III alleges that ALC disposed of leachate at the Galva Wastewater Treatment Facility (Galva WWTF) without any permit issued by the Agency, thereby threatening the pass through of untreated wastewater into Edwards River. In count IV, the People allege that ALC's operation of trucks to haul leachate to the Galva facility for disposal without an operating permit was capable of causing or threatening water pollution. For each of the four counts, the People seek an order requiring ALC to cease and desist from further violations; pay a civil penalty; and pay attorney and other fees and costs.

By order of June 6, 2013, the Board denied ALC's motion for joinder of the Village and Galva. On June 7, 2013, in accordance with the schedule set by the Board, ALC filed a motion to strike or dismiss (Mot. Dis.) the first amended complaint. On June 21, 2013, the People filed their response in opposition to the motion to strike or dismiss (Resp. Dis.), along with a motion to strike portions of the dismissal motion and the affidavits of Gary Hull and Erik Vardijan, which are attached to ALC's dismissal motion (Mot. Str.). On July 18, 2013, in accordance with the schedule set by the hearing officer, ALC filed a reply in support of its dismissal motion (Reply Dis.) and a response to the People's motion to strike (Resp. Str.).

On July 23, 2013, the People filed motions for leave to file a reply in support of their motion to strike (Mot. File Reply), and a surreply to ALC's reply in support of its motion to strike or dismiss (Mot. File Surreply). On August 6, 2013, ALC filed "Objections" to the motions for leave to file the reply (Obj. Reply) and to file the surreply (Obj. Surreply).

People's Motion for Leave to File Surreply

Citing the threat of material prejudice, the People claim a surreply is warranted for five reasons. First, the People contend, ALC's reply in support of its dismissal motion incorrectly asserts "numerous times" that the People did not respond on the merits to ALC's arguments for

dismissal based on the Hull and Vardijan affidavits. Mot. File Surreply at 2. Second, according to the People, ALC's reply erroneously argues that the People failed to respond to ALC's claim that the amended complaint improperly specifies no statutory basis for the Agency's issuance of a water pollution control permit to ALC. *Id.* Third, the People contend that the reply misconstrues case law cited in support of the argument that ALC's water pollution control permit is so vague as to be unenforceable, and mischaracterizes the reason a copy of ALC's application for the permit is attached to the People's response to the dismissal motion. *Id.* Finally, the People maintain that the reply argues for the first time that dismissal is warranted even if the Board refuses to consider the Hull and Vardijan affidavits because the Village and Galva facilities have been delegated authority to regulate discharges of landfill leachate into their respective systems. *Id.*

ALC urges the Board to deny the motion for leave to file, insisting that the Board's procedural rules do not permit the filing of a surreply. Obj. Surreply at 15. ALC also disputes that a surreply is warranted, arguing, first, that the ALC's claim that its landfill operation permit satisfies 35 Ill. Adm. Code 309.204(a) was raised for the first time, not in its reply in support of the dismissal motion, but in the dismissal motion itself. *Id.* at 2-3. And, ALC continues, any newly raised argument might be permissible in any event, as the Illinois Supreme Court Rules do not automatically preclude consideration of new arguments in a reply brief. *Id.* at 3-4, citing Ill. Sup. Ct. R. 341(j). ALC reiterates that the People have not specified the statutory basis for the Agency's issuance of a "totally superfluous" water pollution control permit to ALC, even though Section 31(c)(1) of the Act (415 ILCS 5/31(c)(1) (2012)) requires this. *Id.* at 5-6. While the proposed surreply, according to ALC, cites Sections 21(d) and 39 of the Act (415 ILCS 5/21(d), 39 (2012)) as that basis, neither provision authorizes the issuance of "multiple permits" for the same landfill. *Id.* at 6.

ALC adds that its reply does not misconstrue Harris v. American General Finance Corp., 54 Ill. App. 835, 840, 368 N.E.2d 1099 (3rd Dist. 1977), and that even if it did, that would not be a basis for a surreply. Obj. Surreply at 7-8. Similarly, ALC continues, while its reply did not mischaracterize the People's reason for attaching ALC's operating permit application to their response to the dismissal motion, a surreply would be unwarranted even if ALC had mischaracterized the reason. *Id.* at 8. In addition, ALC contends that it properly raised in its reply the argument that dismissal is warranted even if the Hull and Vardijan affidavits are not considered because it responded to an argument in the People's response to the motion to strike or dismiss. Obj. Surreply at 9. Moreover, ALC continues, ALC's dismissal motion did argue that the Village and Galva have delegated authority to regulate discharges of landfill leachate into their systems. *Id.* at 9-10.

ALC also states that attached to, but not referenced in, the surreply are two documents that, according to ALC, may not be considered on a motion to dismiss based on legal sufficiency, *i.e.*, similar to a motion under Section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615 (2012)). These documents are the affidavit of Darin LeCrone (LeCrone affidavit) and a purported copy of ALC's application for a water pollution control permit. Obj. Surreply at 10-11. According to ALC, under 35 Ill. Adm. Code 101.500(d), the People "waived" their opportunity to timely submit these documents—*i.e.*, with the response to the dismissal motion—and they should not be permitted to present them now. *Id.* at 11-12. ALC adds that the LeCrone

affidavit improperly contains the legal conclusion that the Village STP and Galva WWTF were authorized to "impose only more stringent conditions" on ALC concerning leachate discharges into their systems. *Id.* at 12-13, citing Ill. Sup. Ct. R. 191(a). This is a misstatement of applicable law, according to ALC, since federal pretreatment regulations provide that state and local authorities may establish standards "not less stringent" than national pretreatment standards. *Id.* at 13, citing 40 C.F.R. § 403.4. ALC insists this is not the same as a requirement to be "more stringent than" a federal regulation. *Id.* ALC adds that because USEPA has declined to establish standards for the introduction of landfill pollutants into publicly owned treatment works (POTWs), the only applicable standards are national discharge requirements "or local requirements developed" by a POTW. *Id.* ALC argues that under federal law as well as the Board's regulations, the Village STP and Galva WWTF are authorized to regulate the discharge of "trucked or hauled pollutants" from landfills. *Id.* at 13-14, citing 35 Ill. Adm. Code 307.1101, 40 C.F.R. § 403.5.

ALC concludes that the People are groundlessly "multiply[ing] these proceedings *ad infinitum*, at seemingly no cost to" themselves. Obj. Surreply at 15. ALC adds that if the Board accepts the surreply, it should grant ALC leave to file a "surrebuttal." *Id.* at 16.

Under Section 101.500(e) of the Board's procedural rules, the moving party has no right to file a reply in support of a motion except as permitted by the Board or the hearing officer to prevent "material prejudice." 35 Ill. Adm. Code 101.500(e). The Board has applied this rule to surreplies as well as replies. *See, e.g.*, City of Quincy v. IEPA, PCB 08-86, slip op. at 3 (June 17, 2010). In this case, ALC's reply in support of its dismissal motion leads with the argument that because ALC has a permit issued by the Agency to operate its *landfill*, it already has the wastewater source "operating permit" required under Section 309.204(a) of the Board's water pollution regulations (35 Ill. Adm. Code 309.204(a)). Reply Dis. at 2-3. While ALC's dismissal motion hints at this position (Mot. Dis. at 5), it does so in support of a different point: that the Act requires the People to specify the statutory basis for issuance of a water pollution control permit to ALC. The dismissal motion does not present the developed argument on this subject that ALC's reply does. In addition, ALC's reply characterizes the pretreatment program as "delegating" to publicly owned treatment works (POTW) authority over hauled landfill leachate discharged into their systems. Reply Dis. at 14-15. While the dismissal motion argues that an operating permit is not required because of the federal and Illinois POTW pretreatment program (Mot. Dis. at 18-21), it does not explicitly assert that the program effects the delegation that the reply claims. The People are entitled to respond to these and other arguments as framed and developed in the reply. Accordingly, the Board grants the People's motion for leave to file a surreply concerning ALC's motion to strike or dismiss.

However, the Board agrees with ALC that the LeCrone affidavit and surreply arguments based on it should not be considered in resolving the dismissal motion. *See* Surreply at 6 & Exh. 1. The surreply presents this affidavit for the first time, depriving ALC of the opportunity to submit a counteraffidavit or other response. And because discovery has not yet been conducted, the affiant has not been subject to examination concerning the basis for his testimony, particularly his conclusion that the Village STP and Galva WWTF may impose only more stringent conditions on ALC regarding discharges of leachate into their respective systems. *Id.* at Exh. 1, p. 2. Accordingly, while the Board accepts the surreply (Surreply Dis.), it gives no

consideration to the LeCrone affidavit and associated portion of the surreply in ruling upon ALC's dismissal motion.

Finally, the Board denies ALC's request for leave to file a "surrebuttal" to the People's surreply. ALC's 16-page objection to the People's motion for leave to file the surreply responds, not only to the motion for leave to file, but also to the surreply. *E.g.*, Obj. Surreply at 5-6, 7. The Board is not persuaded that ALC will be prejudiced without an opportunity to elaborate on the arguments on the merits that it makes in its objection.

People's Motion for Leave to File Reply

As noted above, the People seek to file a reply in support of their motion to strike, citing the threat of material prejudice and pointing to several purported misstatements in ALC's response to the motion to strike. Mot. File Reply at 3. According to the People, the response erroneously argues that the People failed to respond to ALC's arguments based on the Hull and Vardijan affidavits attached to the dismissal motion, and that the People cannot reserve the right to respond to them. Mot. File Reply at 2-3 & n.1. In addition, the People maintain, ALC's response to the motion to strike: (1) misconstrues Rule 101.626 of the Board's procedural rules (35 Ill. Adm. Code 101.626) and Illinois Rule of Evidence 801(d)(2)(f); (2) impermissibly contends the amended complaint should be dismissed whether or not the Hull and Vardijan affidavits are considered; and (3) argues for the first time that the Village and Galva have been delegated authority to regulate discharges of landfill leachate into their systems. *Id.* at 3.

ALC objects that the Board's procedural rules do not permit the filing of motions to strike anything other than a pleading. Obj. Reply at 2. By extension, ALC continues, the rules do not authorize the filing of a reply in support of an unauthorized motion. *Id.* at 3. Moreover, ALC maintains the People attached to the reply the same LeCrone affidavit and ALC operating permit application, which, ALC adds, are improper for the same reasons that they are inappropriate as attachments to the People's surreply.

Under Section 101.500(e) of the Board's procedural rules, the moving party has no right to file a reply in support of a motion except as permitted by the Board or the hearing officer to prevent "material prejudice." 35 Ill. Adm. Code 101.500(e). While the Board disagrees with ALC that the motion for leave to file is unauthorized, the Board nonetheless is unconvinced that a reply on an essentially procedural question is warranted. It is true that ALC's response raises issues not addressed in the People's motion to strike—*e.g.*, that purported statements by third parties recited in the affidavits constitute admissions by a party-opponent. However, the Board does not require additional briefing to rule upon the motion to strike, and the reply's attachment of the LeCrone affidavit is problematic for the reasons discussed above. Accordingly, the Board denies the People's motion for leave to file a reply, and denies as moot ALC's request for leave to file a surrebutal.

PEOPLE'S MOTION TO STRIKE

Below, the Board summarizes the filings relating to the People's motion to strike the Hull and Vardijan affidavits and portions of ALC's dismissal motion based on them. The Board then analyzes and rules upon the motion.

People's Motion to Strike Affidavits and Portions of ALC's Dismissal Motion

The People urge the Board to strike the Hull and Vardijan affidavits and related portions of ALC's dismissal motion (pp. 18-21, 25-27) because they contain inadmissible hearsay statements. Mot. Str. at 3-4. Both affiants are truck drivers who claim to have hauled leachate from ALC's landfill on particular dates. Mr. Hull states that on or around March 16, 2011, Village of Atkinson employee Bob Floming directed him to discharge the leachate into the Atkinson sewer at an abandoned gas station because the Village STP had too much wastewater to process. Mr. Hull claims he followed these directions after obtaining approval to do so from ALC manager Diana Vardijan. Mot. Dis. Exh. A. In his affidavit, Mr. Erik Vardijan states that on May 4, 2011, when he hauled leachate to the Galva WWTF, Galva water and sewer official Greg Thompson designated a discharge point for the leachate at a sewer interceptor near the facility. *Id.* at Exh. B. Mr. Vardijan adds that after that, all loads of leachate hauled by him and other ALC truck drivers were discharged at that point. *Id.*

According to the People, the affidavits' inadmissible hearsay testimony consists of purported statements by third parties cited in the affidavits, as well as Mr. Vardijan's assertion about the locations where other drivers discharged subsequent loads of leachate. Mot. Str. Obj. at 3. These out-of-court statements, which the dismissal motion offers for the truth of the matter asserted, the People continue, would be inadmissible at hearing. *Id.* at 4, citing Ill. Sup. Ct. R. 191(a). Accordingly, the People ask the Board to strike the affidavits as well as the related portions of the dismissal motion. *Id.* The People "reserve[ ] the right" to respond" to such sections of the motion to strike or dismiss should the Board deny their motion to strike. *Id.* at 4 n.2.

The People conclude that even taking the affidavits at face value, they do not address *all* of the dates of ALC's disposal of leachate into the POTWs alleged in the amended complaint. Mot. Str. at 2. The People add that neither affidavit asserts that the driver was authorized to discharge a particular amount of leachate on the referenced dates, *i.e.* March 17, 2011 and May 4, 2011, and neither "specifically addresses" leachate disposals between March 17 and April 12, 2011 at the Village STP or between May 5 and June 16, 2011 at the Galva WWTF. *Id.*

ALC's Response in Opposition to Motion to Strike

ALC claims the motion to strike is improper because no section of the Board's procedural rules or Code of Civil Procedure cited by the People authorizes a motion to strike anything other than a pleading. Resp. Str. at 2. In addition, ALC contends that Section 101.500(d) of the Board's procedural rules (35 Ill. Adm. Code 101.500(d)), regarding waiver of objections to the granting of motions, makes clear that People cannot "unilaterally reserve" the right to respond to arguments in the dismissal. *Id.* at 3.

ALC further maintains its dismissal motion "is not dependent on the viability" of the Hull and Vardijan affidavits because the amended complaint is barred under the federal and state pretreatment program for POTWs and the "terms and conditions" of ALC's water pollution control permit. Resp. Str. at 4. According to ALC, the pretreatment program delegates to POTWs authority over the "disposition of trucked leachate" not subject to the pretreatment program's "general and specific discharge prohibitions," none of which, ALC adds, is cited in the amended complaint. *Id.* This delegation, ALC continues, is reflected in 35 Ill. Adm. Code 307.1101 (no person may introduce, among other things, trucked pollutants into a POTW except at discharge points authorized by the POTW) and 40 C.F.R. § 403.5 (trucked pollutants may not be introduced into a POTW except at POTW-designated discharge points). *Id.* at 5. Accordingly, ALC contends, the People's claims are barred by "other affirmative matter," namely, the pretreatment program. *Id.*, citing 735 ILCS 5/2-619(a)(9) (2012).

Similarly, ALC continues, ALC's water pollution control permit includes two conditions stating that the permit does not relieve the permittee of responsibility to comply with the pretreatment program and related Board regulations as well as any limitations imposed by the Village. Resp. Str. at 6. Moreover, according to ALC, by referring to "any" trucked leachate, the pretreatment program and Board regulation also authorizes the POTW to determine the *amount* of leachate that may be discharged into its system. *Id.* Any conflicting allegations in the amended complaint must yield to the terms of the permit, ALC maintains. *Id.* at 7.

As to the affidavits, ALC asserts that "hearsay is implicitly allowed as an exception to the rules of evidence" by Section 101.626 of the Board's procedural rules (35 Ill. Adm. Code 101.626). Resp. Str. at 7. The "hearing officer may admit evidence that is material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs," ALC recites. *Id.* ALC asserts that while nothing in the affidavits constitutes hearsay, any statement that did would nonetheless be admissible under Section 101.626.

ALC contends nothing in the affidavits constitutes hearsay under the Illinois Rules of Evidence because the third-party statements recited in them constitute admissions of a party-opponent. Resp. Str. at 8, citing Ill. R. Evid. 801(d)(2)(f). ALC asserts this is so because the Village and Galva, as municipal operators of POTWs pursuant to state-issued NPDES permits, are "in privity" with the State. *Id.*

ALC also contends that while the Hull affidavit's reference to only a single date on which leachate was discharged could affect its relevance to other alleged dates of discharge, it does not "disqualify" the affidavit from Board consideration. Regarding the Vardijan affidavit, even if, as the People point out, it refers only to official authorization to discharge leachate on May 4, 2011, Mr. Vardijan further states that all subsequent loads of leachate were discharged at the same point designated by the Galva WWTF official. And, ALC continues, there is no dispute that ALC's leachate "was, in fact, accepted by" the Village and Galva. Resp. Str. at 9.

Board Analysis and Ruling

As a threshold matter, the Board does not agree with ALC that the People's motion to strike is an unauthorized "nullity." Obj. Str. at 2. Under Section 101.500(a) of the Board's

procedural rules, the Board may entertain any motion that is "permissible under the Act or other applicable law, the[ ] [procedural] rules, or the Illinois Code of Civil Procedure." 35 Ill. Adm. Code 101.500(a). The Board notes that this provision allows Board consideration of "permissible" motions, and not just motions expressly authorized by the Act, Board rule, or the Code of Civil Procedure. ALC cites no provision in any of these sources proscribing the filing of motions to strike documents other than pleadings, and the Board knows of none.

However, even reading "permissible" as "specifically authorized," as ALC seems to do, courts have held in the civil litigation context that an objection to the sufficiency of an affidavit under Ill. Sup. Ct. R. 191(a) may be made by a motion to strike. *See, e.g.*, Fooden v. Board of Governors, 48 Ill. 2d 580, 587, 272 N.E.2d 497, 501 (1971); Kearns v. Board of Education, 73 Ill. App. 3d 907, 913-14, 392 N.E.2d 148, 153 (1st Dist. 1979). Moreover, the motion to strike need not be "directed specifically to the affidavit," but may be directed at the motion to which the affidavit is attached. *See, e.g.*, Anderson v. Dorick, 28 Ill. App. 3d 225, 228, 327 N.E.2d 541, 543 (3rd Dist. 1975). Accordingly, Ill. Sup. Ct. R. 191(a) implicitly authorizes a motion to strike an affidavit and a motion relying on it. Under 35 Ill. Adm. Code 101.500(a), this, in turn, makes such motions permissible in Board proceedings.

On the merits of the motion to strike, the Board looks to the Supreme Court Rules, and Rule 191 in particular, for guidance in determining whether the affidavits constitute competent evidence on which a motion to strike or dismiss may be based, as the procedural rules do not address the matter. *See, e.g.*, 2222 Elston LLC v. Purex Industries, Inc., PCB 03-55, slip op. at 9 (June 19, 2003); 35 Ill. Adm. Code 101.100(b). It is well established that hearsay statements do not comport with Rule 191's requirement that the witness be competent to testify to the attested facts, and that an affidavit based on hearsay is inadmissible and warrants no relief. Pruitt v. Pruitt, 2013 IL App (1st) 130032, ¶ 20, 995 N.E.2d 313, 319 (1st Dist. 2013); *see also* Ill. Sup Ct. R. 191(a).

Under Illinois law, hearsay is defined as "testimony in court or written evidence, of a statement made out of court," offered for the truth of the matter asserted, and "thus resting for its value upon the credibility of the out-of-court asserter." People v. State Oil Co., PCB 97-103, slip op. at 7 (Nov. 19, 1998), citing Tomaszewski v. Godbole, 174 Ill. App. 3d 629, 529 N.E.2d 260 (3rd Dist. 1988). The references in the Hull affidavit to statements by a Village employee and an ALC manager (Mot. Dis. Exh. A) clearly fall within this category: they are out-of-court statements offered to show that ALC lawfully discharged leachate into the Village STP on a particular date. The same is true of the Vardijan affidavit's recitation of oral instructions by a Galva sewer official and its implicit reliance on statements that other ALC truck drivers also discharged leachate into the Galva WWTF at the same "designated discharge point." *Id.* at Exh. B.

However, under Illinois Rule of Evidence 801(d)(2)(f), a statement offered against a party is not hearsay if made by a "person, or a person on behalf of an entity, in privity with the party or jointly interested with the party." Ill. R. Evid. 801(d)(2)(f).[1] The Board is not

[1] Under the Board's procedural rules, evidence may be admitted in Board proceedings to the extent it is admissible under the "rules of evidence as applied in the civil courts of Illinois," except as otherwise provided in the procedural rules. 35 Ill. Adm. Code 101.626.

persuaded that this rule applies here. In denying ALC's prior consolidation and stay motion, which asserted that the entry of judgment in the People's enforcement cases against the Village and Galva (PCB 13-60 and PCB 13-61) would bar this action, ALC admitted, and the Board found, that this case and those cases do not involve the same parties or others in privity with them. Atkinson Landfill Co., PCB 13-28, slip op. at 5 (Aug. 8, 2013). That ruling is consistent with case law holding that the State and municipal corporations are not in privity. *See, e.g.*, Gumma v. White, 216 Ill. 2d 23, 38, 833 N.E.2d 834, 843 (2005) (finding Secretary of State and village not in privity); City of Naperville v. Morgan, 126 Ill. App. 3d 91, 93, 466 N.E.2d 1349, 1350-51 (2nd Dist. 1984) (holding municipality could not "be said to be in privity" with State). The Board also agrees with the People's claim that the Village and Galva are not jointly interested with the State in this proceeding, as the People's filing of separate enforcement actions (PCB 13-60 and PCB 13-61) against the Village and Galva demonstrates. Thus, the Board finds that purported statements by third parties recited in the Hull and Vardijan affidavits constitute hearsay.

Next, the Board considers whether the affidavits are nonetheless admissible under the relaxed standard of Section 101.626(a) of the Board's procedural rules (35 Ill. Adm. Code 101.626(a)). That subsection provides that the "hearing officer" may admit "evidence that is material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs, unless the evidence is privileged." 35 Ill. Adm. Code 101.626(a). The Board has previously found various kinds of out-of-court statements admissible under this provision. *See, e.g.*, Boyer v. Harris, PCB 96-151, slip op. at 3 (Sept. 4, 1997) (letter from laboratory technician providing results of tests of paint chips); Village of Matteson v. World Music Theatre Jam Productions, Ltd., PCB 90-146, slip op. at 3-5 (Mar. 25, 1993) (compilation of noise complaints received by local police department); Ekco Glaco Corp. v. IEPA, PCB 87-41, slip op. at 4 (Dec. 17, 1987) (air quality monitoring results). The statements at issue here are not of this character. There has been no showing that the municipal POTW employees who purportedly made the statements had authority to designate discharge points for either facility, and the Board otherwise believes the statements are not of a type that would be relied upon by "prudent persons in the conduct of serious affairs." 35 Ill. Adm. Code 101.626(a). Rather, they are oral, on-the-spot remarks by third parties who have not been subject to examination in this case. Accordingly, the Board finds the affidavits are not admissible under 35 Ill. Adm. Code 101.626(a).

Because the affidavits are not competent evidence, they are not properly the basis for a motion to strike or dismiss. However, the Board finds over-inclusive the People's request to strike pages 18-21 and 25-27 of the dismissal motion, given that only parts of pages 20-21 and 26-27 explicitly seek relief based on the affidavits. The Board, therefore, grants the People's motion to strike in part and denies it in part, striking the Hull and Vardijan affidavits and the final paragraph on page 20 through the heading on page 21 relating to counts III and IV, and from the final paragraph on 26 through the sentence on page 27 immediately preceding "CONCLUSION." The Board gives the affidavits and these portions of the motion no consideration or weight in resolving ALC's dismissal motion.

ALC's MOTION TO STRIKE OR DISMISS THE AMENDED COMPLAINT

In this section, the Board summarizes the filings relating to ALC's motion to strike or dismiss the amended complaint. The Board then analyzes and rules upon the motion.

ALC's Motion to Strike or Dismiss the Amended Complaint

ALC's motion to strike or dismiss relies on Section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (2012), and, in the alternative, Section 2-619 of the Code (735 ILCS 5/2-619 (2012)). A Section 2-615 motion tests the legal sufficiency of the complaint and asserts defects on its face. *See*, *e.g.*, City of Chicago v. Beretta U.S.A. Corp., 213 Ill. 2d 351, 364, 821 N.E.2d 1099, 1110 (2004). In contrast, a motion to dismiss under Section 2-619 admits the "legal sufficiency of the claim but asserts affirmative matters outside of the pleading that defeats the claim." Wallace v. Smyth, 203 Ill. 2d 441, 447, 786 N.E.2d 980, 984 (2002). Section 2-619(a)(9), the particular subsection of Section 2-619 on which the dismissal motions rely, authorizes motions to dismiss on the ground that claims are "barred by other affirmative matter avoiding the legal effect of or defeating" them. 735 ILCS 2-619(a)(9) (2012).[2]

This section summarizes, first, the grounds for dismissal of all counts, and then turns to the asserted ground for dismissal of counts I and II.

Regarding All Counts

Counts I and III. ALC maintains that the claims for violation of Sections 12(a) and (b) of the Act (415 ILCS 5/12(a), (b) (2012)) are inadequately pled. Mot. Dis. at 14-15, 21-23. According to ALC, "water pollution," as defined by the Act, requires discharges into "waters of the State," a term the Act does not define. *Id.* However, ALC continues, regulations under the CWA exclude POTWs from the definition of "waters of the United States." *Id.* at 14-15, 22, citing 40 C.F.R. §§ 122.3(c), 403.3(q). ALC insists that since the alleged discharges of leachate in this case were to POTWs, they were not to a "water of the State," as is required to violate Section 12(a). *Id.* at 15-16, 22, citing Citizens Utilities Co. of Illinois v. PCB, 127 Ill. App. 3d 504, 468 N.E.2d 992 (3rd Dist. 1984).

Counts II and IV. The Section 12(b) claims have the same deficiency, according to ALC, for they allege only that leachate discharges into the Village STP and Galva WWTF constituted discharges "indirectly" to "water[s] of the State." Mot. Dis. at 17, 25. But, ALC

[2] While the provisions of the Code of Civil Procedure do not expressly apply to Board proceedings (35 Ill. Adm. Code 101.100(b)), the Board may entertain any motion that is permissible under the Code of Civil Procedure (*id.* at 101.500(a)). Moreover, the Board has often looked to Illinois civil practice law for guidance when considering motions to strike or dismiss pleadings. *See*, *e.g.*, 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).

adds, federal CWA regulations define an "indirect discharger" as a discharger to a POTW, which, ALC reiterates, is not a "water of the State." *Id.*

35 Ill. Adm. Code 309.204(a). ALC also asserts that the People's amended complaint fails to state a cause of action for violations of Sections 12(a) and (b) of the Act (415 ILCS 5/12(a), (b) (2012)) because "no permit was required for ALC's alleged disposal of leachate" directly into the Village STP and Galva WWTF. Mot. Dis. at 2-3, 24-25. ALC contends that POTWs are not "waters of the United States," and, thus, discharges into such systems do not require an NPDES permit. *Id.* at 3, 24. In addition, according to ALC, Section 12(f) of the Act, 415 ILCS 5/12(f) (2012), provides that if an NPDES permit is not required for a particular discharge of wastewater, no other permit is required. *Id.* Accordingly, ALC continues, no permit was required for ALC's discharges into the Village STP and the Galva WWTF. *Id.*

ALC further maintains that Section 309.204(a) of the Board's water pollution regulations, (35 Ill. Adm. Code 309.204(a)), which requires a permit for, among other things, the operation of any "wastewater source," runs afoul of Section 12(f) of the Act (415 ILCS 5/12(f) (2012)) in requiring permitting for discharges for which an NPDES permit is not necessary. Mot. Dis. at 4, 25. Section 309.204(a), ALC continues, is also inconsistent with Section 309.204(b)(1), which provides that an operating permit is not required for any discharge that requires an NPDES permit. *Id.* at 4. ALC maintains that requiring an operating permit for discharges that do not require an NPDES permit creates a "dual permit" system, which, ALC adds, is exactly what Section 12(f) of the Act was designed to avoid. *Id.*

Pretreatment Standards. ALC contends that the amended complaint fails to state a claim because it alleges no violation of the federal Clean Water Act (CWA) or state pretreatment standards for discharges to POTWs. Mot. Dis. at 11-14, 23-25, citing 40 C.F.R. § 403.5(b), 35 Ill. Adm. Code 307.1101(b). Rather, ALC asserts, the complaint alleges only that discharges of leachate to the Village STP and Galva WWTF *may* cause harm to the treatment works by upsetting the treatment process, interfering with normal operation, or causing conditions harmful to facility workers and resulting in contaminants passing through the facility untreated. *Id.* at 11-12, 23-24, citing 1st Am. Comp. at 4, 10. But, ALC adds, pretreatment regulations prohibit only discharges that actually cause pass through or interference. *Id.*, citing 40 C.F.R. § 403.5(a)(1), 35 Ill. Adm. Code 307.1101(a), 310.201(a). *Id.* ALC argues that by alleging only what harm *may* occur to the POTWs, rather than what harm has actually occurred, the People have failed to give ALC notice of the basis for their claims and deprived them of the opportunity to assert affirmative defenses. *Id.* at 13-14, 23-24, citing IEPA v. Rosenbalm, PCB 71-299 (Jan. 16, 1973); 35 Ill. Adm. Code 310.201(b) (setting out affirmative defenses available to industrial user charged with introducing into a POTW any pollutant that causes pass through or interference).

In addition, ALC seeks dismissal on the ground that the People's claims are affirmatively barred by the pretreatment program and conditions in its water pollution control permit. Mot. Dis. at 18-21, 25-27. ALC's argument primarily relies on the Hull and Vardijan affidavits to establish that the alleged discharges occurred at points designated by the Village and Galva, which meant they were exempt from federal and state prohibitions on discharges of trucked pollutants into a POTW. *Id.*, citing 40 C.F.R. § 403.5(b)(8); 35 Ill. Adm. Code 307.1101(b)(13).

ALC adds that conditions in its operating permit to discharge to the Village STP required it to comply with local provisions and limits imposed by the Village. *Id.* at 19-20.

Because the Board above grants in part the motion to strike the affidavits and portions of the dismissal motion relying on them, the Board does not provide a summary of those portions here.

Attorney General Authority. ALC argues that the complaint should be dismissed because it is brought on the Attorney General's own motion pursuant to Section 31 of the Act (415 ILCS 5/31 (2012)). Mot. Dis. at 17-18.[3] According to ALC, Section 31 does not authorize the Attorney General to proceed in this manner. By contrast, ALC adds, Section 42(e) of the Act (415 ILCS 5/42(e) (2012)) expressly empowers the Attorney General to bring a civil action for injunctive relief on her own motion. *Id.*, citing People v. NL Industries, 152 Ill. 2d 82, 604 N.E.2d 349 (1992). ALC insists that Section 31(b) of the Act (415 ILCS 5/31(b) (2012)) permits the Attorney General to bring actions only on the Agency's referral or request. *Id.* at 18.

ALC further contends that its operating permit is "superfluous" and lacks any statutory basis, requiring dismissal of the counts based on them (I and II). Mot. Dis. at 3. ALC argues that the amended complaint's failure to specify the statutory basis for that permit violates Section 31(c)(1) of the Act (415 ILCS 5/31(c)(1) (2012)), which requires a complaint to specify, among other things, the provision of the Act or Board regulation that the respondent allegedly violated. *Id.* at 5-6. In any event, ALC adds, ALC has a permit to operate its landfill, and the amended complaint alleges no violation of that permit. *Id.* at 5.

Regarding Counts I and II

Next, ALC claims that the terms of its water pollution control permit are vague and ambiguous, so the allegations of counts I and II based on the permit are, too. Mot. Dis. at 6. According to ALC, the permit's authorization for ALC to "to construct and or operate water pollution control facilities" by "the hauling of approximately 12,000 gpd (DMF of 12,000 gpd) of landfill leachate to the headworks of the [Village STP]" is impermissibly vague. *Id*. ALC adds that "hauling," "facility," or "headworks" are not defined in the Act, making the permit so vague as to be "unenforceable and void." *Id*. at 6, 10.

In addition, ALC argues that although the amended complaint alleges that ALC discharged to the Village STP in excess of "approximately 12,000 gpd" of leachate, the complaint does not even allege that the permit imposes *any* limit on the amount of leachate ALC may discharge to the POTW. Mot. Dis. at 8-9. And, according to ALC, the permit's authorization of the disposal of "approximately 12,000 gpd" can reasonably be construed to

[3] The Board assumes that ALC intended this as a ground for dismissing the entire amended complaint, even though the dismissal motion, in pressing this ground, refers only to counts I and II. Mot. Dis. at 17. While counts III and IV, unlike counts I and II (1st Am. Comp. at 1, 6), do not explicitly state that they are brought by the Attorney General on her own motion, both counts incorporate by reference count I's statement to that effect (*id.* at 8, 11). Accordingly, it is clear that those counts, too, are brought by the Attorney General on her own motion.

authorize the discharge of "*at least* approximately 12,000 gallons per day." *Id.* at 9 (emphasis in motion). ALC adds that it can also be read to allow "the hauling of not only approximately 12,000 [gpd of leachate] to the headworks, but also more to the headworks or to some other location." *Id*. ALC further argues that because "headworks" does not "designate a definable point" where ALC is required to dispose of its leachate, ALC is authorized to dispose of leachate at the Village STP "at any location at any time." *Id.* at 10.

Even if "approximately 12,000 [gpd]" is a limit, ALC adds, several exceedances of that limit alleged in the amended complaint cannot reasonably be deemed violations of the limit. Mot. Dis. at 9. For example, ALC continues, the amended complaint's allegation that ALC disposed of 12,720 gallons of leachate on nine occasions falls within a reasonable definition of "approximately 12,000" gpd. *Id*. at 9. Moreover, ALC contends that because this term is vague, it should be construed against the Agency, as the permit's drafter, such that even ALC's alleged disposal of 50,880 gallons of leachate at the Village STP did not violate its permit. *Id.* at 9-10.

People's Response in Opposition to Motion to Strike or Dismiss the Amended Complaint

Regarding All Counts

Counts I and III. The People argue that the amended complaint's Section 12(a) and (b) claims are adequately pled. Resp. Dis. at 11-15. The People point out that the amended complaint alleges that ALC's disposal of leachate at the Village STP in excess of the limit in its operating permit and at the Galva WWTF without a permit threatened the pass through of wastewater into Green River and Edwards River, respectively. *Id.* at 13. This allegation meets the elements of a Section 12(a) violation, according to the People, because ALC is a "person" within the meaning of the Act (415 ILCS 5/3.315 (2012)); leachate falls within the definition of "contaminant" under Section 3.315 of the Act (415 ILCS 5/3.165 (2012)); and Green River and Edwards River are "waters" as defined by the Act (415 ILCS 5/3.55 (2012)). *Id.* Moreover, the amended complaint alleges that ALC "threatened the discharge" of leachate "into the environment" so as to cause or tend to cause "water pollution," in violation of Section 12(a). *Id.* at 12-13, citing 415 ILCS 5/3.545 (2012).

Counts II and IV. The People argue that the amended complaint also meets the elements of a violation of Section 12(b). Resp. Dis. at 13. The People add that counts II and IV allege ALC operated "equipment," *i.e.*, trucks, to haul leachate for disposal at the Village STP in excess of ALC's permit limit, and at the Galva WWTF without an operating permit. *Id.* The amended complaint alleges that this activity was capable of causing or contributing to the discharge of leachate in the Green and Edwards Rivers, and thus, "water pollution" as defined by the Act. *Id.*

35 Ill. Adm. Code 309.204(a). The People contend that ALC's reliance on Section 12(f) of the Act (415 ILCS 5/12(f) (2012)) is misplaced because the amended complaint does not allege a violation of that provision, and that ALC misreads Section 12(f). Resp. Dis. at 9. The People point out that Section 12(f) provides that "[n]o permit shall be required *under this subsection* and under Section 39(b) of this Act for any discharge for which a permit is not required under the Federal Water Pollution Control Act. . . ." *Id.*, citing 415 ILCS 5/12(f)

(2012)) (emphasis in response). According to the People, this provision simply bars requiring an NPDES permit for discharges not subject to permitting under the CWA; it does not relieve a discharger from having to obtain permits required under other provisions, including Section 309.204(a) of the Board's water pollution regulations (35 Ill. Adm. Code 309.204(a)). *Id.* at 9-10.

The People also assert that ALC misunderstands the concept of a "dual-permit system." Resp. Dis. at 10. The People state that this refers to conflicting federal and state permit schemes. *Id.* The People add that ALC does not claim it had to obtain both federal and state permits to discharge leachate into the POTWs. *Id.*

Pretreatment Standards. The People state that the complaint need not allege a violation of the pretreatment standards, adding that "at this time," they are not seeking relief for any such violations. Resp. Dis. at 14 n.4. The People distinguish Rosenbalm on the grounds that here, unlike in that case, the amended complaint alleges specific dates of the alleged violations, and they have not sought to amend the complaint to allege additional violations on dates not specified in the complaint. Resp. Dis. at 14. In addition, the People claim Citizens Utilities is distinguishable because the claim in that case was that a treatment works violated its NPDES permit and a Board regulation regarding operation and maintenance, which the court interpreted as requiring proof of actual, rather than merely threatened, pollution. *Id.* at 14-15. The People add that, in contrast, Sections 12(a) and (b) do not require a showing of an "actual violation." *Id.* at 15.

The People note that they filed a motion to strike the Hull and Vardijan affidavits, which the response incorporates by reference. Resp. Dis. at 4 n.1.

Attorney General Authority. The People contend ALC's challenge to the Attorney General's authority to bring an enforcement action ignores "express statutory language and established case law." Resp. Mot. at 6. The People add that numerous decisions, including NL Industries, recognize that the Attorney General may bring an enforcement action on her own motion. *Id.* at 6-7.

Nor, according to the People, was the complaint required under Section 31(c)(1) of the Act (415 ILCS 5/31(c)(1) (2012)) to specify the "statutory basis for the issuance of a permit." *Id.* at 11 n.3. The People note that the amended complaint states that ALC's operating permit was issued pursuant to 35 Ill. Adm. Code 309.204(a), and does not premise any claims on violation of ALC's landfill operating permit. *Id.*

Regarding Counts I and II

Regarding ALC's vagueness challenge, the People claim it cannot be resolved on a motion to dismiss because discovery and resolution of the claim by the Board, as the finder of fact, is required. Resp. Dis. at 16-17, citing Harris v. American General Finance Corp., 54 Ill. App. 3d 835, 368 N.E.2d 1099 (3rd Dist. 1977), Citizens Utilities Co. of Illinois v. PCB, 127 Ill. App. 3d 504, 468 N.E.2d 992 (3rd Dist. 1984). This is because, the People continue, they are entitled to offer extrinsic evidence to explain the meaning of any permit terms that are, in fact,

ambiguous. *Id.* at 17. For example, the People add, ALC's application for its operating permit concerning discharges into the Village STP (which is attached to the People's response) "arguably set[s] forth" ALC's "understanding" of the permit terms "DMF," "hauling," and "approximately 12,000 gpd." *Id.*, citing *id.* at Exh. 1. Moreover, the People assert that ALC "arguably did not consider" the operating permit ambiguous in the three years between the date the permit was issued and the dates when ALC allegedly committed the violations at the Village STP. *Id.* at 17.

ALC's Reply in Support of Motion to Strike or Dismiss the Amended Complaint

Regarding All Counts

ALC argues that the People do not distinguish Citizens Utilities because in that case the Board *had* found that the treatment works violated, not just the Board's regulations and the facility's permit, but also Sections 12(a) and (f) of the Act (415 ILCS 5/12(a) and (f) (2012)). Reply Dis. at 11. And, ALC insists, Citizens Utilities makes clear that a violation of Section 12(a) does require a showing of an actual violation. *Id.* at 11-12.

35 Ill. Adm. Code 309.204(a). According to ALC, the People "admit that ALC was lawfully operating" under a valid "permit in the instances of both sets of alleged discharges"—that is, ALC's permit to operate its landfill. Reply Dis. at 2-3 (emphasis omitted). ALC claims that by having such an "operating permit," it effectively complied with the operating permit requirement under Section 309.204(a) of the Board's water pollution regulations (35 Ill. Adm. Code 309.204(a)). *Id.* at 3.

Pretreatment Standards. ALC reiterates its contention that although the complaint alleges potential interference, pass through, or similar harm, it states no claim for violation of the pretreatment standards because that requires "actual upset," pass through, or harm to workers or the POTW. Reply Dis. at 9-10. Nowhere does the People's response address this deficiency, according to ALC. *Id.* at 10.

ALC asserts that under the Board's procedural rules, the People have waived any objection to the granting of its Section 2-619 motion by failing to respond to it on the merits. Reply Dis. at 14, citing 35 Ill. Adm. Code 101.500(d).

Next, ALC insists the People fail to "recognize and adhere" to the pretreatment program, which, according to ALC, "delegat[es]" to POTWs authority over discharges into their systems not prohibited by the pretreatment standards—none of which, ALC adds, it is alleged to have violated. Reply Dis. at 14-15. ALC reiterates that the Hull and Vardijan affidavits demonstrate that it properly complied with the pretreatment standards by discharging only at points designated by the Village STP and Galva WWTF. *Id.* at 17.

However, ALC continues, its Section 2-619(a)(9) motion is "not dependent upon the viability of these affidavits." Reply Dis. at 17. Rather, ALC argues, the pretreatment program itself and conditions in ALC's water pollution control permit requiring it to comply with pretreatment standards and requirements imposed by the POTW are "affirmative matter" that

defeats the People's claims. *Id.* at 17-18. ALC adds that unless the complaint is dismissed based on the pretreatment program, the "State [will] be allowed to unlawfully insert itself into the regulatory relationships between" ALC and the Village STP and Galva WWTF. *Id.*

Attorney General Authority. Noting that the People read NL Industries to hold that the Attorney General has authority to file a certain action where a statute neglects to specify which party is to file an action, ALC asserts that Section 31 of the Act (415 ILCS 5/31 (2012)) is not such a statute. *Id.* at 12-13. Rather, ALC continues, Section 31(b) makes clear that the Attorney General may bring a Section 31 action only on the basis of an Agency referral or request. *Id.* at 13. While Section 31(d)(1) does not specify who may bring an enforcement action, ALC argues that this is just a subsection of a statute rather than the statute itself. *Id.* at 12-13. ALC urges the Board to "reconsider[ ] and reverse[ ]" contrary Board decisions in light of NL Industries. *Id.* at 12.

ALC further asserts that the People's response offers no statutory basis for requiring ALC to "obtain multiple operating permits for the same landfill." Reply at 4. Whatever statutory or regulatory provision a particular operating permit is issued under, an operating permit is an operating permit, according to ALC. *Id.* Accordingly, ALC continues, its water pollution control permit is superfluous, and, by failing to specify the statutory basis for its issuance, the amended complaint gives no notice of the specific conduct constituting the alleged violation, as Section 31(c)(1) of the Act (415 ILCS 5/31(c)(1) (2012)) requires. *Id.* at 4-5.

Regarding Counts I and II

As to its vagueness challenge, ALC argues that the cases on which the People rely do not support their position that discovery is necessary to determine whether its operating permit is enforceable. Resp. Dis. at 5-6. ALC adds that it is "baffling" that the People rely on ALC's purported permit application to argue what ALC "arguably" understood the permit to mean. *Id.* at 6. For one thing, ALC contends, the Board may not consider matters outside the complaint on a motion challenging a complaint's legal sufficiency. *Id.* Moreover, ALC claims that whether it arguably understood the permit is irrelevant, as the question for the Board is whether the operating permit is ambiguous and thus void as a matter of law. *Id.* at 7. In any event, ALC adds, since "hauling," "approximately 12,000 gpd," and "head works" do not appear in its permit application, the application does not show that ALC understood them as used in the permit. *Id.* at 7-8. ALC further claims that the People's reliance on the permit application is a judicial or implied admission that the permit's terms are ambiguous. Reply Dis. at 8-9.

People's Surreply to Reply in Support of Motion to Strike or Dismiss the Amended Complaint

Regarding All Counts

35 Ill. Adm. Code 309.204(a). The People assert that ALC's permit to operate a landfill was issued pursuant to 415 ILCS 5/21(d) (2012) and 35 Ill. Adm. Code Parts 811, 812, and 814 and does not authorize ALC to dispose of leachate at the Village STP or Galva WWTF. Surreply

Dis. at 2. Such disposal requires a different permit, the People continue, issued by the Agency's Bureau of Water pursuant to 415 ILCS 5/39 (2012) and 35 Ill. Adm. Code 309.204(a). *Id.* The People reiterate that by failing to comply with its water pollution control permit for leachate disposal at the Village STP, and by failing to obtain a Section 309.204(a) operating permit for discharges into the Galva WWTF, ALC violated Sections 12(a) and (b) of the Act (415 ILCS 5/12(a),(b) (2012)). The People also call into question ALC's claim that it has been lawfully operating its landfill, stating that the Agency issued notices of violation to ALC in 2010 and 2013 "regarding its landfill operations." *Id.* at 2 n.1.

Pretreatment Standards. The People deny that Illinois does not regulate industrial discharges into POTWs, explaining that ALC was required to obtain a Section 309.204(a) operating permit to dispose of leachate at the Village and Galva treatment works. Surreply Dis. at 6. To obtain such a permit, the People continue, ALC would have had to complete a permit application, which would include a certification of the Village STP and the Galva WWTF that each could accept and treat the volume of leachate ALC intended to discharge into their systems. *Id.*, citing *id.* at Exh. 1 (LeCrone Aff.). According to the People, these facilities could impose "only more stringent conditions" on ALC's leachate discharges into their systems. *Id.*

The People also argue that ALC misinterprets the pretreatment provisions on which it relies as well as the conditions in its water pollution control permit. Surreply Dis. at 5. But even assuming its reading of these provisions were correct, the People continue, ALC's argument that it had municipal authorization to discharge into the POTWs improperly relies on the Hull and Vardijan affidavits. *Id.* at 5-6.

Finally, the People note that ALC cites no authority providing that the State has delegated to the Village and Galva its regulatory control of discharges of leachate into the Village STP and Galva WWTF. Surreply Dis. at 7. According to the People, Section 307(b) of the CWA (33 U.S.C. § 1317(b) (2008)), on which ALC relies, "simply provides that" USEPA is to enact "certain [pretreatment] regulations." *Id.* at 7 n.4. Nor does ALC establish that the pretreatment standards even apply here, according to the People, since ALC identifies no evidence that the Village STP or the Galva WWTF has a "total design flow" greater than 5 million gpd or that either has an "approved pretreatment program" pursuant to 35 Ill. Adm. Code Part 310. *Id.*

Attorney General Authority. The People dispute ALC's assertion that the People's response to the dismissal motion violated Section 31(c)(1) of the Act (415 ILCS 5/31(c)(1) (2012)) by failing to specify the statutory basis for issuance of ALC's Section 309.204(a) operating permit. Surreply Dis. at 3. The People reiterate that Section 31(c) does not require that a complaint include such information, adding that the amended complaint meets Section 31(c)'s requirements by alleging that ALC violated 415 ILCS 5/12(a) and (b) and 35 Ill. Adm. Code 309.204(a). *Id.*

Regarding Counts I and II

The People assert that they did not admit that ALC's water pollution control permit is ambiguous, but that even if it is, they are entitled to offer extrinsic evidence to clarify any ambiguous terms. Surreply Dis. at 3-4 & n.2. The meaning of any such terms is a question of

fact that cannot be decided on a motion to dismiss, according to the People. *Id.* at 4-5. The People add that they attached ALC's water pollution control permit to their response to the dismissal motion as an example of the "extrinsic evidence that exists for the Board's consideration." *Id.* at 4.

Further, the People argue that they did not admit that ALC's water pollution control permit is ambiguous, but that even if it is, they are entitled to offer extrinsic evidence to clarify any ambiguous terms. Surreply Dis. at 3-4 & n.2. The meaning of any such terms is a question of fact that cannot be decided on a motion to dismiss, according to the People. *Id.* at 4-5. The People add that they attached ALC's water pollution control permit to their response to the dismissal motion as an example of the "extrinsic evidence that exists for the Board's consideration." *Id.* at 4.

Board Analysis and Ruling

In ruling on a motion to strike or dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See, e.g.*, Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004); *see also In re* Chicago Flood Litigation, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997). In assessing the adequacy of pleadings in a complaint, the Board has stated that "Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action." Loschen v. Grist Mill Confections, Inc., PCB 97-174, slip op. at 4 (June 5, 1997), citing Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303. "[L]egal conclusions unsupported by allegations of specific facts are insufficient." Village of Mettawa, 249 Ill. App. 3d at 557, 616 N.E.2d at 1303, citing Estate of Johnson v. Condell Memorial Hospital, 119 Ill. 2d 496, 509-10, 520 N.E.2d 37 (1988). A complaint's allegations are "sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action." People *ex rel.* William J. Scott v. College Hills Corp., 91 Ill. 2d 138, 145, 435 N.E.2d 463, 467 (1982).

For the reasons given below, the Board denies ALC's motion to strike or dismiss the amended complaint.

Regarding All Counts

Counts I and III. Regarding the alleged Section 12(a) violations, counts I and III of the first amended complaint allege, respectively, that ALC's disposal of leachate at the Village STP in excess of the limit in its operating permit and at the Galva WWTF without an operating permit threatened the pass through of wastewater into Green River and Edwards River, respectively. 1st Am. Comp. at 5, 10. The Board finds that these allegations meet the elements of Section 12(a), which are: (1) cause or threaten or allow the (2) discharge of any "contaminants" into the environment (3) so as to cause or tend to cause "water pollution" in Illinois or to violate the Board's water pollution regulations or standards. 415 ILCS 5/12(a) (2012). Landfill leachate is clearly a "contaminant"—*i.e.*, "any solid, liquid, or gaseous matter . . . from whatever source" (415 ILCS 5/3.165 (2012)). And the amended complaint alleges that leachate, if allowed to pass through a treatment facility untreated, would cause or tend to cause "water pollution"—that is, a discharge into "waters of the State" that will or is likely to create a nuisance or conditions

"harmful or detrimental or injurious to public health, safety or welfare" (415 ILCS 5/3.545 (2012)). And it is undisputed that Green and Edwards Rivers are "waters of the State" since they are "accumulations of water" in the State. 415 ILCS 5/3.550 (2012).

Counts II and IV. As to the alleged Section 12(b) violations, counts II and IV allege, respectively, that ALC operated equipment, including trucks, to haul leachate for disposal at the Village STP in excess of the operating limit and at the Galva WWTF without an operating permit was capable of causing or contributing to water pollution. 1st Am. Comp. at 7, 11-12. The Board finds the amended complaint's allegations meet the elements of a Section 12(b) violation, which are that the respondent (1) constructed, installed, or operated (2) any equipment, facility, vessel, or aircraft (3) capable of causing or contributing to "water pollution" (4) without an Agency-issued permit or in violation of such a permit. 415 ILCS 5/12(b) (2012). The only element that is not clearly met is the third one; but the Board found above that the amended complaint sufficiently alleges that, by threatening the pass through of untreated leachate into Green River and Edwards River, ALC's alleged discharge of leachate into the Village STP and Galva WWTF caused or tended to cause "water pollution." Given that the pass through allegation is incorporated by reference into counts II and IV (1st Am. Comp. at 6, 11), the Board rules that the amended complaint sufficiently alleges that the use of equipment for leachate disposal at the POTWs was capable of causing or contributing to "water pollution."

Further, the Board disagrees with ALC that actual rather than threatened harm must be alleged for a violation of Section 12(a) or 12(b). Section 12(a) proscribes, among other things, "threaten[ing]" the discharge of any contaminants into the environment, and Section 12(b) prohibits the construction, installation or operation of any equipment "capable" of causing or contributing to water pollution. It has long been settled that the Act not only prohibits one from causing water pollution but also from threatening to cause water pollution. *See*, *e.g.*, Allaert Rendering, Inc. v. PCB, 91 Ill. App. 3d 153, 156, 414 N.E.2d 492, 495 (3rd Dist. 1980); United City of Yorkville v. Hamman Farms, PCB 08-96, slip op. at 24 (Oct. 16, 2008).

The Board also finds ALC's reliance on Citizens Utilities Co. of Illinois v. PCB, 127 Ill. App. 3d 504, 468 N.E.2d 992 (3rd Dist. 1984) misplaced. Contrary to ALC's assertion, the Board did not find there that the respondent had violated Section 12 of the Act, and the appellate court, therefore, reviewed no such finding. Rather, the Board found that the respondent violated certain Board water pollution regulations and conditions in respondent's NPDES permit, including "operation and maintenance" standards. IEPA v. Citizens Utilities Co. of Illinois, PCB 79-142, slip op. at 16-17 (Jan. 12, 1984). The Board imposed a civil penalty only for the operation and maintenance violations (*id.* at 17), and on review the respondent challenged only the penalty (Citizens Utilities, 127 Ill. App. 3d at 505, 468 N.E.2d at 992). Ruling that the applicable permit provisions and Board regulations could not be violated absent a showing that operation and maintenance deficiencies caused "actual, resulting pollution," the appellate court reversed the Board's order imposing a civil penalty. 127 Ill. App. 3d at 507, 468 N.E.23 at 993-94. The court did not reverse "findings of violations of" Sections 12(a) and 12(f), as ALC claims. Reply Dis. at 11. Thus, its decision did not disturb settled precedent holding that actual harm is not a prerequisite to a violation of Section 12. *See*, *e.g.*, People v. Keeven, 68 Ill. App. 3d 91, 95, 385 N.E.2d 804, 806-07 (5th Dist. 1979). The Board notes that Citizens Utilities distinguishes Keeven on the ground that the violations of the NPDES permit and the Board rule

in Citizens Utilities "imposed a standard of actual pollution" that the provisions of the Act at issue in Keeven do not. Citizens Utilities, 127 Ill. App. 3d at 508, 468 N.E.2d at 994-95.

35 Ill. Adm. Code 309.204(a). Section 309.204(a) of the Board's water pollution regulations provides that no person may "cause or allow the use or operation of any treatment works, pretreatment works or wastewater source without an operating permit issued by the Agency" except as provided in subsections (b), (c), and (d) of Section 309.204. 35 Ill. Adm. Code 309.204(a). The Board's water pollution regulations define "wastewater" as "sewage, industrial waste, or other waste," whether treated or untreated. 35 Ill. Adm. Code 301.425. A "wastewater source," in turn, is "any equipment, facility, or other source" that discharges wastewater, directly or indirectly to the waters of the State." 35 Ill. Adm. Code 301.430. And "waters" means "all accumulations of water" flowing within, through, or along a border of the State, except for "sewers and treatment works," except as otherwise provided by Board rule. 35 Ill. Adm. Code 301.440.

The Board finds that the amended complaint meets these elements. In particular, ALC's landfill leachate constitutes "wastewater" that ALC, using equipment including trucks, allegedly discharged through the two POTWs into Green River and the Edwards Rivers, which are indisputably "waters of the State." While it is true that these discharges are alleged to have been directly into sewers tributary to the Village STP and Galva WWTF rather than the rivers themselves, the amended complaint alleges that these facilities discharge to the rivers, such that ALC's wastewater is discharged indirectly to the rivers. 1st Am. Comp. at 2, 5, 8, 10. And "wastewater" is defined to include treated as well as untreated waste, so the alleged discharges constitute wastewater even if they were in fact treated before reaching Green or Edwards River. Nor does ALC assert that its alleged leachate discharges fall within the exceptions to the permit requirement in subsections (b) through (d) of Section 309.204.[4]

Further, the Board is not convinced that the amended complaint states no claim for violation of Section 309.204(a) because it does not allege that ALC violated its landfill operating permit. As the People explain (*see* Surreply Dis. at 2), a permit to operate a municipal solid waste landfill (MSWLF) is issued pursuant to Section 21(d) of the Act (415 ILCS 5/21(d) (2012)), which is part of Title V (Land Pollution and Refuse Disposal), as well as implementing regulations, in particular 35 Ill. Adm. Code Parts 811, 812, and 814. That permitting regime clearly is distinct from the permitting scheme under the Act's provisions regarding water pollution and associated regulations, including Section 309.204. Moreover, no provision in Section 309.204 exempts from the operating-permit requirement a landfill permitted under Section 21(d) of the Act and MSWLF landfill regulations.

[4] Subsection (b) provides that no operating permit is required for discharges (1) for which an NPDES permit is required, or (2) for which a pretreatment permit has been issued by the Agency or for which an authorization to discharge has been issued by a POTW with an approved pretreatment program. 35 Ill. Adm. Code 309.204(b). Subsection (c) exempts from permitting smaller treatment works and wastewater sources serving a single building within certain parameters. *Id.* at 309.204(c). Finally, subsection (d) requires no operating permit for pretreatment works or wastewater sources discharging to a treatment works, provided the discharge meets specified standards. *Id.* at 309.204(d).

The Board further disagrees with ALC's position that no operating permit is required because its leachate discharges are not subject to NPDES permitting. For starters, the Board rules that ALC's claim that Section 309.204(a) is invalid because it conflicts with Section 12(f) of the Act (415 ILCS 5/12(f) (2012)) constitutes a collateral challenge to the regulation prohibited by Section 29(b) of the Act (415 ILCS 5/29(b) (2012). *See, e.g.*, Freedom Oil Co. v. IEPA, PCB 10-46, slip op. at 15 (Aug. 9, 2012). That rule provides in its entirety that "[a]ction by the Board in adopting any regulation for which judicial review could have been obtained under Section 41 of this Act shall not be subject to review regarding the regulation's validity or application in any subsequent proceeding under Title VII [Enforcement], Title IX [Variances] or Section 40 of this Act." 415 ILCS 5/29(b) (2012).

Moreover, even considering the merits of ALC's challenge, the Board finds no merit to the argument. Section 12(f) of the Act, which generally bars discharges to waters of the State without an NPDES permit, provides in relevant part that "[n]o permit shall be required *under this subsection and under Section 39(b) of this Act* for any discharge for which a permit is not required under" the CWA and associated regulations. 415 ILCS 5/12(f) (2012) (emphasis added). As the People point out, this provision bars only permitting requirements *in addition* to NPDES permitting under Section 12(f) and Section 39(b) of the Act (415 ILCS 5/39(b) (2012). By the terms of subpart B of part 309, which includes Section 309.204, Section 309.204 applies *solely* to discharges that are not required to have an NPDES permit. 35 Ill. Adm. Code 309.201(a). Permitting under Section 309.204(a), therefore, does not conflict with permitting pursuant to Section 12(f).

The Board further disagrees that Section 309.204(a) is inconsistent with Section 309.204(b)(1), which provides that no operating permit is required under Section 309.204 for any discharge for which an NPDES permit is required. 35 Ill. Adm. Code 309.204(b)(1). Subsection (b)(1) simply reflects the prohibition under Section 12(f) of the Act (415 ILCS 5/12(f) (2012) against requiring additional operating permits for discharges subject to NPDES permitting.

More generally, the Board notes that its authority to promulgate regulations concerning water pollution is not limited to implementing Illinois' NPDES permit program. Title III of the Act, concerning water pollution, expressly states that its provisions requiring the Board to promulgate regulations "necessary or appropriate" to obtain federal approval of Illinois' NPDES program (415 ILCS 5/13(b)(1) (2012); *see also id.* at 5/11(b)), are not to be construed to

> limit, affect, impair, or diminish, the authority of the Board . . . to regulate and control pollution of any kind, to restore, protect, or to enhance the quality of the environment, or to achieve all other purposes, or to enforce provisions, set forth in this Act or other State law or regulation. 415 ILCS 5/11(c) (2012); *see also*, *e.g.*, U.S. Steel Corp. v. PCB, 52 Ill. App. 3d 1, 4, 367 N.E.2d 327, 330-31 (2nd Dist. 1977).

Part 309 reflects the breadth of this authority. It includes a subpart concerning NPDES permits (Subpart A) as well as one regarding water pollution control permits (Subpart B), and was adopted under Section 13 of the Act (415 ILCS 5/13 (2012)), which concerns rulemaking to implement an NPDES program (415 ILCS 5/13(b) (2012)) and to generally promote Title III's

purposes and provisions (*id.* at 5/13(a)). *See* 35 Ill. Adm. Code Part 309, App. A. Among other things, Section 13(a) provides that the Board "may adopt" standards for the "issuance of permits for construction, installation, or operation of any equipment . . . capable of causing or contributing to water pollution or designed to prevent water pollution . . . ." 415 ILCS 5/13(a)(3). Accordingly, there is a statutory basis for Section 309.204, and, by extension, for permitting requirements for discharges to POTWs.

Pretreatment Standards. ALC challenges the legal sufficiency of the amended complaint on the ground that its allegation that unpermitted discharges of leachate "may cause serious harm" to the Village and Galva facilities states no claim for violation of the pretreatment standards. Comp. at 4, 10. According to ALC, actual harm is required to violate those standards. The Board disagrees that the amended complaint is deficient in this respect. The amended complaint does not seek relief based on any alleged violation of the pretreatment standards (Resp. Dis. at 14 n.4), so no allegations of actual harm to or interference with the POTWs were necessary. And the Board is persuaded that a single allegation of potential harm or interference, presumably made in support of the complaint's actual claims under Sections 12(a) and (b) of the Act (415 ILCS 5/12(a), (b) (2012)), is not prejudicial. Moreover, the Board finds Rosenbalm distinguishable. There, unlike in this case, the Agency amended the complaint at the first hearing to add additional alleged violations occurring on unspecified dates. Rosenbalm, PCB 71-299, slip op. at 3.

ALC also contends the amended complaint is barred by federal pretreatment standards adopted pursuant to Section 307(b) of the Clean Water Act (33 U.S.C. § 1317(b) (2006)) and Illinois pretreatment standards adopted pursuant to various provisions of the Act, including section 13.3 (415 ILCS 5/13.3 (2012)), as well as conditions in its own operating permit. However, ALC does not attempt to show that the Village STP and Galva WWTF have approved pretreatment programs pursuant to Part 310 of the Board's water pollution regulations (35 Ill. Adm. Code Parts 310), or that either POTW is required to have such a program.[5] In addition, ALC cites no authority establishing a delegation to POTWs of the State's authority to implement a pretreatment program. Nor does ALC claim that it has a pretreatment permit pursuant to Part 310 of the Board's water pollution regulations, which would bring its discharges within an exception to Section 309.204(a)'s operating permit requirement. 35 Ill. Adm. Code 309.204(b)(2) (no operating permit is required for discharges subject to a pretreatment permit or for which authorization has been issued by a POTW with an approved pretreatment program).

Further, any suggestion that ALC had "authorization to discharge" from the Village STP and Galva WWTF does not meet the exception to Section 309.204(a) because ALC does not show that (a) these facilities have approved pretreatment programs, and (b) the facilities gave the required "authorization to discharge," whether through a permit, license, ordinance, or "other mechanism" specified in the approved pretreatment program. 35 Ill. Adm. Code 310.110. Rather, ALC relies on the Hull and Vardijan affidavits to establish the required authorization. However, the Board granted above the motion to strike the affidavits, and observes that they do

[5] Under federal and state regulations, a POTW with a total design flow greater than five million gallons per day that receives certain kinds of industrial discharges must generally implement an approved pretreatment program. 40 C.F.R. § 403.8(a); 35 Ill. Adm. Code 310.501.

not support dismissal in any event because ALC does not show that the Village and Galva POTWs have approved pretreatment programs. As for the cited conditions in ALC's operating permit, the Board finds nothing in their language that purports to excuse ALC from complying with Section 309.204(a). Accordingly, the Board denies ALC's motion to dismiss the amended complaint based on the pretreatment program and ALC's operating permit.

Attorney General Authority. The Board rejects ALC's argument that the Attorney General lacks authority to initiate enforcement actions on her own motion under Section 31(c)(1) of the Act (415 ILCS 5/31(c)(1) (2012)). The Board has previously noted that after "'considering the legislative history of the 1996 amendments to Section 31 the Board has repeatedly found that they were not intended to bar the Attorney General from prosecuting an environmental violation.'" People v. Sheridan Sand & Gravel, PCB 06-177, slip op. at 14 (June 7, 2007), citing People v. Chiquita Processed Foods, L.L.C., PCB 02-156, slip op. at 4-5 (Nov. 21, 2002); *see also* People v. Sheridan-Joliet Land Development, LLC, PCB 13-19 & 13-20 (cons.), slip op. at 18-19 (Aug. 8, 2013); People v. Freeman United Coal Mining Co., LLC, PCB 10-61 & 11-02 (cons.), slip op. at 31 (Nov. 15, 2012); People v. Eagle-Picher Boge, PCB 99-152, slip op. at 7 (July 22, 1999).

The Board also finds no merit in ALC's request to overturn this authority based on People v. NL Industries, 152 Ill. 2d 82, 604 N.E.2d 349 (1992). ALC relies on the supreme court's holding there that where the Act allows "for the institution of a lawsuit without specifying which party can bring the suit, the Attorney General must be recognized as having authority to bring such an action." 152 Ill. 2d at 103, 604 N.E.2d at 358. From this, ALC reasons that where the Act does specify which party may file an action, as Section 31(c)(1) does, the Attorney General may not do so on her own motion. But NL Industries did not concern Section 31(c)(1), and accordingly does not bear on the scope of the Attorney General's authority to bring an enforcement action under Section 31. And, as discussed above, the Board has repeatedly held that Section 31(c)(1) does not bar the Attorney General from initiating an enforcement proceeding on her own motion.

Moreover, the Board agrees with the People that they were not required under Section 31(c)(1) of the Act (415 ILCS 5/31 (c)(1) (2012)) to specify the statute authorizing issuance of a Section 309.204(a) operating permit to ALC. That provision makes no reference to permit issuance. Rather, by its terms, it requires an enforcement complaint to "specify the provision of the Act, rule, regulation, permit, or term or condition thereof" that the respondent allegedly violated. 415 ILCS 5/31(c)(1) (2012). The Board finds that the amended complaint meets the requirements of this provision. *See* 1st Am. Comp. at 5, 8, 10, 12.

Regarding Counts I and II

According to ALC, the following phrases in its water pollution control permit are unenforceably ambiguous: (1) "operate . . . facilities described as . . . [t]he hauling of approximately 12,000 gpd" of leachate; (2) "approximately 12,000 gpd"; and (3) "head works." Reply Dis. at 5. As a matter of due process, a statute is void if it is so vague that persons of "common intelligence must necessarily guess at its meaning and differ as to its application." Ardt v. Illinois Department of Professional Regulation, 154 Ill. 2d 138, 156-57, 607 N.E.2d 1226, 1234 (1992) (internal quotations omitted); *see also* Citizens Utilities Co., 127 Ill. App. 3d

at 507, 468 N.E.2d at 994 (finding that without reference to "actual, resulting pollution," permit's operation and maintenance conditions were "too vague for rational enforcement").

The Board concludes that this issue cannot be resolved at this stage of the proceeding. A threshold question that the parties do not address is whether ALC may challenge its permit in this proceeding. Section 40(a)(1) of the Act (415 ILCS 5/40(a)(1) (2012) provides that if the Agency denies or grants a permit with conditions, the applicant "within 35 days" after service, may "petition for a hearing before the Board to contest the decision of the Agency." 415 ILCS 5/40(a)(1) (2012). Where this provision applies, failure to pursue an appeal bars a subsequent collateral attack on a permit. *See*, *e.g.*, City of Elgin v. County of Cook, 169 Ill. 2d 53, 65, 660 N.E.2d 875, 882 (1995); People v. Panhandle Eastern Pipe Line Co., PCB 99-191, slip op. at 16 (Nov. 15, 2001). Here, there is no evidence that ALC appealed issuance of its water pollution control permit, which it received in 2008. Nevertheless, this issue is not addressed in the parties' filings and the Board declines to consider it on this record.

On the merits, the record has not been sufficiently developed to resolve whether the permit is ambiguous and, if so, whether it may be clarified using extrinsic evidence. That is the appropriate inquiry under federal case law. *See*, *e.g.*, Natural Resources Defense Council, Inc. v. County of Los Angeles, 725 F.3d 1194, 1204-05 (9th Cir. 2013) (stating that permits are construed like contracts: if permit's language is plain, it alone determines permit's meaning, but that extrinsic evidence may be adduced to interpret ambiguous terms). And the parties here, by relying on a case resolving a contract dispute (Harris v. American General Finance Corp., 54 Ill. App. 3d 835, 368 N.E.2d 1099 (3d Dist. 1977)), seem to assume that the same rules of construction apply to permit interpretation under Illinois law. The Board agrees that that is the appropriate analysis, and, therefore, that the Agency's intent in drafting ALC's permit must be determined based on any unambiguous terms in the permit, but that extrinsic evidence is admissible to clarify any ambiguous terms. *See* Harris, 54 Ill. App. 3d at 839, 368 N.E.2d at 1103.

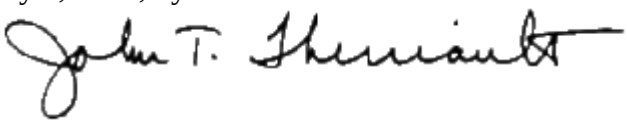
At this stage of the proceeding, the parties have not had the opportunity to develop evidence, on this or any other issue. Accordingly, the Board declines to resolve the permit interpretation question presented on a motion to dismiss.

CONCLUSION

For the reasons given above, the Board denies ALC's motion to strike or dismiss the first amended complaint. Any answer to the amended complaint must be filed on or before March 10, 2014, which is the 60th day after the date of this order. The Board directs and parties and the hearing officer to proceed expeditiously to hearing pursuant to the Board's order of December 20, 2012.

IT IS SO ORDERED.

I, John Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on January 9, 2014, by a vote of 4-0.



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John Therriault, Clerk
Illinois Pollution Control Board