

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:
PEOPLE OF THE STATE OF ILLINOIS)
)
)
Complainant,)
)
)
v.) PCB 2010-061
) (Enforcement-Water)
)
FREEMAN UNITED COAL)
MINING CO., L.L.C., and)
SPRINGFIELD COAL CO., L.L.C.)
)
)
Respondents.)

NOTICE OF ELECTRONIC FILING

TO:

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PLEASE TAKE NOTICE that on March 15, 2010, I electronically filed with the Clerk of the Pollution Control Board, Springfield Coal Co., L.L.C.'s Response to the Environmental Law & Policy Center's Motion for Leave to Intervene, copies of which are herewith served upon you.

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By:



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- 1) The person has a conditional statutory right to intervene in the proceeding;
- 2) The person may be materially prejudiced absent intervention; or
- 3) The person is so situated that the person may be adversely affected by a final Board order.

3. Movants must therefore demonstrate that they have met one of the above criteria.

Movants have not met that burden. As noted above, Movants do not cite any statutory right for intervention, therefore Movants have not demonstrated any statutory right to intervene. 35 Ill. Adm. Code 101.402(d)(1).

4. Movants have failed to demonstrate that they will be materially prejudiced absent intervention. 35 Ill. Adm. Code 101.402(d)(2). Movants fail to acknowledge the other opportunities for participation afforded to them by the Board's procedural rules. Non-parties to an enforcement proceeding may submit *amicus curiae* briefs, or file written or oral testimony with the Commission. These means provide a more than sufficient opportunity for the Movants to present any arguments they feel appropriate to the Board, and present notice and an opportunity to be heard as concerned citizens. These options preclude the Movants from making any credible argument that failure to grant them intervention would result in material prejudice.

5. In addition, Movants have failed to show that they may be adversely affected by a final Board order in this case. Movants have not provided any facts that would entitle them to intervene in this case. Movants' motion mentions that PRN has "members who live in the watersheds of Camp Creek, Willow Creek, Grindstone Creek, and tributaries thereto and are *concerned about issues* which would impact recreational activities and environmental health of these waters." (Emphasis added) Motion at Para. 2. Additionally, according to Movants' motion, Sierra Club's "*members are concerned about pollution* that would affect their ability to enjoy activities dependant on the ecological health of these waters, including swimming, wading,

fishing, canoeing, kayaking, hiking, nature study, bird watching, and other wildlife viewing.”
(Emphasis added) Id.

6. In the above statements, Movants cite “concerns” with pollution as a reason as to why they should be allowed to intervene. If the standard for intervention in an action before the Board was “concern,” the potential pool of intervenors would be nearly limitless, providing ample opportunity for undue delay. It is undisputed that many, if not all, of the people of Illinois are “concerned” with potential pollution of the state.

7. The Movants’ interests are already well-represented by the State, as the caption to this action indicates. In the above statements, Movants have not stated any facts that indicate that the Complainants, the People of the State of Illinois (“State of Illinois” or “State”), will not address these very issues. Moreover, the speculative language emphasized above does not indicate that Movants currently engage in any of the cited activities, nor does it state “how” Movants will be adversely affected by failure to intervene. Indeed, it would be close to impossible to kayak, swim, or canoe in the bodies of water mentioned for the simple reason that there is not enough water to do so. Though Movants allege that members live in the affected watershed and that they “may be directly and materially affected by the outcome of this proceeding” (Motion at Para. 18), Movants neither support these allegations with affidavits, nor plead these allegations with any measure of specificity.

8. Indeed, even if Movants would provide affidavits that their members engaged in some or even all of the activities above, or were otherwise adversely affected by the proceeding, such affidavits would not prove an injury more specific to Movants’ members as opposed to the People of Illinois. The State of Illinois has a vested interest in preventing pollution within Illinois that could impact the state’s environment, or its citizens’ enjoyment of the activities set

forth by Movants in waters of the state containing the proper volume of water to allow them to do so. Because Movants' members are included within the ambit of the People of Illinois, the State is obligated to represent their interests. Consequently, Movants have not indicated that the State will not adequately represent their concerns.

9. In their Motion for Leave to Intervene, Movants would like for the IPCB to believe that it was their actions in sending a citizen suit notice letter to Freeman United Coal Mining Co., L.L.C. ("Freeman") and Springfield Coal in December, 2009 that initiated this present case. Motion at Para. 4. That is not accurate. In reality, the matter began two months earlier when the Illinois Environmental Protection Agency ("IEPA") issued a Violation Notice (#W-2009-00306) on October 8, 2009. The Violation Notice alleged violations of the facility's NPDES permit effluent limitations. These same allegations are set forth in the State of Illinois's Compliant filed in this matter.

10. In addition, Movants assert that they may be adversely affected by the State of Illinois' choice not to request that the Board immediately issue an order under Section 33 of the Illinois Environmental Protection Act (the "Act"), 415 ILCS § 5/33. The Movants state that without this relief the operation of the Industry Mine may well continue to cause water pollution during the pendency of this proceeding. Motion at Para. 21. First, the Movants seem to suggest that the State is not concerned whether the Industry Mine will continue to cause water pollution for the duration of this proceeding, which is not true. Second, the Board should be aware that subsequent to receiving the Violations Notice, Springfield Coal met with IEPA and discussed a plan for eliminating future excursions. These discussions culminated in Springfield Coal submitting a compliance plan to IEPA, dated February 18, 2010, to prevent future violations. (Copy attached and labeled as Exhibit A). This compliance plan should address any concerns

that Movants have with the State's choice not to suggest that the Board issue a Section 33 order. The authority to issue such orders rests solely with the Board. Additionally, the State is well within the bounds of prosecutorial discretion to request Board action on this matter. In its Complaint, the State of Illinois asks the Board to "grant such other and further relief as the Board deems appropriate" If the State of Illinois believes that while this matter proceeds, such an order is needed, the State can seek such an order from the Board. Finally, Movants would be well within their rights to suggest a Section 33 order through either written or oral testimony, or via an *amicus curiae* brief submitted to the Board.

11. Movants additionally cite the State's decision not to include violations of Special Condition No. 1 of Springfield Coal's NPDES (which prohibits Springfield Coal from contributing to the violation of water quality standards) as evidence that they will be materially prejudiced absent leave to intervene. Motion at Para. 20. The State had previously considered including such a count in its complaint and had sent the Movants a copy of a draft complaint the State had prepared which contained a count which was almost word-for-word identical to the Fourth Cause of Action contained in the draft complaint attached to Movants' motion. The Movants obviously used the State's draft complaint as the basis for its draft complaint. However, the State made the choice to not include such a count in the complaint it filed with the Board in this case. The State informed Springfield Coal that it had decided not to include such allegations in its complaint because changes in the water quality standards over the last few years had called into question whether such violations existed. Because the State of Illinois chose not to address such alleged violations, the Board should respect this prosecutorial discretion, and not delay the proceedings by allowing Movants to intervene so that they may present a charge that the State of Illinois has already considered and chosen not to pursue.

12. Finally, Movants allege that they will be materially prejudiced absent leave to intervene since the State failed to include a claim that the facility's NPDES Permit was not properly transferred from Freeman to Springfield Coal in 2007. Motion at Para. 20. Movants allege in the draft complaint (attached to their motion) that Freeman's notice to have the permit transferred was sent to IEPA only 15 days in advance of the transfer instead of the 30 days required by the permit, and therefore the transfer was ineffective. Although Springfield does not want to make light of any regulatory requirements, assuming all of the allegations made by the Movants are true, this alleged violation is not serious enough to allow intervention by Movants in this case. Moreover, IEPA reviewed the transfer notice when it was filed in 2007 and did not find the notice deficient at that time so as to issue a violation notice. IEPA has had ample time since the date of transfer to challenge the allegedly deficient transfer, yet has chosen not to do so. Again, this is a prime example of Movants' attempts to unnecessarily delay the proceedings under the guise of "raising new issues."

13. Relevant to the present proceeding are the Board's decisions in other matters involving requests for intervention. Generally, the Board has not viewed motions to intervene with favor, as the Board rightfully sets forth the requisite regulatory standard in Section 101.402. This is a standard that is not easily met, as intervention is a significant act with potentially far-reaching implications to the parties. Three cases illustrate this point.

14. In 2222 Elston LLC v. Purex Industries, et al., PCB 03-55 (Jan. 23, 2003), the City of Chicago requested opportunity to intervene in an underground storage tank enforcement case before the Board. The Board gave no special deference to intervene based on Chicago's status as a governmental entity. Chicago had spent \$350,000 cleaning up pollution from

respondents' underground storage tanks at the site in question. Nevertheless, the Board found that intervention by the City was inappropriate.

15. In Midwest Generation v. Illinois EPA, PCB 04-185 (Nov. 4, 2004), the Sierra Club asked to intervene in a trade secret proceeding to make public information that it had requested through the Freedom of Information Act. The Board ruled that Sierra Club had not articulated how "its purposes cannot be fulfilled by means of participating other than as a party...such as by making statements at hearing and filing *amicus curiae* briefs or public comment." Midwest Generation at 11. In the present case, Movants have similarly failed to explain how the mechanisms afforded to them as non-parties, combined with the State of Illinois' role in the proceedings, will not properly serve their purposes.


16. In the Matter of Midwest Generation, LCC, AS07-03 (April 17, 2008) involved ELPC's motion to intervene in an adjusted standard proceeding. The Board ruled that ELPC had ample opportunity to participate in the proceeding through public comment, *amicus curiae* briefs, and comments at hearing. The Board furthermore noted that ELPC could not state with certainty that its position would differ from IEPA's in the case. In the present case, Movants likewise cannot state that the State will fail to support their own position. Though they assert arguments already rejected by IEPA and the State of Illinois in an attempt to do so, what Movants end up with is an obvious attempt to circumvent prosecutorial discretion, and needlessly delay the proceedings.

WHEREFORE, for the reasons set forth above Respondent, SPRINGFIELD COAL COMPANY, L.L.C. respectfully requests that the Motion For Leave to Intervene by the Prairie Rivers Network and the Sierra Club, Illinois Chapter, be DENIED.

Respectfully Submitted,

BRYAN CAVE LLP

By:



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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing response was served upon the following parties via U.S. Mail on the 15th day of March, 2010:

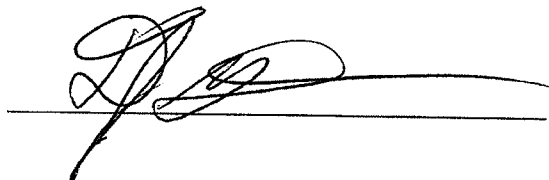
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A handwritten signature in black ink, appearing to be 'J. Therriault', is written over a horizontal line. The signature is stylized and cursive.

Springfield Coal Company, LLC

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February 18, 2010

Chad Kruse
Assistant Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

Re: Violation Notice W-2009-00306
Springfield Coal Industry Mine

Dear Mr. Kruse:

On January 6, 2010 we met with you and other representatives of the IEPA to discuss the above-referenced Violation Notice. At the meeting, we discussed the action steps Springfield Coal Company is taking and plans to take in response to the Violation Notice. This letter provides a summary of such action steps.

The Industry Mine opened in 1982 and was operated by Freeman United Coal Mining Company under permits issued by the Office of Mines and Minerals and the Illinois Environmental Protection Agency until September 1, 2007. At that time Springfield Coal Company, LLC purchased the assets of the Industry Mine and requested the permit be transferred to Springfield Coal.

Springfield Coal Company, LLC has been in control of the Industry Mine since September 1, 2007. Reclamation work for the areas around the ponds has been mostly completed, as per the reclamation plans. The majority of the affected watershed for each pond has had a Phase I bond release. All the drainage areas from which these ponds collect the surface runoff and groundwater seepage are "Reclamation Areas" as defined in 35 ILAC 402.101.

As pointed out previously, when the initial applications for permits were prepared, it was noted that there was prior coal mining in upstream areas off-site of two of the ponds at the Industry Mine with the largest number of excursions, ponds 18 and 19. This was noted in pre-mining information of the original permit. Runoff and seepage from these areas was already affecting water quality within the permit area prior to any mining by the prior permittee of the Industry Mine, Freeman United Coal Mining Company.

Exhibit A

Springfield Coal Company, LLC

As required by IEPA, a renewal application for the NPDES permit for the permitted areas was submitted in August of 2003. As of the date of this letter, the renewal has not been issued, however, the prior NPDES permit continues in effect until IEPA acts upon the renewal application.

Revisions to the various effluent standards have occurred since the last time the permit was modified and/or renewed. The sulfate standard now uses water hardness and chloride to calculate sulfate limits. If the permit had been revised in a timely manner almost all of the sulfate excursions would have been well below the new standards.

A number of treatment technologies have been utilized over the years especially for manganese excursions from pond 19.

Those have included:

1. The channels from the seeps to pond 19 have been lined with limestone rip rap to increase aeration before the groundwater reaches pond 19.
2. Approximately 20,000 cubic yards of material has been excavated from the upper portions of pond 19, increasing its capacity to approximately 30,000 cubic yards, essentially providing a two cell system.
3. Soda ash briquettes in a metal aeration basket have been placed periodically in the flow from the seeps near the upper end of pond 19.
4. Windmills have been constructed to drive aeration units in the pond.
5. Hydrated limestone slurry is being applied on a weekly basis except when pond surface is frozen

Despite all of the above, the combined treatment steps have not consistently reduced manganese concentrations at the outfall of pond 19 to meet the discharge limits.

As we discussed at our January 6 meeting, the following is Springfield Coal's compliance plan for ponds 9, 18, 19, 24W, and 26:

1. For ponds 9, 24W, and 26, the excursions primarily relate to sulfate limits. Prior to the July 21, 2003 modification of the permit, the sulfate effluent standard was 2,500 mg/l, and there were very few excursions for sulfate at the three (3) ponds. As previously noted, if IEPA would approve our renewal application, the method for a calculated SO₄ would be in effect. With this revised effluent standard, the vast majority of the past excursions would have fell below those revised sulfate limits. Additionally, in the future, any discharges monitored for sulfate, would very likely be below the calculated sulfate limit. Springfield Coal requests that the renewal to NPDES Permit No.

Springfield Coal Company, LLC

IL00661247 be approved or IEPA enter into a consent order with Springfield Coal which establishes sulfate discharge limits based on the revised effluent standard.

2. For ponds 18 and 19
 - A) Springfield will continue to maintain previous forms of treatment set out above to treat for manganese in pond 19.
 - B) Springfield will treat both ponds with hydrated lime and/or soda ash briquettes, or other approved materials on a regular basis. Springfield Coal will mix the lime using windmills, and/or mechanical means to insure mixing and aeration.
 - C) Springfield Coal will add soda ash and/or soda ash with potassium permanganate to both ponds on a regular basis.
 - D) Springfield Coal will monitor the water in both ponds 18 and 19 on a regular basis. Water will not be discharged from these ponds until the water meets discharge requirements. At such time, we will either pump or drain the ponds down to sufficient levels for the ponds to hold the anticipated inflow expected until such time that they need to be discharged again. Springfield will repeat the process on an as needed basis.

Springfield Coal proposes to undertake these action steps for Ponds 18 and 19 for a period of one year or until a more permanent solution can be found.

Thank you for your attention to this matter. After IEPA has had a chance to review this letter, we would like to schedule a meeting in order to discuss resolving this matter.

Sincerely,



Thomas J. Austin
Vice President, Human Resources &
Government Relations