

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

PEOPLE OF THE STATE OF)
ILLINOIS)
)
Complainant,)
)
v.)
)
FREEMAN UNITED COAL)
MINING CO., L.L.C., and)
SPRINGFIELD COAL CO., L.L.C.)
)
Respondents.)

PCB 2010-061
(Enforcement-Water)

To:

John Therriault, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph St., Suite 11-500
Chicago, IL 60601

Persons included on the attached
SERVICE LIST

PLEASE TAKE NOTICE that the Environmental Law and Policy Center has today filed a **Motion for Leave to Reply** and **Reply** in PCB 2010-061, a copy of which is herewith served upon you.

Respectfully Submitted,



Jessica Dexter
Staff Attorney
Environmental Law and Policy Center
35 East Wacker Drive, Suite 1300
Chicago, IL 60601
312-795-3747

DATED: March 25, 2010

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

PEOPLE OF THE STATE OF)
ILLINOIS)
)
Complainant,)
)
v.)
)
FREEMAN UNITED COAL)
MINING CO., L.L.C., and)
SPRINGFIELD COAL CO., L.L.C.)
)
Respondents.)

PCB 2010-061
(Enforcement-Water)

MOTION FOR LEAVE TO REPLY TO SPRINGFIELD COAL'S RESPONSE TO ENVIRONMENTAL LAW & POLICY CENTER'S MOTION TO INTERVENE

I, JESSICA DEXTER, hereby file a MOTION FOR LEAVE TO REPLY to Springfield Coal's March 15, 2010 RESPONSE TO THE ENVIRONMENTAL LAW & POLICY CENTER'S MOTION TO INTERVENE in this matter on behalf of PRAIRIE RIVERS NETWORK, its individual members, and SIERRA CLUB, ILLINOIS CHAPTER, and its individual members (collectively, "Movants"). In support of this Motion, ELPC states the following:

1. The Board has the authority to grant Movants a right to reply where failure to do so would create material prejudice. 35 Ill. Admin. Code 101.501(e).

2. The Environmental Law & Policy Center (ELPC) would be materially prejudiced by the Board's decision to hear Springfield Coal's objection to ELPC's Motion to Intervene and Complaint, as Springfield Coal's response is untimely and Springfield Coal has therefore waived its opportunity to object to ELPC's motion. Moreover, Springfield Coal's reasons for objection are self-contradictory and misstate the applicable law.

3. Wherefore, ELPC respectfully requests that the Board GRANT its Motion for Leave to Reply and file the attached Reply to Springfield Coal's Response to the Environmental Law & Policy Center's Motion to Intervene.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

PEOPLE OF THE STATE OF)
ILLINOIS)
)
Complainant,)
)
v.)
)
FREEMAN UNITED COAL)
MINING CO., L.L.C., and)
SPRINGFIELD COAL CO., L.L.C.)
)
Respondents.)

PCB 2010-061
(Enforcement-Water)

REPLY TO SPRINGFIELD COAL'S RESPONSE TO THE ENVIRONMENTAL LAW & POLICY CENTER'S MOTION TO INTERVENE

I, JESSICA DEXTER, hereby REPLY to Springfield Coal's March 15, 2010 RESPONSE TO THE ENVIRONMENTAL LAW & POLICY CENTER'S MOTION TO INTERVENE in this matter on behalf of PRAIRIE RIVERS NETWORK, its individual members, and SIERRA CLUB, ILLINOIS CHAPTER, and its individual members. ELPC respectfully requests that the Illinois Pollution Control Board (the "PCB" or "Board") enter an order rejecting Springfield Coal's Response, as it is untimely and Springfield Coal has therefore waived its right to object to ELPC's motion. In the event that the PCB decides to hear Springfield Coal's Response despite its untimely nature, ELPC respectfully requests that the PCB grant ELPC's Motion despite Springfield Coal's Response. In support of this request, ELPC states the following:

1. The PCB regulation governing filing of motions and responses is found in the PCB's procedural rules at 35 Ill. Admin. Code § 101.500. Section 101.500(d) states that parties may file a response "[w]ithin 14 days after service of a motion If no response is filed, the party will be deemed to have waived objection to the granting of the motion[.]"

Electronic Filing - Received, Clerk's Office, March 25, 2010

2. The PCB regulation governing computation of time for purposes of the PCB's procedural rules is found at 35 Ill. Admin. Code § 101.300.
3. 35 Ill. Admin. Code § 101.300(c) provides that "In the case of service by registered or certified mail, or by messenger service, service is deemed complete on the date specified on the registered or certified mail receipt or the messenger service receipt."
4. On February 25, 2010, Environmental Law & Policy Center (ELPC), on behalf of its clients, Prairie Rivers Network (PRN) and the Illinois Chapter of the Sierra Club, as well as their individual members, electronically filed with the PCB a Motion to Intervene and Complaint in the present action, PCB 2010-061.
5. On the same day, ELPC served a copy of this Motion and Complaint, by certified mail, upon Respondents Springfield Coal, LLC, and Freeman United Coal Mining Co., LLC, and Complainant People of the State of Illinois, via the Office of the Attorney General. The certified mail receipts for service on each and every party specify that Motion and Complaint were sent on February 25, 2010.
6. Service on Springfield Coal, LLC, was thus complete on February 25, 2010.
7. 35 Ill. Admin. Code § 101.300(a) provides:

Computation of Time. Computation of any period of time prescribed in the Act, other applicable law, *or these rules* will begin with the first calendar day following the day on which the act, event or development occurs and will run until the close of business on the last day, or the next business day if the last day is a Saturday, Sunday or national or State legal holiday. [emphasis added]
8. Applying the rule of section 101.300(a), the 14-day period in which Springfield Coal was required to reply began to run on February 26, 2010. The 14-day period beginning on February 26, 2010 ended on March 11, 2010.
9. March 11, 2010 was a Thursday, not a Saturday or Sunday.
10. March 11, 2010 was not a national or State legal holiday.

Electronic Filing - Received, Clerk's Office, March 25, 2010

11. Therefore, the 14-day period in which Springfield Coal's Response could be timely filed before the PCB ended on March 11, 2010.

12. This deadline was in no way unduly swift, and Springfield Coal was in no way prejudiced by the requirement to respond within a 14-day period. In fact, both of the other two parties to this proceeding – Freeman United Coal Mining Co., LLC, and the Illinois Office of the Attorney General, proved capable of filing their responses to ELPC's Motion and Complaint within the time period specified by the PCB's procedural rules, the Attorney General's office on March 1, and Freeman United on March 9.

13. Nevertheless, Springfield Coal did not file a response on or before March 11, 2010, nor did it file a motion for extension of time in accordance with 35 Ill. Admin. Code 101.522. Springfield Coal's Response was filed on March 15, 2010. This Response was untimely.

14. 35 Ill. Admin. Code § 101.500(d) therefore deems Springfield Coal's objections to ELPC's Motion and Complaint to be waived.

15. Even if the PCB decides to consider Springfield Coal's Response despite its late filing, the Response does not provide any reason for the PCB to deny ELPC's Motion.

16. Springfield Coal would have the Board believe that concern about environmental degradation resulting from their flagrant violations of the law is not an interest sufficient to prove injury. Springfield Coal's Response at para. 5-7. This assertion is flatly contradicted by the U.S. Supreme Court's ruling in Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc., 528 U.S. 167, 183 (2000), which reaffirmed that "environmental plaintiffs claim injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." (internal quotes and citations omitted) In

Friends of the Earth, the Court held that members of the environmental organization plaintiff who lived within a few miles of the facility and were “concerned about harmful effects from discharged pollutants” established a protected interest sufficient to show standing under the Clean Water Act. Id. at 182.

17. Springfield Coal also seems to suggest that ELPC’s Motion should be denied because the attached Complaint is not supported by affidavits from specific members with specific injuries. Springfield Coal’s Response at para. 7-8. Neither the Board’s regulations nor the Illinois Environmental Protection Act contain such a requirement.

18. 35 Ill. Admin. Code 103.212 provides the following regarding citizens’ complaints:

Any person may file with the Board a complaint against any person allegedly violating the Act, any rule or regulation adopted under the Act, any permit or term or condition of a permit, or any Board order. When the Board receives a citizen’s complaint, unless the Board determines that it is duplicative or frivolous, it shall schedule a hearing.

The Illinois Environmental Protection Act, 415 ILCS 5/31(d), contains nearly identical language. It has never been suggested that parties in Board proceedings must offer evidence proving standing in their complaints. Movants will, of course, offer affidavits or other evidence proving their standing at the appropriate time in this proceeding, such as in response to a properly filed motion for summary judgment. *See* Friends of the Earth, 528 U.S. at 177.

19. Springfield Coal cannot support its bald assertion that the additional claims raised by ELPC in its Complaint are merely “attempts to unnecessarily delay the proceedings,” Springfield Coal’s Response at para. 12. These claims – first, for violations of Illinois water quality standards, and second, for discharges without a permit due to Springfield Coal’s failure to comply with the regulations governing permit transfer – rest almost entirely upon the same set of facts that will be used to prove the claims already raised by the People of the State of Illinois,

and thus will require little additional factfinding. The People themselves contradicted Springfield Coal's assertion, stating that ELPC's intervention to raise these claims "will not unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding." People's Response to Motion to Intervene at para. 2.

20. The People's Response also refutes Springfield Coal's assertions that ELPC's Motion is "an obvious attempt to circumvent prosecutorial discretion," Springfield Coal's Response at para. 16. The People, in their discretion, requested that the Board grant ELPC's Motion. If the Board truly wishes to support the People in the exercise of their prosecutorial discretion, they should comply with the People's request to allow Movants to intervene.

21. None of the PCB Rulings cited by Springfield Coal are to the contrary.

22. 2222 Elston LLC, PCB 03-55, was the only case cited by Springfield Coal that dealt with an enforcement proceeding. That case involved recovery of cleanup costs for an underground storage tank; both 2222 Elston and the City of Chicago had allegedly incurred costs which they sought to require respondents to pay. In the Board's Jan. 23, 2003 Order denying the City's motion to intervene in 2222 Elston LLC, the Board noted two facts that place that case in a different posture than this one. First, Respondent's motion to dismiss was still pending at the time of the January 23 Order. It would make little sense to allow intervention in an action that the Board thought could be dismissed. Second, the Board also noted that the City could file its own action in the case, because the Board would not find that a separate complaint by the City was duplicative – that is, that it would be "identical or substantially similar" to Elston's complaint, 35 Ill. Admin. Code 101.202. Shortly thereafter, the City of Chicago filed its own complaint against the Respondents, and at the same time moved to consolidate its enforcement action with Elston's. 2222 Elston LLC, PCB 03-55 (Order of Nov. 6, 2003). In its consolidation

motion, the City asserted that the two cases “involve the same site, environmental conditions, events, and transactions, and will therefore involve much of the same evidence at hearing.” Id. at

4. The Board accepted the City’s complaint and consolidated it with Elston’s. Id.

23. In this case, there is no colorable motion to dismiss the complaint by the State of Illinois and, thus, it would serve no purpose to require Movants to file a separate complaint only to have it consolidated with this case.

24. In the Matter of Midwest Generation, LLC, AS 07-03, also cited by Springfield Coal, involved Midwest Generation’s petition for an adjusted standard for control of mercury emissions. First, this case did not involve the federal policy strongly favoring intervention by citizens in enforcement actions. *See* 33 U.S.C. §§ 1319(g), 1365(b) (2006); Citizens for a Better Environment v. EPA, 596 F.2d 720 (7th Cir. 1979).

25. Moreover, at the time that the Movants in Midwest Generation made their motion, it appeared that the Movants’ arguments might entirely overlap with those of the IEPA. As the Board noted, “[Movants could not] say that their position will be at odds with the Agency.” AS 07-03, Order of April 17, 2008, at 6. That is clearly not the case here, as ELPC has requested leave to file a Complaint alleging violations of the Illinois Environmental Protection Act in addition to those alleged by the People. The Board in In the Matter of Midwest Generation also stated that ELPC could participate adequately through oral comments and the filing of an *amicus curiae* brief. Id. Again, that is not the case here, where ELPC must participate as a party to file the additional counts of violation in its Complaint.

26. Midwest Generation v. Illinois EPA, PCB 04-185, was an appeal of IEPA’s determination that certain information submitted to the agency did not qualify for trade secret protection. PCB 04-185, Order of Nov. 4, 2004, at 1. A motion was made to intervene based on

a pending FOIA request for the information at issue and its interest in public participation in IEPA proceedings in general, id. at 6, but stated that it was not actually concerned with whether the information was, in fact, a trade secret, id. at 10. The Board denied intervention because “[Movant’s] rationales for intervention [did] not concern the sole issue in this appeal” – whether Midwest Generation’s submitted information was a trade secret. Id. at 10. Here, however, Movants’ interests are precisely those involved in this proceeding: stopping Springfield Coal’s ongoing violation of the Illinois Environmental Protection Act, and ensuring future compliance with the Act. Movants have repeatedly stated the ways in which allowing intervention would further those interests and denying intervention would prejudice them.

27. WHEREFORE, Movants hereby request that the Board GRANT their Motion to Intervene and file the Complaint attached thereto.

CERTIFICATE OF SERVICE

I, Jessica Dexter, hereby certify that I have served the attached **Motion for Leave to Reply** and **Reply** in PCB 2010-061 upon:

Mr. John T. Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

via electronic filing on March 25, 2010; and upon the attached service list by depositing said documents in the United States Mail, postage prepaid, in Chicago, Illinois on March 25, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'JD', with a long horizontal flourish extending to the right.

Jessica Dexter
Staff Attorney
Environmental Law and Policy Center
35 East Wacker Drive, Suite 1300
Chicago, IL 60601
312-795-3747

SERVICE LIST

March 25, 2010

Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274

Thomas A. Korman, R.A.
Freeman United Coal Mining Company, LLC
222 N. LaSalle Street Suite 800
Chicago, IL 60601

Thomas Davis - Asst. Attorney General
Office of the Attorney General,
Environmental Bureau
500 South Second Street
Springfield, IL 62706

Springfield Coal Company, LLC
BCRA Co. R.A.
161 N. Clark Street Suite 4300
Chicago, IL 60601

Dale A. Guariglia, Pamela A. Howlett &
Dennis J. Gelner II
Bryan Cave, LLP
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, MO 63102-2750

Bill S. Forcade, E. Lynn Grayson &
James A. Vroman
Jenner & Block LLP
353 N. Clark Street
Chicago, IL 60654