BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

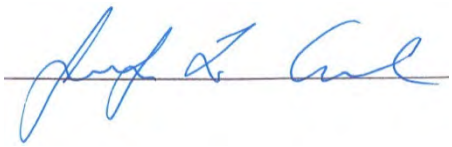
In the Matter of:	)	
	)	
SIERRA CLUB, ENVIRONMENTAL LAW AND POLICY CENTER, PRAIRIE RIVERS NETWORK, and CITIZENS AGAINST RUINING THE ENVIRONMENT	)	
	)	PCB No-2013-015
Complainants,	)	(Enforcement – Water)
	)	
v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondents	)	

NOTICE OF ELECTRONIC FILING

To: Attached Service List

PLEASE TAKE NOTICE that on June 21, 2013, I electronically filed with the Clerk of the Illinois Pollution Control Board: **CITIZEN GROUPS' RESPONSE TO RESPONDENT'S MOTION TO DISMISS**, a copy of which is served on you along with this notice.

Respectfully submitted,



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Dated: June 21, 2013

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CITIZEN GROUPS' RESPONSE TO RESPONDENT'S MOTION TO DISMISS

I. INTRODUCTION

Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (collectively "Citizen Groups") file this response to Respondent Midwest Generation's ("MWG") Motion to Dismiss and Memorandum in Support of Motion to Dismiss ("Motion to Dismiss"). MWG seeks dismissal of Citizen Groups' complaint as frivolous for failure to state a cause of action upon which the Illinois Pollution Control Board ("Board") can grant relief, and as duplicative for alleging substantially similar violations as were alleged in Notices of Violation ("NOVs") issued by the Illinois Environmental Protection Agency ("IEPA") and resulting Compliance Commitment Agreements ("CCAs"). *See* Mem. Supp. Mot. to Dismiss. As discussed herein, MWG's allegations are meritless and its Motion to Dismiss should be denied.

II. FACTUAL BACKGROUND

On October 3, 2012 Citizen Groups filed a complaint against MWG alleging hundreds of violations of the Illinois Environmental Protection Act (the "Act"), 415 ILCS §5/1 *et seq*. Specifically, Citizen Groups alleged three counts of open dumping violations at Powerton, Waukegan, and Will County, and four counts of water pollution at Joliet 29, Powerton, Waukegan, and Will County. Compl. ¶¶ 42-62. The complaint alleges the following distinct violations that were not alleged in the IEPA-issued NOVs: 12 violations of Illinois Class I Groundwater Quality Standards ("GQS"), including four antimony violations at Joliet 29, one chloride violation at Joliet 29, two boron violations at Waukegan, and one manganese violation at Waukegan; 259 violations of Illinois Class II GQS at Joliet 29, Powerton, Waukegan, and Will County; and 37 open dumping violations at Powerton, Waukegan, and Will County. Compl. ¶¶ 42-50, 52, 55, 58, 61, and Exs. B and C thereto.

On October 24, 2012, three weeks after Citizen Groups filed the complaint, MWG and IEPA entered into CCAs for Joliet 29, Powerton, Waukegan, and Will County ostensibly to resolve the violations of Illinois Class I GQS alleged in the NOVs issued by IEPA. *See* Mot. to Dismiss ¶¶ 3, 6, 9, 12, Ex. 1-4. The NOVs did not allege open dumping violations or the distinct violations of Illinois Class I and II GQS alleged in the complaint. The CCAs make no reference to Citizen Groups' complaint, despite the fact that the complaint was filed prior to October 15, when MWG executed the CCAs, and October 24, when they were executed by IEPA. *Id.*

MWG's Motion to Dismiss was filed on November 5, 2012.

MWG filed for Chapter 11 bankruptcy protection on December 17, 2012, after which date further proceedings in this case halted due to the bankruptcy code's automatic stay.

Pursuant to the CCAs, MWG submitted proposed Groundwater Management Zones ("GMZs") for Joliet 29, Powerton and Will County, and proposed Environmental Land Use Controls ("ELUCs") for Powerton, Waukegan, and Will County to IEPA on January 18, 2013. *See* Proposed GMZS and Proposed ELUCs, attached hereto as Exhibits A – F.

On April 22, 2013, the bankruptcy court lifted the stay of this matter for purposes of resolving the Motion to Dismiss.

On May 29, 2013, the Hearing Officer set a briefing schedule for resolving that motion, pursuant to which Citizen Groups file this Response.

III. STANDARD OF REVIEW

Illinois is a fact-pleading state which requires a pleader to set out the ultimate facts which support the cause of action; legal conclusions unsupported by allegations of specific facts are insufficient. *Schilling v. Hill*, PCB 10-100, slip op. at 7 (Mar. 15, 2012). "A complainant's allegations are 'sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action.'" *Id*. (citing *People v. College Hills Co.*, 91 Ill. 2d 138, 145, 435 N.E.2d 463, 467 (1982)). In determining whether a complaint alleges facts sufficient to support a cause of action, "only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts." *Id.* (citing *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 308, 430 N.E.2d 1005, 1008-09 (1981) (internal quotations omitted)). The complaint must include only enough facts to reasonably allow the respondent to prepare a defense. *People v. Inverse Investments, L.L.C.*, PCB 11-79, slip op. at 7 (Feb. 16, 2012) (citing *Cunningham v. City of Sullivan*, 15 Ill. App. 2d 561 (1958); 35 Ill. Adm. Code 103.204(c)(2)).

In ruling on a motion to 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., Schilling*, PCB 10-100, slip op. at 6 (Mar. 15, 2012); *People v. Freeman United Coal Co.*, PCB 10-61, slip op. at 11 (July 15, 2010); *United City of Yorkville v. Hamman Farms*, PCB 08-96, slip op. at 5 (Oct. 16, 2008); *Beers v. Calhoun*, PCB 04-204, slip op. at 2 (July 22, 2004). "Dismissal is proper only if it is clear that no set of facts could be proven that would entitle complainant to relief." *Beers*, PCB 04-204, slip op. at 2 (citing *People v. Peabody Coal Co.*, PCB 99-134, slip op. at 1-2 (June 20, 2002); *People v. Stein Steel Mills Co.*, PCB 02-1, slip op. at 1 (Nov. 15, 2001); *Callaizakis v. Astor Dev. Co.*, 4 Ill. App. 3d 163, 167-68, 280 N.E.2d 512, 516 (1972) ("dismissal is proper only where under no set of circumstances could the allegations support a cause of action") (internal citation omitted)); *see also Schilling*, PCB 10-100, at *5 (citing *Smith v. Cent. Ill. Reg'l Airport*, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003) ("[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief.")).

IV. ARGUMENT

Contrary to MWG's unsupported allegations, Citizen Groups' complaint is neither frivolous nor duplicative. First, MWG's strained interpretation of Section 31(c) of the Act as barring citizen groups from filing a citizen suit unless there is a "disagreement" between IEPA and the alleged violator as to the violations at issue is wrong. Second, the federal open dumping regulations cited in Citizen Groups' complaint form a part of Illinois law and thus are properly considered by the Board in determining violations of the Act. Third, Citizen Groups' complaint pleads facts more than adequate to satisfy the Board's pleading standards. Fourth, Citizen Groups' complaint is neither identical nor substantially similar to any other proceeding in

another forum, and therefore it is not duplicative. As further explained herein, MWG's Motion to Dismiss should be denied.

A. Citizen Enforcement Actions Under Section 31(d) of the Act Do Not Require a Disagreement Between IEPA and the Person Complained Against.

MWG's argument that Citizen Groups' suit is frivolous[1] is based on a flawed interpretation of Section 31(d) of the Act. MWG incorrectly argues that Section 31(d) requires citizen complaints to comply with every aspect of subsection 5/31(c), which specifies what the Illinois Attorney General's complaints must contain when the Attorney General files a complaint concerning "alleged violations which remain the subject of disagreement between the Agency and the person complained against…." *See* Mem. Supp. Mot. To Dismiss at 8-12. MWG's strained reading is that subsection 5/31(c)'s prerequisite for filing a state enforcement action – namely, that the alleged violations remain the subject of disagreement between the Agency and the person complained of – also applies to citizen suits. *Id.* MWG further asserts that the CCAs entered into between IEPA and MWG remove any disagreement between IEPA and MWG concerning the violations of groundwater standards set forth in the June NOVs. *Id*. at 12-14. Thus, MWG argues, Citizen Groups are barred from filing suit on those violations.

MWG is wrong. The existence of a CCA does not bar citizen actions concerning matters addressed in the CCAs. *People v. Freeman United Coal Co.*, PCB 10-61, slip op. at 9 (Apr. 18, 2013). If MWG's strained interpretation of Section 31 of the Act were correct, no citizen could file suit over violations that were the subject of a CCA (and therefore, under MWG's logic, no longer the subject of disagreement between IEPA and the violator), yet the Board in *Freeman United* allowed a citizen complaint to go forward despite the existence of a CCA. *Id*.

[1] A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." 35 Ill. Adm. Code § 101.202.

The plain language of subsection 31(c) further elucidates the error of MWG's argument. A common-sense reading of subsection 31(c) reveals that many of its requirements only apply to state enforcement actions, not citizen suits. For example, subsection 31(c) requires that "the Office of the Illinois Attorney General or the State's Attorney of the county in which the alleged violation occurred shall issue and serve [notice of the complaint]." Surely MWG would not argue that citizen enforcement complaints must be served by the Illinois Attorney General or a State's Attorney. Likewise, the language referring to "disagreement between the Agency and the person complained against" is clearly only applicable to state enforcement actions.

MWG's flawed interpretation also defies common sense, as it would lead to the absurd result that citizens could only use the authority granted by subsection 5/31(d) in the narrow window of time after IEPA has made a disagreement apparent by issuing a violation notice, but before the signing of a CCA.[2] This would radically cripple the effectiveness of the citizen suit provision and could not have been the intent of the legislature. Indeed, MWG is unable to cite a single case in which the Board or any court has held that an ongoing disagreement between IEPA and the party complained against is a prerequisite for a citizen enforcement action,[3] and it readily

[2] As it happens, our complaint was filed in this narrow window.

[3] The *Chrysler Realty* case that MWG cites, in which a federal district court held that a plaintiff did not have a private right of action to recover cleanup costs under the Illinois Environmental Protection Act, is inapt. In that case, *Chrysler Realty Corp. v. Thomas Industries, Inc.*, 97 F.Supp.2d 877 (N.D. Ill. 2000), the only reference to the relationship between subsections 31(c) and (d) is a footnote that reads:

> Section 5/31(d) does provide that any person may file a complaint with the Illinois Pollution Control Board against any person violating the Act. The complaint must meet the requirements of subsection (c), which pertain to alleged violations that remain the subject of disagreement between the Illinois Environmental Protection Agency and the person complained against.

Id. at 879 n.1. While the Court observed that subsection (c) pertains to ongoing disagreements between IEPA and a party complained against, it did not conclude that all aspects of subsection (c), including the violations to which it pertains, also apply to complaints under subsection (d). There is no conflict between the Court's observation and what we believe to be a common-sense interpretation of subsection 31(c) – State enforcement actions cannot be brought before the Board unless there is an ongoing disagreement between the State and the person complained against, while all enforcement actions, be they State enforcement actions or citizen complaints, must meet the content requirements for complaints enumerated in that subsection.

admits that there are no such cases. *See* Mem. Supp. Mot. to Dismiss at 15-16 ("the Board has not specifically addressed the language concerning disagreements between the Agency and the person complained against.").

The only reasonable interpretation of subsection 31(d) is that it requires citizen complaints to meet the *content* requirements for complaints set out in subsection 31(c):

> a formal complaint . . . shall specify the provision of the Act, rule, regulation, permit, or term or condition thereof under which such person is said to be in violation and a statement of the manner in and the extent to which such person is said to violate the Act, rule, regulation, permit, or term or condition thereof and shall require the person so complained against to answer the charges of such formal complaint at a hearing before the Board….

The cases cited by MWG support that reading. *See Gregory v. Regional Ready Mix*, LLC, PCB 10-106 (Nov. 18, 2010) (regarding the specificity of pleadings); *Schilling*, PCB 10-100 (Nov. 4, 2010) (same); *Leesman v. CIMCO Recycling*, PCB 11-1 (Oct. 7, 2010) (same); *Finley v. IFCO ICS-Chicago, Inc.*, PCB 02-208 (Dec. 5, 2002) (regarding the requirement for a hearing on the complaint). MWG's strained, erroneous interpretation of subsection 31(d) must be rejected.

B. Citizen Groups' Open Dumping Claims Allege Violations of Illinois Law and Are Based on Substantial Factual Support.

Citizen Groups allege violations of Illinois law prohibiting open dumping. 415 ILCS § 5/21(a). That Illinois law clearly incorporates elements of federal open dumping regulations. MWG's arguments that the Board cannot enforce federal law are not relevant to our alleged violations of Illinois law. MWG's arguments invoking identical-in-substance rulemaking authority in the context of municipal solid waste regulations are equally irrelevant. Finally, the self-evident fact that the coal ash ponds at issue in the Citizen Groups' complaint are not landfills is also irrelevant since this Board has repeatedly applied the Illinois open dumping prohibition to

non-landfill circumstances. Citizen Groups' open dumping claims are therefore properly before the Board, have more than adequate factual support, and cannot be dismissed as frivolous.

1. MWG Violated Illinois Law Prohibiting Open Dumping, which Incorporates Federal Open Dumping Regulations.

The federal open dumping regulations cited in Citizen Groups' complaint form a part of Illinois law and thus are properly considered by the Board in determining violations of the Act. MWG incorrectly argues that all references to federal regulations must be stripped from our open dumping claims. *See* Mem. Supp. Mot. to Dismiss 15-18. To be clear, Citizen Groups are not alleging violations of federal law before the Board. Rather, Citizen Groups allege that MWG violated Illinois law, specifically 415 ILCS § 5/21(a). Compl. ¶¶ 33-35, 42-50. The federal regulations that define the alleged violations are cited in, and thus incorporated by reference into, the Illinois regulations implementing the Act. The federal regulations are, as a result, part of Illinois law, and it is necessary for the Board to look to those federal regulations in determining whether MWG violated state law. *See Commonwealth Edison Co. v. Illinois Pollution Control Bd.*, 468 N.E.2d 1339 (Ill. App. Ct. 1984).

Commonwealth Edison is especially instructive because, in that case, the Illinois Appellate Court held that provisions of federal law referenced in Board regulations become part of Illinois law. *Id*. at 1343. Specifically, the Appellate Court held that the mere identification of a specific statutory provision makes that provision enforceable under the referencing statute; no specific incorporating language is required. *Id.* The Court explained:

> [T]he federal regulations which implement RCRA are accompanied by appendices numbered I, II, IV and V. Those four appendices to the federal RCRA rules are referenced in appendices A, B, C, D and E to the rules promulgated by the IPCB. The petitioners contend that to simply refer to the federal appendices, without actual incorporation of those federal appendices by reference renders the appendices invalid. This contention strikes us as somewhat frivolous. *Clearly, by referring to the federal appendices, those provisions become a part of the Illinois*

> *regulatory structure. Whether the federal appendices are incorporated by reference, or simply identified with a signal "see", the result is the same and the appendices become a part of the administrative law of this state.*

Id. (emphasis added).

The Illinois prohibition on open dumping in 415 ILCS § 5/21(a) must be interpreted consistent with the Appellate Court's decision in *Commonwealth Edison*. Based on that precedent, the federal RCRA regulations referenced in 415 ILCS § 5/3.445 are incorporated into and are part of Illinois law. As set forth in our complaint, Section 21(a) of the Act prohibits "the open dumping of any waste." 415 ILCS § 5/21(a); Compl. ¶ 33. The Act defines "open dumping" as "the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill." *Id.* The Act defines "sanitary landfill" as "a facility permitted by the Agency for the disposal of waste on land meeting the requirements of the Resource Conservation and Recovery Act ["RCRA"] [42 U.S.C.A. § 6901 et seq.], *and regulations thereunder*." 415 ILCS § 5/3.445 (emphasis added); Compl. ¶ 33.

RCRA, in turn, defines a sanitary landfill by the specific criteria found in 40 CFR Part 247. Compl. ¶ 33. Under 40 CFR § 257.1, facilities that do not meet the criteria at 40 CFR § 257.3-4, including that which prohibits a facility from "contaminat[ing] an underground drinking water source beyond the solid waste boundary or beyond an alternative compliance boundary," are considered prohibited open dumps. 40 CFR § 257.3-4(a); Compl. ¶ 34. Groundwater contamination is demonstrated by an exceedance of one of the Maximum Contaminant Levels (MCLs) set forth in 40 CFR pt. 257 in either an actual drinking water source, or in an aquifer with less than 10,000 mg/L total dissolved solids. 40 CFR § 257.3-4; Compl. ¶ 35. All of these cross-referenced federal definitions, then, form part of Illinois law and are enforceable as such.

The relevance of the federal regulations to Citizen Groups' open dumping claims under state law is further evidenced by the fact that Illinois provisions must rely on the federal regulations for criteria necessary to establish the applicability of the Section 21(a) open dumping proscription. The structure of the Illinois open dumping prohibition parallels the structure of federal law. The federal RCRA statute defines an "open dump" as "any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under section 6944 of this title and which is not a facility for the disposal of hazardous waste." 42 U.S.C. § 6903(14). In other words, an open dump is any waste disposal site that is not a sanitary landfill or a hazardous waste landfill. Illinois adopted the same relationship between open dumps and sanitary landfills in the Act, by defining open dumping as "the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill." 415 ILCS § 5/3.305.

The critical difference between Illinois and federal law on this subject is that federal regulations provide detailed criteria for distinguishing between open dumps and sanitary landfills by defining open dumps,[4] while Illinois law does not. Specifically, 40 CFR § 257.1(a) states that "facilities [or practices] failing to satisfy either the criteria in §§ 257.1 through 257.4 or §§ 257.5 through 257.30 are considered open dumps [or open dumping]." These criteria include 40 CFR § 257.3-4, which explains how groundwater contamination is used to define an open dump. Illinois has no corresponding set of criteria. The Illinois definitions must therefore rely on the federal regulations that they cite.

Finally, the Board has recognized the historical and structural alignment between the Illinois open dumping prohibition and the federal open dumping criteria:

[4] The open dumping regulations were required by 42 USC § 6944(a) and promulgated as 40 CFR § 257. 40 CFR § 257.2 defines "open dump" as "a facility for the disposal of solid waste which does not comply with this part."

> USEPA adopted part 257 in 1979 to further the purposes of RCRA Subtitle D and provide guidance as to whether a site is an illegal "open dump" or a legal "landfill." The counterpart in Illinois law to this older segment of 40 C.F.R. 257 is Section 3.24 [now numbered 3.305] and 21(a) of the Act, which define and prohibit "open dumping" in Illinois.

In the Matter of RCRA Update, USEPA Regulations, R97-21, R98-3, and R98-5, Final Order and Opinion at 11, Aug. 20, 1998 (internal citations omitted) (hereinafter "1998 RCRA Update"). The Illinois counterpart lacks the substance of the federal criteria. Instead, as outlined above, the Illinois counterpart incorporates the federal criteria by reference.

In sum, the federal regulations referenced in our complaint are a necessary part of the Illinois Environmental Protection Act. A violation of those regulations is a violation of Illinois law. References to those regulations are properly included in Citizen Group's complaint and the Board clearly has jurisdiction over violations of those regulations. MWG's assertions to the contrary are incorrect.

2. MWG Mischaracterizes Board Precedent.

MWG is incorrect in asserting that the Board has refrained from adopting regulations similar to 40 CFR 257. MWG argues that the Board "has specifically refrained from adopting regulations that are identical in substance to 40 CFR 257," but attempts to support this argument by citing an unrelated rulemaking that has no bearing on this case. Mem. Supp. Mot. to Dismiss 17. In that rulemaking, the Board was amending municipal solid waste regulations. *In the Matter of: RCRA Subtitle D Update, USEPA Regulations (July 1, 1996 through December 31, 1996)*, R97-20, Final Order, Nov. 20, 1997 (hereinafter "1997 RCRA Update"). It was doing so pursuant to 415 ILCS § 5/22.40, which provides that the Board "shall adopt rules that are identical in substance to federal regulations or amendments thereto . . . *insofar as those*

regulations relate to a municipal solid waste landfill unit program." (emphasis added). The Board was thus narrowly focused on municipal solid waste regulations.

The EPA regulations that the Board declined to adopt at that time, by contrast, dealt with non-municipal landfills, specifically those accepting Conditionally Exempt Small Quantity Generator (CESQG) hazardous wastes.[5] The Board stated that "[o]ur identical-in-substance mandate under 22.40 of the Act clearly focuses on the federal rules of 40 CFR 258, not 40 CFR 257 or RCRA Subtitle D. We view the 40 CFR 257 requirements as outside the scope of our mandate." 1997 RCRA Update at 3. The Board correctly determined that it could not use its municipal landfill rulemaking authority to adopt rules for non-municipal landfills accepting CESQG waste. This holding has no relevance to our case—to the best of our knowledge the Board has not considered adopting 40 CFR § 257.3-4, and in fact has no reason to do so because, as discussed above, the Illinois statute that serves as the counterpart to the federal open dumping prohibition incorporates the federal regulations.

3. Citizen Groups Adequately Pled Facts Sufficient to Support Open Dumping Claims and Meet Illinois Pleading Requirements.

Citizen Groups' complaint pleads facts more than adequate to satisfy the Board's pleading standards. MWG alleges, incorrectly, that Counts 1, 2 and 3 of the complaint "have no basis in fact" and therefore fail to state a claim as a matter of law. Mem. Supp. Mot. to Dismiss 18. MWG's argument is based on its claim that Citizen Groups "do not include any facts or statements to establish that the ash ponds" fall within the scope of the Act's open dumping proscriptions. *Id*. The facts contained in Citizen Groups' complaint belie MWG's argument.

Citizen Groups' allege facts more than sufficient to meet pleading requirements under both Section 31(c) of the Act and the Board's rules. Section 31(c) provides 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, rule [or] regulation . . . ." 415 ILCS § 5/31(c). The Board's rules further codify the requirements for the contents of a complaint, including:

> (1) A reference to the provision of the Act and regulations that the respondents are alleged to be violating;
> (2) The dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations. The complaint must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense; and
> (3) A concise statement of the relief that the complainant seeks.

35 Ill. Adm. Code § 103.204(c). These requirements are met when the complaint lists the source of pollution, e.g., construction activities, and the year of the violation. *Schilling v. Hill*, PCB 10-100, slip op. at 10-11 (Nov. 4, 2010).

Citizen Groups' complaint clearly meets those requirements. The complaint alleges that "MWG, through the coal ash disposal ponds at [Powerton, Waukegan, and Will County], has caused or contributed to contamination of the groundwater." Compl. ¶¶ 43, 46, 49. For all plants, the complaint identifies the source of the contamination and the extent of the contamination by date, by pollutant, and by monitoring well. Compl. ¶¶ 42-62 and Exs. B and C thereto. This is more than enough to "advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense." 35 Ill. Adm. Code § 103.204(c). The details of *how* the impoundments caused the contamination are not available to us and are not required at the pleading stage. *See Schilling v. Hill*, PCB 10-100, slip op. at 7 (Mar. 15, 2012) (citing *People ex rel. Fahner*, 88 Ill. 2d at 308 ("Fact-pleading does not require a complainant to set out its evidence: to the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts.") (internal quotations omitted).

4. Board Precedent Establishes that the Act's Open Dumping Proscriptions Apply to the Coal Ash Impoundments at Issue in Citizen Groups' Complaint.

Board precedent shows that the Act's open dumping provisions apply in this case. MWG points out that coal ash is stored in impoundments, not landfills, suggesting that applicability of the open dumping provisions turns on that distinction. It does not. The Illinois open dumping prohibition has been applied multiple times to non-landfill storage, and the coal ash ponds at issue in Citizen Groups' complaint are both impoundments and open dumps. *See, e.g., People v. State Oil Co*., PCB 97-103, slip op. at 4, Aug. 19, 1999. In *People v. State Oil Co*., the Board followed federal precedent and held that leakage from an underground storage tank constituted waste to which the Act's Section 21(a) open dumping proscriptions applied:

> When determining whether material is a "waste," the Board considers federal court interpretations of the definition of "solid waste" under the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 et seq. The RCRA definition of "solid waste" is nearly identical to the definition of "waste" under the Act.
>
> Federal courts interpreting the RCRA definition have found that once petroleum leaks from an underground storage tank, it becomes "discarded material" and thus a "solid waste." See, *e.g.,* Agricultural Excess & Surplus Insurance Company v. A.B.D. Tank & Pump Co., 878 F. Supp. 1091, 1095 (N.D. Ill. 1995) ("[L]eaked gasoline from an underground storage tank is no longer useful and is appropriately defined as discarded material or solid waste."); Zands v. Nelson, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991) ("[G]asoline is no longer a useful product after it leaks into, and contaminates, the soil."). The Board finds these cases persuasive here.
>
> The Board further finds that the facts pled, if proven, would demonstrate violations of Sections 21(a) and 21(d)(2). Accordingly, the Board will not dismiss the Abrahams' claims under Sections 21(a) and 21(d)(2) as frivolous, and denies the Anests' motion to dismiss these claims.

PCB 97-103, slip op. at 4, Aug. 19, 1999 (internal citations omitted). The Board has repeatedly affirmed this holding. *See*, *e.g.*, *Universal Scrap Metal, Inc. v. Flexi-Van Leasing, Inc.*, PCB 99-149, slip op. at 7, Apr. 5, 2001 ("[T]he Board has previously held that contamination from

leaking underground tanks satisfies the statutory prerequisites of "open dumping" under Section 21(a) of the Act"); *People v. State Oil Co.*, PCB 97-103, slip op. at 21, Mar. 20, 2003 ("The Board reconfirms that the leaked petroleum in this case was waste."). Just as in these underground storage tank cases, because MWG's coal ash impoundments have leaked or leached contaminants into the groundwater, they have discarded waste, regardless of the fact that the sources of the contamination were surface impoundments.

MWG does not cite any persuasive precedent to the contrary. MWG cites *Petition of Ameren Energy Generating Company for Adjusted Standard from 35 Ill. Code Parts 811, 814, 815;* however, in that case, the Board merely stated that "[f]or the purposes of this part [810] and 35 Ill. Code 811 through 815, a surface impoundment is not a landfill." *In re Petition of Ameren Energy Generating Company for Adjusted Standard from 35 Ill. Code Parts 811, 814, 815*, AS 09-1, slip op. at 4, Mar. 5, 2009. The Ameren proceeding is irrelevant to the present case because MWG's impoundments do not need to be landfills for them to be liable for violations of the open dumping provisions of the Act.

MWG also argues, without citing any authority, that the fact that the ash ponds have NPDES permits means that they cannot be disposal sites for purposes of the open dumping prohibition. Mem. Supp. Mot. to Dismiss 20. The underground storage tank cases cited above make clear that a site can be both a permitted, regulated storage area and a disposal site in violation of Illinois open dumping proscriptions under Section 21(a) of the Act when, as is the case here, the storage unit fails to contain the waste.

In sum, MWG's arguments that Citizen Groups' complaint is frivolous must be rejected.

C. Citizen's Groups' Complaint Is Not Duplicative.

Contrary to MWG's assertions, Citizen Groups' complaint is not duplicative. A matter is "duplicative" if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code § 101.202. To determine whether a matter is "identical or substantially similar" to one brought before another forum, the Board has evaluated a number of factors, including whether: (i) the parties to the two matters are the same, (ii) the proceedings are based on the same legal theories, (iii) the violations alleged in the two matters took place over the same time period, and (iv) the same relief is sought in the two proceedings. *See Freeman United Coal Co.*, PCB 10-61, slip op. at 14-15 (July 15, 2010); *Yorkville v. Hamman Farms*, PCB 08-96, slip op. at 5-6 (Apr. 2, 2009). Any one of these criteria alone is sufficient to establish that a complaint is not duplicative. *See UAW v.Caterpillar, Inc*., PCB 94-240, slip op. at 5 (Nov. 3, 1994) (complaint not duplicative solely because issues before the Board were not being "litigated before any other judicial forum. . ."); *League of Women Voters v. North Shore Sanitary Dist*., PCB 1970-007, slip op. at 1-36 (Oct. 8, 1970) (complaint not duplicative when violations of different laws alleged but same relief sought).

Citizen Groups' complaint is not duplicative because none of the above criteria applies. First, no other forum has addressed the allegations contained in Citizen Groups' complaint. Second, the parties in the two matters are not the same because Citizen Groups are not, nor could they be, parties to the CCAs entered into between IEPA and MWG. Third, the complaint alleges different violations of the Act, including twelve additional violations of Class I GQS, 259 violations of Class II GQS, and 37 violations of the open dumping prohibition under section 21 of the Act – a legal theory that IEPA never raised in the NOVs issued to MWG. Fourth, the groundwater quality violations alleged in the complaint occurred over a different time period

than those alleged by IEPA in the NOVs. Finally, the relief requested by Citizen Groups is very different and far more extensive than the remedy provided in the CCAs with regard to Joliet 29, Powerton, Will County and Waukegan. Because the complaint does not meet any single criterion used by the Board to determine duplicity, it is not duplicative and may not be dismissed as such.

1. The Allegations in the Complaint Have Not Been Brought Before Another Forum.

Citizen Groups' complaint is not duplicative because none of the allegations in the complaint have been addressed by the Board or "another forum." The Board has consistently held that "another forum" refers to adjudicatory proceedings before administrative or judicial tribunals. *See, e.g.*, In re: Revision of the Board's Procedural Rules: 35 Ill. Code, R00-20 at 6 (Mar. 16, 2000); *Finley*, PCB 02-208, slip op. at 9 (PCB Aug. 8, 2002) (complaint not duplicative when Notice of Violation neither "commence[d], or [was] the product of, an adjudicatory proceeding by a tribunal, either administrative or judicial"); *UAW v. Caterpillar, Inc*., PCB 94-240, slip op. at 5 (Nov. 3, 1994).

Board decisions further clarify that anything short of adjudication in such a tribunal does not make a complaint duplicative. The issuance of an NOV does not render a complaint duplicative. *Finley*, PCB 02-208, slip op. at 9. Even if an enforcement proceeding ensues from an NOV, it does not render a complaint filed prior to its commencement duplicative. *Id*. A complaint is determined to be duplicative, or not, based on the circumstances present at the time it is filed. *Id.* ("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.")

Likewise, participation in a voluntary program offered by the IEPA does not render a complaint duplicative. As the Board explained in *UAW v.Caterpillar, Inc*.,

> In the context of the adjudication of environmental enforcement cases, the Agency is not a duplicative forum to the Board. Rather, the Agency…is the prosecutorial arm of the enforcement process. When the Agency chooses to work with companies in its voluntary program, it may of course exercise its prosecutorial discretion to bring or not bring a complaint before the Board or a court. The exercise of this discretion however does not make the Agency another 'forum' for the adjudication of a citizen's enforcement complaint properly brought pursuant to Section 31(b) of the Act. *Since the issues before the Board are not being litigated before any other judicial forum with jurisdiction to hear and decide these issues, this complaint is not duplicitous*.

PCB No. 94-240, slip op. at 5 (Nov. 3, 1994) (emphasis added). Finally, the Board recently held – and more recently reiterated – that a CCA, entered into prior to the filing of a complaint and related to violations alleged in that complaint, does not make the complaint duplicative. Rather, it may be considered in determining appropriate penalties. *Freeman United Coal Co.*, PCB 10-61, slip op. at 63 (Nov. 15, 2012); *Freeman United Coal Co.*, PCB 10-61, slip op. at 9 (Apr. 18, 2013).

Here, no administrative or judicial tribunal has addressed the allegations in Citizen Groups' complaint. When Citizen Groups filed their complaint with the Board on October 3, 2012, the only pre-enforcement-related action that had taken place, concerning just some of the allegations made in their complaint, was IEPA's issuance of NOVs to MWG in June 2012. *See* Compl., Exs. K-N. Because, as this Board held in *Finley*, duplicity is determined based on the circumstances that exist at the time the complaint is filed, the issuance of an NOV by IEPA prior to the filing of Citizen Groups' complaint does not render the complaint duplicative. *Finley*, PCB 02-208, slip op. at 9.

The CCAs later entered into between IEPA and MWG do not alter that analysis. Those CCAs were entered into three weeks *after* Citizen Groups filed their complaint, and as such fall outside the scope of proceedings considered in determining whether the complaint is duplicative. *See id.* Moreover, even if IEPA and MWG had executed the CCAs before Citizen Groups filed

their complaint, the complaint would still not be duplicative because CCAs do not constitute "another forum," but rather may be considered only in determining appropriate penalties. *Freeman United Coal Co.*, PCB 10-61, slip op. at 63 (Nov. 15, 2012); *Freeman United Coal Co*., PCB 10-61, slip op. at 9 (Apr. 18, 2013). Thus, the CCAs do not render Citizen Groups' complaint duplicative.

MWG argues that the Board should accept the proposition that CCAs are "similar to a settlement filed in enforcement cases brought before a circuit court." Mem. Supp. Mot. to Dismiss 23. That is not an apt comparison. CCAs present no opportunity for public intervention or input, and the CCAs are developed entirely out of the public eye. Court cases, in contrast, are public actions in which interested members of the public may attend, sometimes intervene, present evidence and cross examine witnesses, and become intimately involved in the details and fine-tuning of enforcement settlements. This Board recognizes the important distinction between formal, transparent adjudicatory proceedings in courts and administrative tribunals and private agreements such as CCAs. *See UAW v. Caterpillar, Inc.*, PCB No. 94-240, slip op. at 5 (Nov. 3, 1994) (Participation in a voluntary program offered by the IEPA does not render a complaint duplicative.) MWG's analogy fails.

In sum, the allegations in Citizen Groups' complaint have never been addressed in another forum because (i) those allegations have never been adjudicated before an administrative or judicial tribunal, (ii) the only pre-enforcement activity that had taken place prior to filing the complaint was IEPA's issuance of NOVs, and (iii) the CCAs subsequently entered into between IEPA and MWG do not constitute "another forum." Therefore, Citizen Groups' complaint may not be dismissed as duplicative.

2. The Allegations in the Complaint are Not Identical or Substantially Similar to Those Alleged by IEPA in the NOVs or the Resulting CCAs.

In determining whether two matters are identical or substantially similar, the Board considers whether: (1) the parties are the same, (2) the allegations rely on the same legal theories, (3) the alleged violations occurred over the same period of time, and (4) the same relief is sought. *See Freeman United Coal Co.,* PCB 10-61, slip op. at 13; *Hamman Farms*, PCB 08-96, slip. op. at 5-6. As noted above, disproving any one of these factors alone suffices to establish the complaint is not duplicative. Here, (1) Citizen Groups are not parties to the CCAs; (2) the complaint alleges violations of different provisions of Illinois law not alleged by IEPA in the NOVs; (3) the complaint alleges different violations of groundwater quality standards over a longer period of time than alleged by IEPA; and (4) the relief that Citizen Groups request is significantly different from any remedy provided in the CCAs. Because none of the criteria rendering a complaint "identical or similar" to a proceeding before another forum is present here, the complaint is not duplicative.

i. Citizen Groups are not parties to the CCAs.

Citizen Groups' complaint is not duplicative because Citizen Groups played no role in the formulation of the CCAs and certainly were not "parties" thereto. In determining whether a complaint is identical or substantially similar to a proceeding before another forum, and thus duplicative, the Board has considered whether the same parties were involved in both matters. *See Hamman Farms*, PCB 08-96, slip. op. at 5 (Apr. 2, 2009) (finding complaint was not duplicative where complainant was not a party to a separate enforcement action filed in circuit court); *see also Indian Creek Development Co.,* PCB 07-44, slip op. at 6 (Mar. 15, 2007).

Here, Citizen Groups are not, nor could they be, parties to the CCAs entered into between IEPA and MWG. *See* Mem. Supp. Mot. to Dismiss, Ex. 1-4. The provisions of the Act

authorizing IEPA to enter into CCAs do not allow for citizen intervention or participation in the process. *See* 415 ILCS § 5/31(a) (7)-(10). Because the parties to the respective matters differ, the complaint is not duplicative.

ii. Citizen Groups Allege Violations of a Different Provision of Illinois Law than IEPA Alleged in the NOVs.

Citizen Groups' complaint also is not duplicative because it is based, in part, on different legal theories than the allegations that IEPA raised against MWG in the NOVs and the resulting CCAs. Where a complaint alleges violations of different provisions of law than alleged in another matter, the complaint is not duplicative. *See Hamman Farms*, PCB 08-96, slip op. at 5-6 (Apr. 2, 2009) (citizen complaint not duplicative where complaint alleges violations of different subsections of Section 21 of the Act); *Indian Creek Development Co.*, PCB 07-44, slip op. at 6 (Mar. 15, 2007) (where complaint alleges violations of a different Section of the Act than alleged in an earlier lawsuit stemming from same incident, complaint is not duplicative); *Finley*, PCB 02-208, slip op. at 8-11 (complaint not duplicative of NOV when it alleged violations of a different category of air pollution, and violations of a separate provision of the Act, than were included in the NOVs).

Here, the complaint not only alleges water pollution in violation of Section 12(a) and (d) of the Act, 415 ILCS §§ 5/12(a), (d), but also alleges 37 open dumping violations under section 21(a) of the Act, 415 ILCS § 5/21(a).The NOVs, in contrast, only allege water pollution in violation of Section 12 of the Act, 415 ILCS §§ 5/12(a), (d). *See* Compl., Ex. K-N. The Section 21(a) prohibition on open dumping is a wholly distinct provision of Illinois law from the Section 12 proscriptions on water pollution. *See* 415 ILCS § 5/21(a); *id.* §§ 5/12(a), (d). Unlike the groundwater protection provisions of Section 12 of the Act that prohibit only water pollution, the Section 21(a) open dumping provision prohibits pollution of both land and water. The 37 alleged

open dumping violations of Section 21(a) of the Act cannot be conflated with the alleged violations of Section 12 of the Act because they are based on an entirely different legal theory.[6] Because Citizen Groups alleged violations of Section 21(a) open dumping standards, whereas the NOVs issued by IEPA only alleged violations of groundwater standards under Section 12 of the Act, Citizen Groups' complaint is not duplicative.

iii. The Complaint Alleges Different Violations of Illinois Groundwater Standards, Over a Different Time Frame, Than Were Alleged by IEPA in the NOVs.

The complaint also is not duplicative because it alleges *different* violations of the same provisions of law over a different time frame than alleged by IEPA in the NOVs. The Board has held that, where a complaint alleges distinct violations from the violations of the same provision of law alleged in a proceeding in a different forum, the complaint is not duplicative. *See Freeman United Coal Co.,* PCB 10-61, slip op. at 15 (July 15, 2010) (motion to reconsider denied at *Freeman United Coal Co*., PCB 10-61, slip op. at 42 (Nov. 15, 2012)); *Indian Creek Development Co*., PCB 07-44, slip op. at 6 (Mar. 15, 2007) (where complaint alleges new, different violations of the same sections of the Act than were alleged in an earlier lawsuit stemming from same incident, complaint is not duplicative).

The complaint alleges twelve additional violations of Illinois Class I groundwater standards under section 12 of the Act, 415 ILCS §§ 5/12(a), (d), that were not alleged by IEPA in the NOVs. The new violations raised in the complaint include:

- 4 additional violations of Class I GQS for antimony at Joliet 29
- 1 additional violation of Class I GQS for iron at Joliet 29, and
- 4 additional violations of Class I GQS for chloride at Joliet 29;
- 2 additional violations of Class I GQS for boron at Waukegan; and

[6] Whether the open dumping violations stem from the same facts as the groundwater violations is of no consequence. *See Indian Creek Development Co*., PCB 07-44, slip op. at 6; *Lake County Forest Preserve Dist. v. Ostro*, PCB 92-80, slip op. at 1 (July 30, 1992) (complaint not duplicative notwithstanding being based on the same actions as suit in another forum when it relied on different legal theory than the separate proceeding).

- 1 additional violation of Class I GQS for manganese at Waukegan.

See Compl. and Ex. B thereto. Moreover, Citizen Groups allege 259 violations of Class II groundwater standards not alleged by IEPA in the NOVs. Compl. and Ex. C. thereto.

In addition, the violations alleged by Citizen Groups extend over a different time frame than those alleged by IEPA in the NOVs. The Board has held that complaints are not duplicative when their allegations extend over a different period of time than the violations alleged in separate proceedings. *See Freeman United Coal Co*., PCB 10-61, slip op. at 15 (July 15, 2010) (where intervenors' allegations extend three years beyond allegations contained in People's complaint, intervenors' complaint not duplicative) (motion to reconsider denied at *Freeman United Coal Co.*, PCB 10-61, slip op. at 42 (Nov. 15, 2012)); *Hamman Farms*, PCB 08-96, slip. op. at 6 (Apr. 2, 2009) (even where some overlap in timeframe of alleged violations, complaint not duplicative when complainants alleged longer period of violations); *Finley*, PCB 02-208, slip op. at 8-9 (citizen complaint not duplicative of EPA-issued NOV when the NOV "refers only to a March 1, 2001 inspection of the plant…. 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*.") (emphasis in original).

Citizen Groups allege violations of Class I GQS at Joliet 29 and Waukegan that extend over a different, and longer, period of time than the violations alleged by IEPA in the NOVs. At Joliet 29, the violations of Class I GQS alleged in the complaint extend over a year and a quarter beyond the last (and only) alleged violation in the NOV. *See* Compl. and Exs. B, K thereto. Specifically, whereas the NOV only alleges one violation of Class I GQS for antimony on December 6, 2010, the complaint alleges three additional violations of Class I antimony standards from September 2011 through March 2012. *Id.* Further, whereas the NOV alleges only

a single violation of Class I GQS for iron at Joliet 29, dated June 14, 2011, the complaint alleges a separate Class I GQS violation for iron nearly a year later, on March 15, 2012. *Id.* Lastly, while the NOV only alleges violations of Class I GQS for manganese at Waukegan from March 2011 through March 2012, the complaint alleges an additional violation on October 25, 2010 – six months prior to the first violation noted by IEPA. *See* Compl. and Exs. B, M thereto. Because the violations alleged in the complaint occur over a different, longer time frame than those alleged in the NOVs, and include different violations of Illinois groundwater standards not alleged in the NOVs, the complaint is not duplicative and should not be dismissed.

iv. Citizen Groups Seek Different and More Extensive Relief than Any Remedy Provided by the CCAs.

Finally, Citizen Groups demand quite different and far more extensive relief than the remedy provided in the CCAs for each site. The Board has held on numerous occasions that, where a complaint calls for different relief from that requested in a similar matter before another forum, the complaint is not duplicative. *See, e.g., Hamman Farms*, PCB 08-96, slip. op. at 6 (Apr. 2, 2009)); *Freeman United Coal Co*., PCB 10-61, slip op. at 13; *Finley*, PCB 02-208, slip op. at 11 (Aug. 8, 2002) (complaint not duplicative of order issued by Chicago Dept. of Environment [DOE] in part because discretionary relief Board could order was not available in, and could differ from, relief available in similar matter being addressed by the DOE).

MWG claims that, through the CCAs, it has "already agreed to perform" the relief Citizen Groups seek. Mem. Supp. Mot. to Dismiss 22. Not so. The relief Citizen Groups seek is different and far more extensive than the relief provided by the CCAs. First, as discussed above, Citizen Groups allege different violations, extending over a different time frame, than the violations alleged in the NOVs. This Board has previously held that "additional violations alleged and a longer period of alleged violations affects the relief requested." *Freeman United*

Coal Co., PCB 10-61, slip op. at13 (July 15, 2010); *see also Hamman Farms*, PCB 08-96, slip. op. at 6 (Apr. 2, 2009). Therefore, because the complaint alleges additional violations that also extend over a longer time frame, the relief Citizen Groups seek is different from the relief provided in the CCAs and the complaint is not duplicative.

Second, Citizen Groups ask the Board to "grant such… relief as the Board deems just and proper." Compl. 19. The Board has broad authority to fashion a more extensive remedy than any relief provided by the CCAs. *See* 415 ILCS § 5/33(a); *People v. Jersey Sanitation Corp.*, PCB 97-2, slip op. at 3-4 (June 16, 2005); *Finley*, PCB 02-208, slip op. at 11 (Aug. 8, 2002). Because Citizen Groups ask the Board to exercise its discretion to order more extensive relief than that provided by the CCAs, the relief Citizen Groups request differs from that provided by the CCAs.

Third, Citizen Groups specifically ask the Board to order MWG to: "[c]ease and desist from open dumping of coal ash and from causing or threatening to cause water pollution," "[m]odify its coal ash disposal practices so as to avoid future groundwater contamination," and "remediate the contaminated groundwater so that it meets applicable groundwater standards. . . ." Compl. 18-19. Contrary to MWG's assertions, and for the reasons more fully explained below and in the attached expert declaration of Remy J.-C. Hennet, the CCAs do not provide that requested relief. *See* Decl., attached hereto as Exhibit G; *see also* Exhibit H, Curriculum Vitae of Remy J.-C. Hennet.

The relief Citizen Groups' seek would require, at minimum, permanent removal of the coal ash and any other contaminated materials from the coal ash ponds at Waukegan and Will County and the installation of systems to pump and treat contaminated groundwater at all four plants.[7] Decl., Ex. G ¶¶ 7, 12(a), 13(a), 14(c) and (d), and 15(c) and (d). MWG must also stop

[7] Because compliance with Illinois' proscriptions against open dumping depends, in part, on whether the dumped material is being placed in a site where contaminants in groundwater exceed the open dumping Maximum

dumping coal ash and other contaminated materials into those ponds to avoid further groundwater contamination. *See* Decl., Ex. G ¶¶ 7, 14(c) and 15(c). The CCAs do not require permanent removal of coal ash and other contaminated materials from the coal ash ponds or pumping and treating of contaminated groundwater, nor do they require MWG to cease dumping coal ash into the ash ponds. *See* Decl., Ex. G ¶¶ 12(a), 13(a), 14(c) and (d), and 15(c) and (d); Mot. to Dismiss, Exs. 1-4. Therefore, they do not provide the relief that Citizen Groups seek.

In fact, it is difficult to determine what relief the CCAs provide. Many of the measures in the CCAs are "to be determined," sometimes in months or years, sometimes in the indeterminate future, and the CCAs do not establish deadlines for cessation of releases or for remediation of existing contamination. *See* Mot. to Dismiss, Exs. 1-4. The CCAs, as such, offer only lengthy, aspirational processes that do not resolve the alleged violations. While the CCAs provide a shield beneficial to MWG's interests, they do not address the gravamen of the relief sought by Citizen Groups. This Board should not dismiss a complaint based on CCAs that do not resolve the alleged violations but merely invoke measures without substance, to be implemented over long periods of time, with no assurance of successful results, devoid of deadlines by which violations will be remedied.

To the extent the requirements of the CCAs are clear, they are insufficient to ensure achievement of the relief that Citizen Groups request. The CCAs generally rely on four measures to address releases of contaminants and the resulting impacts on groundwater – groundwater monitoring, engineered controls (liners), Groundwater Management Zones ("GMZs"), and Environmental Land Use Controls ("ELUCs"). *See* Mot. to Dismiss, Exs. 1-4. Groundwater monitoring requirements included in the CCAs neither address the violations, nor provide

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Contaminant Levels, *see* Compl. ¶¶ 33-35, Respondents will not cease and desist open dumping unless and until they prevent further groundwater contamination from occurring.

sufficient data to allow for meaningful hydrogeological analysis or detection of further groundwater contamination. Decl., Ex. G ¶¶ 12(b)-(d), 13(b), (c), (e), 14(e)-(f), 15(e)-(f). As such, they do not provide the relief Citizen Groups request.

The engineered control requirements of the CCAs might improve groundwater quality in certain limited areas; however, they will not come close to providing the full protection of groundwater and cleanup of already-contaminated groundwater that Citizen Groups seek. *See* Decl., Ex. G ¶¶ 10, 12(e), 13(d), (f) and 15(c), (g). For example, the re-lining of the Ash Surge Basin and the Secondary Ash Settling Basin at Powerton and of Ash Pond 2S at Will County will not remedy violations at up-gradient wells, and most likely will not prevent the continuous release of contaminants to groundwater from impacted materials that will remain in place beneath and around the lined basins. Decl., Ex. G ¶¶ 13(d) and 15(g). The re-lining of ash pond #3 at Joliet 29 most likely will not improve groundwater impacts at numerous monitoring wells where contaminated groundwater has been found at the site. Decl., Ex. G ¶ 12(e). Requirements in the CCAs for maintenance of liners are already standard operating procedures at coal ash ponds that, as a result, likely will have no effect on continued violation of groundwater standards at those plants. Decl., Ex. G ¶¶ 8, 10, and 16.

The limited effectiveness of lining, and re-lining, ash ponds to prevent groundwater contamination is evidenced by the hundreds of violations of groundwater standards found at these plants despite the fact that nearly all of the ash ponds at these four plants are lined. *See* Compl. ¶¶ 1-8. The existing liners did not suffice to prevent those violations. Decl., Ex. G ¶¶ 14(b) and 15(b). Moreover, liner or no liner, the violations continue: MWG's groundwater monitoring reports from the second, third, and fourth quarters of 2012 and the first quarter of 2013 reveal over 250 additional exceedances of Class I groundwater standards and open

dumping standards above and beyond the violations included in Citizen Groups' complaint. *See* compiled summary of recent violations, attached hereto as Exhibit I; *see also* groundwater monitoring data summaries for Joliet 29, Powerton, Waukegan and Will County, attached hereto as Exhibits J, K, L and M, respectively. Increasing violations of groundwater standards at these plants are even more likely in the near future due to MWG's plans to use Dry Sorbent Injection ("DSI") to control sulfur dioxide air pollution from their fleet. *See* Decl., Ex. G ¶ 11; Construction Permit to Install Dry Sorbent Injection Systems at Powerton, attached hereto as Exhibit N; and Excerpts of MWG 2011 Annual 10-K Report, attached hereto Exhibit O[8]. DSI generates a waste stream that is high leachable, and the measures included in the CCAs are not adequate to address the increased leachable load that will result from the use of DSI at these plants. Decl., Ex. G ¶ 11.

The CCAs' requirements for GMZs likewise do not provide the relief that Citizen Groups request. To begin with, the Waukegan CCA does not require a GMZ at all. Mot. to Dismiss, Ex. 4. The Powerton, Will and Joliet CCAs do not include GMZs, but rather provide one-year timeframes for developing GMZs. *See* Mot. to Dismiss, Ex. ¶ 5(j), Ex. 2 ¶ 5(i)., Ex. 3 ¶ 5(g). Consequently, Citizen Groups, IEPA, this Board, and even MWG cannot evaluate the effectiveness of GMZs to provide the relief sought in Citizen Groups' complaint until the terms of each are finalized. CCAs that invoke GMZs that are to be designed over the course of a year, with substantive elements that are "to be determined" and which omit the Waukegan facility entirely, do not provide the relief that Citizen Groups seek. As such, the CCAs do not render Citizen Groups' complaint duplicative.

Similarly, the CCAs' requirements that ELUCs be developed do not provide the relief Citizen Groups seek. As with the GMZs, the ELUC mandate does not require MWG to establish

[8] At ¶ 11of Ex. G, the decl., Exhibits N-O are erroneously referred to as H-I.

ELUCs, and does not apply to all sites – the CCA for Joliet 29 includes no ELUC mandate. *See* Mot. to Dismiss, Ex. 3. The CCAs mandate for two of the three sites requires nothing more than a commitment from MWG to propose ELUCs; only the Will County CCA establishes a fixed one-year deadline for establishing ELUCs. Mot. to Dismiss, Ex. 2 ¶ 5(h)-(i). By contrast, the Powerton and Waukegan CCAs do not set a deadline for establishing ELUCs, mandating instead only a 90-day deadline for MWG "…to submit a proposed draft ELUC…". Mot. to Dismiss, Ex. 1 ¶ 5(h)-(i), Ex. 4 ¶ 5(f)-(g). For all three plants where ELUCs are invoked in the CCAs, the substantive elements are "to be determined." Speculative ELUCs that are not required for all facilities addressed in Citizen Groups' complaint do not provide the relief that Citizen Groups request therein.

Although no development that occurs subsequent to the filing of a complaint renders that complaint duplicative, *Finley*, PCB 02-208, slip op. at 9, it is important to note that neither the GMZs proposed by MWG in January 2013 pursuant to the CCAs, nor the ELUCs established in 2013 pursuant to the CCAs, provide the relief Citizen Groups request. Neither the proposed GMZs nor the ELUCs call for the removal of coal ash and other contaminated materials from the coal ash ponds, or the pumping and treating of contaminated groundwater. *See* Proposed GMZs for Powerton, Will County and Joliet 29, attached hereto as Exs. A-C; Decl., Ex. G ¶¶ 12(f), 13(g) and 15(h)-(i); and ELUCs for Powerton, Will County and Waukegan, attached hereto as Exs. D-F. Thus, even if the GMZs and ELUCs could be taken into account, they would not provide the relief that Citizen Groups request and would not render Citizen Groups' complaint duplicative.

In sum, because (i) relief is necessarily tied to the violations alleged, and Citizen Groups alleged different violations over a different time period from the allegations in the NOVs; (ii) the

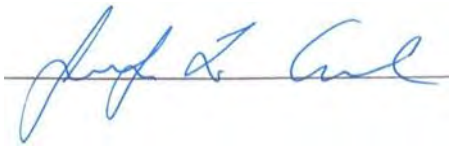
Board has broad authority to fashion a different and much more extensive remedy that the measures included in the CCAs, and Citizen Groups requested that the Board exercise that authority; (iii) the CCAs are far too incomplete and inadequate to achieve the relief Citizen Groups seek, and (iv) even if the subsequently developed GMZ proposals and ELUCs could be taken into account in determining whether Citizen Groups' complaint is duplicative, they would not provide the relief Citizen Groups seek, the CCAs neither mandate nor ensure achievement of the relief Citizen Groups request. Citizen Groups' complaint is, therefore, neither identical nor substantially similar to any matter brought before the Board or another forum, and may not be dismissed as duplicative.

V. CONCLUSION

For the foregoing reasons, the complaint should not be dismissed as frivolous or duplicative, and Citizen Groups respectfully request that the Board deny MWG's Motion to Dismiss.

Dated: June 21, 2013

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **CITIZEN GROUPS' RESPONSE TO RESPONDENT'S MOTION TO DISMISS** was served to all parties of record listed below by United States Mail, postage prepaid, on June 21, 2013.

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