

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

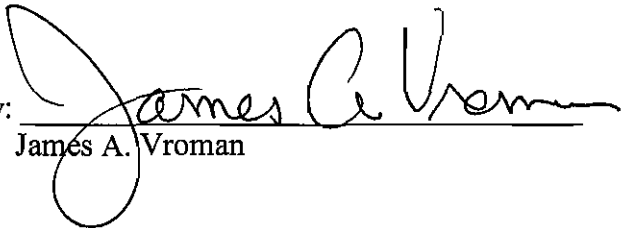
PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.)
)
 FREEMAN UNITED COAL MINING)
 COMPANY, LLC,)
 a Delaware limited liability company, and)
 SPRINGFIELD COAL COMPANY, LLC,)
 a Delaware limited liability company,)
)
 Respondents.)

**PCB NO. 10-061
(Water Enforcement)**

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

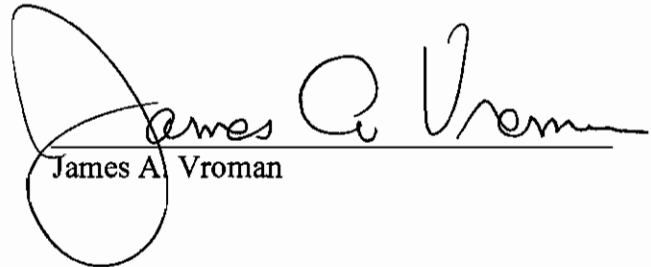
PLEASE TAKE NOTICE that on May 14, 2010, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, FREEMAN UNITED COAL MINING COMPANY, LLC'S MOTION TO STRIKE AND/OR DISMISS INTERVENORS' COMPLAINT, a copy of which is attached hereto and herewith served upon you.

By: 
 James A. Vroman

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 Freeman United Coal Mining Company, LLC,
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CERTIFICATE OF SERVICE

NOW COMES the Respondent, Freeman United Coal Mining Company, LLC, a Delaware limited liability company, and through its attorneys, and pursuant to the Board's procedural rules, provides proof of service of the attached FREEMAN UNITED COAL MINING COMPANY, LLC'S MOTION TO STRIKE AND/OR DISMISS INTERVENORS' COMPLAINT and NOTICE OF ELECTRONIC FILING upon the parties listed on the attached Service List, by having a true and correct copy affixed with proper postage placed in the U.S. Mail at Jenner & Block LLP, 353 North Clark Street, Chicago, IL 60654-3456, at or before 5:00 p.m., on May 14, 2010.



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Dated: May 14, 2010

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
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Complainant,)	
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v.)	PCB NO. 10-061
)	(Water Enforcement)
FREEMAN UNITED COAL MINING)	
COMPANY, LLC,)	
a Delaware limited liability company, and)	
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**FREEMAN UNITED COAL MINING COMPANY, LLC'S
MOTION TO STRIKE AND/OR DISMISS INTERVENORS' COMPLAINT**

Respondent, FREEMAN UNITED COAL MINING COMPANY, LLC ("Freeman United"), by its attorneys, hereby moves the Illinois Pollution Control Board (the "Board") to strike and/or dismiss the complaint filed by the Environmental Law and Policy Center ("ELPC") on behalf of Prairie Rivers Network and Sierra Club, Illinois Chapter (collectively "Intervenors"), and states as follows:

BACKGROUND

1. It is undisputed that Freeman United owned and operated the Industry Mine only until September 1, 2007.
2. On February 10, 2010, the People of the State of Illinois (the "People") filed an enforcement action against Freeman United and Springfield Coal Company, LLC ("Springfield Coal") relating to alleged water pollution violations associated with the Industry Mine and the Industry Mine National Pollution Discharge Elimination System Permit (the "Industry Mine NPDES Permit"). The People's complaint contains two counts against Freeman United under the Illinois Environmental Protection Act (the "Act"): one count for violations of the Industry

Mine NPDES Permit (Count I), and one count for water pollution violations (Count III), all of which were alleged to have occurred prior to September 1, 2007. The People's complaint also contains two corresponding counts against Springfield Coal alleging violations of the Industry Mine NPDES Permit and water pollution violations that allegedly occurred after September 1, 2007 (Counts II and IV).

3. On February 25, 2010, Intervenors filed a Motion to Intervene in the enforcement proceeding. Intervenors attached to their Motion to Intervene a complaint ("Intervenors' Complaint"). Intervenors' Motion requested the Board to grant them leave to intervene and to file the attached complaint. Although the Second and Third Causes of Action in Intervenors' Complaint contained the same allegations made in the People's complaint, Intervenors' Complaint also contained two additional causes of action alleging violations of the Act not alleged in the People's complaint.

4. The section of Intervenors' Complaint titled "First Cause of Action" alleges that Springfield Coal discharged without a valid NPDES permit and that Freeman United remains liable for violations of the Industry Mine NPDES Permit after Freeman United sold the Industry Mine to Springfield Coal. (Intervenors' Complaint at ¶¶ 12-37). The section of Intervenors' Complaint titled "Fourth Cause of Action" alleges that both Springfield Coal and Freeman United caused or allowed discharges of contaminants which caused or contributed to violations of the Board's Water Quality Standards. (Intervenors' Complaint at ¶¶ 57-67). However, all of the alleged water quality standard violations occurred after Freeman United sold the Industry Mine to Springfield Coal. (Intervenors' Complaint at ¶ 65).

5. On April 15, 2010, the Board entered an order accepting Intervenors' Complaint for filing. The Board stated that it would not accept Intervenors' Complaint for hearing until respondents have been awarded appropriate time to file any applicable motions regarding Intervenors' Complaint.

ARGUMENT

I. Intervenors' First Cause Of Action Should Be Stricken.

A. Intervenors' First Cause Of Action Would Impermissibly Broaden This Proceeding.

6. The First Cause of Action in Intervenors' Complaint, Discharge Without a Valid NPDES Permit, as well as all allegations in Intervenors' Complaint that aver that Freeman United remains liable for violations of the Act that occurred after September 1, 2007, should be stricken because the First Cause of Action and the related allegations go beyond the facts and allegations in the People's complaint, inappropriately expanding the scope of this enforcement hearing.

7. Intervenors allege in the First Cause of Action, specifically in paragraphs 11 and 12, and in paragraphs 35 and 36, that Freeman United remains the permittee of the Industry Mine NPDES Permit and remains liable for any and all violations of the conditions of the Industry Mine NPDES Permit because the permit was never properly transferred to Springfield Coal.

8. As this Board stated in its April 15th order, even though Intervenors "will have all the rights of an original party to this proceeding...as with any intervenor, ELPC must take the case as it finds it." 4/15/10 Bd. Order at 10, citing *Saline County Landfill, Inc. v. IEPA*, PCB 02-108, slip op. at 6 (Apr. 18, 2002).

9. By adding allegations above and beyond what the People have averred, Intervenors are attempting to broaden the scope of these proceedings. This expansion of the case is contrary to the Board's pronouncement that Intervenors must take the case as they find it. This position is supported by the Board's previous decision in *Saline County Landfill*. In *Saline County Landfill*, the County of Saline intervened in a permit appeal proceeding and attempted to file a counter-motion for summary judgment. The Board held that because an intervenor must take the case as it finds it, the County could not file a counter-motion for summary judgment in favor of the Agency where the Agency had not done so. *Saline County Landfill*, PCB 02-108, slip op. at 6.

10. Just as in the Board's past rulings, Intervenors must take this case as they find it, therefore Intervenors' First Cause of Action and their subsequent allegations related to the First Cause of Action, to the extent they are based on Intervenors' theory that the Industry Mine NPDES Permit was not effectively transferred to Springfield Coal, must be stricken.

B. Intervenors' Are Estopped From Challenging The Permit Transfer.

11. It is undisputed that on September 1, 2007, Freeman United sold its assets, including the Industry Mine, to Springfield Coal, and Springfield Coal assumed control over operations at the Industry Mine upon acquiring the assets of Freeman United. (See Intervenors' Complaint at ¶¶ 6-7). Also undisputed is the fact that on August 14, 2007, approximately two weeks prior to the sale of the Industry Mine, Freeman United and Springfield Coal sent a letter to the Illinois Environmental Protection Agency ("IEPA") that notified IEPA that Freeman United was selling the Industry Mine to Springfield Coal and requesting transfer of the Industry Mine NPDES Permit from Freeman United to Springfield Coal. (See Exhibit A; see also Intervenors'

Complaint at ¶ 34). Neither Freeman United nor Springfield Coal received any response from IEPA to the August 14, 2007 notice letter.

12. On October 8, 2009, IEPA sent Springfield Coal a Notice of Violation for alleged violations of the Industry Mine NPDES Permit. In response to the Notice of Violation, Springfield Coal submitted a compliance plan to IEPA on February 18, 2010. These facts are not in dispute. (*See* Springfield Coal's Response to ELPC's Motion for Leave to Intervene, Ex. A).

13. Based on these undisputed facts, Intervenors are estopped from alleging that the Industry Mine NPDES Permit was not transferred to Springfield Coal. In the almost three years since Freeman United and Springfield Coal sent the permit transfer letter to IEPA, IEPA never raised any objection to the transfer of the Industry Mine NPDES Permit from Freeman United to Springfield Coal. Instead, IEPA's actions demonstrate that IEPA deemed the Industry Mine NPDES Permit transfer effective in September of 2007, and that IEPA considered Springfield Coal to be the current permittee.

14. It is undisputed that Freeman United and Springfield Coal notified IEPA of the transfer. Intervenors' aver that the transfer was never effective because Freeman United and Springfield Coal did not provide the stipulated 30 days advance notice. However, Intervenors do not acknowledge, and fail to disclose, that IEPA never objected or otherwise responded to the August 14, 2007, notice letter and that IEPA never notified Freeman United or Springfield Coal that it intended to modify or revoke and reissue the Industry Mine NPDES Permit. Under Standard Condition 13 of the Industry Mine NPDES Permit, IEPA, after receiving a notice letter, is to "notify the existing permittee and the proposed new permittee of its intent to modify or revoke and reissue the permit. If this notice is not received, the transfer is effective on the date

specified in the agreement" (emphasis added). The specified date of the transfer was September 1, 2007.

15. IEPA certainly understood that the Industry Mine NPDES Permit had transferred to Springfield Coal. On October 8, 2009, IEPA sent Springfield Coal a Notice of Violation letter for alleged violations of the Industry Mine NPDES Permit and then met with Springfield Coal representatives in early 2010 to discuss actions Springfield Coal should take to come into compliance with the Industry Mine NPDES Permit. Additionally, IEPA referred this case to the People to bring an enforcement action against Springfield Coal as the current permittee under the Industry Mine NPDES Permit. None of the allegations in the People's complaint against Freeman United extend to dates after September 1, 2007, and all of the alleged violations which occurred after September 1, 2007, are exclusively against Springfield Coal. This further demonstrates that the People and IEPA had concluded that the Industry Mine NPDES Permit was effectively transferred to Springfield Coal.

16. IEPA's past and continuing actions demonstrate that it has concluded that the Industry Mine NPDES Permit was properly transferred. By filing a citizen complaint seeking to enforce the Act, Intervenors are acting as private attorneys general. *See Int'l Union v. Caterpillar Inc.*, PCB 94-240, slip op. at 36 (Aug. 1, 1996). As private attorneys general, Intervenors are bound by IEPA's determination that the Industry Mine NPDES Permit was effectively transferred to Springfield Coal.

17. Intervenors' First Cause of Action and their subsequent allegations related to the First Cause of Action, to the extent they are based on Intervenors' theory that the Industry Mine NPDES Permit was not effectively transferred to Springfield Coal, impermissibly expand the

scope of this enforcement proceeding and are barred by the principal of estoppel and should therefore be stricken.

II. Intervenor's Complaint Also Should Be Dismissed In Its Entirety As To Freeman United Because It Is Frivolous And Duplicative Of The People's Complaint.

A. Freeman United Is Not Responsible For Alleged Violations Which Occurred After It Sold The Industry Mine To Springfield Coal.

18. The Board's rules define "frivolous" as "a request for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief." 35 Ill. Admin. Code 101.202.

19. Freeman United is not liable for any alleged violations which occurred after September 1, 2007, because Freeman United did not maintain control over the premises or operations at the Industry Mine after it was sold to Springfield Coal. "A complainant must show that the alleged polluter has the capability of control over the pollution or that the alleged polluter was in control of the premises where the pollution occurred." *Illinois v. Prior*, PCB 02-177, slip op. at 26 (May 6, 2004); *People v. A.J. Davinroy Contractors*, 249 Ill. App. 3d 788, 793 (5th Dist. 1993) ("The analysis applied by courts in Illinois for determining whether an alleged polluter has violated the Act is whether the alleged polluter exercised sufficient control over the source of the pollution.").

20. Regardless of whether the Industry Mine NPDES Permit was properly transferred, Freeman United cannot be held liable for violations which occurred after Freeman United sold the Industry Mine to Springfield Coal. Any claim that Freeman United remains liable for violations of the Industry Mine NPDES Permit after it sold the Industry Mine to Springfield Coal is frivolous.

B. Intervenors' Do Not Have Standing To Allege Wholly Past Violations Of The Act.

21. Likewise, Intervenors' Complaint is frivolous because Freeman United sold the Industry Mine to Springfield Coal in 2007, and any possible claims that can be asserted against Freeman United are for wholly past violations of the Act. Intervenors have standing, if they have standing at all, only to bring claims against those who are "violating the Act" at the time Intervenors filed their complaint.

22. Section 5/31(d)(1) of the Act allows citizens to file a complaint for alleged violations of the Act, stating that "[a]ny person may file with the Board a complaint...against any person allegedly violating the Act..." 415 ILCS § 5/31(d)(1) (emphasis added).

23. Intervenors' cannot claim that Freeman United is presently "violating the Act" because any violations, for which Freeman United may allegedly be responsible, occurred in the past, prior to the sale of the Industry Mine on September 1, 2007.

24. Under the federal Clean Water Act ("CWA"), the United States Supreme Court has held that citizens can only seek injunctive relief and civil penalties associated with ongoing violations of the CWA. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). The Supreme Court came to this determination based on the language of the CWA, which states that "any citizen may commence a civil action on his own behalf against any person...who is alleged to be in violation of (A) an effluent standard or limitation...or (B) an order issued by the Administrator..." 33 U.S.C. §1365(a)(1). The Supreme Court stated that because the language of this statute is in the present tense – "alleged to be in violation" – the CWA only allows citizens to sue for ongoing violations. *Gwaltney*, 484 U.S. at 59.

25. Because the Act's citizen complaint provision, like the CWA, is written in the present tense, this Board should rule that citizens only have standing to file suit for ongoing violations of the Act.¹

26. Furthermore, Intervenors do not have standing to pursue Intervenors' Complaint against Freeman United's alleged past violations because Intervenors cannot be adversely affected by a final Board order relating to Freeman United in this proceeding. Freeman United no longer owns or operates the Industry Mine, and all of Freeman United's alleged violations occurred wholly in the past. The only relief Intervenors could seek from Freeman United are civil penalties to be paid to the State treasury. No injunctive relief is available as to Freeman United; therefore Intervenors will not be impacted materially by any final determination relating to Freeman United in this proceeding.

C. Intervenors' Complaint is Duplicative of the People's Complaint.

27. Additionally, as explained in Section I above, since Intervenors must take this case as they find it, they are bound by the scope and facts of the People's complaint. Because Intervenors cannot go beyond the allegations made in the People's complaint, the only potentially viable claims in Intervenors' Complaint are duplicative of the People's complaint. Indeed, since Intervenors must take the case as the People have filed it, there is no need for a separate Intervenors' Complaint and it should be dismissed in its entirety.

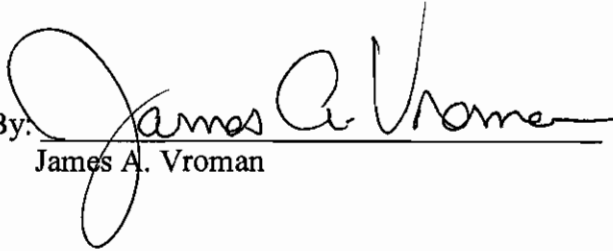
¹ The present situation is distinguishable from *Shelton v. Crown*, PCB 96-53 (Oct. 2, 1997), where the Board allowed a private citizen to maintain a suit against a neighbor for noise violations despite the fact that the source of the noise had been modified so that the noise violations were abated before any hearing on the matter. In *Shelton*, the alleged offender, unlike Freeman United, continued to own and operate the equipment and the alleged violations were not abated until approximately one year after the citizen suit was filed. Furthermore, there was no involvement by the People of the State of Illinois, unlike here, where the People are actively pursuing alleged past violations of the Act.

28. All of the claims in Intervenor's Complaint are frivolous as to Freeman United and are duplicative of the claims in the People's complaint. For either, or both, of these reasons, Intervenor's Complaint should be dismissed in its entirety.

WHEREFORE, Respondent, Freeman United, respectfully requests that the Board strike Intervenor's First Cause of Action and their subsequent allegations related to the First Cause of Action, to the extent they are based on Intervenor's theory that the Industry Mine NPDES Permit was not effectively transferred to Springfield Coal, or dismiss Intervenor's Complaint in its entirety as to Freeman United.

Respectfully submitted,

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COMPANY, LLC

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Dated: May 14, 2010