

ILLINOIS POLLUTION CONTROL BOARD
July 15, 2010

PEOPLE OF THE STATE OF)
ILLINOIS,)
)
Complainant,)
)
ENVIRONMENTAL LAW AND)
POLICY CENTER, on behalf of PRAIRIE)
RIVERS NETWORK and SIERRA CLUB,)
ILLINOIS CHAPTER,)
)
Intervenor,)
)
v.) PCB 2010-061
) (Enforcement – Water)
FREEMAN UNITED COAL MINING)
CO., LLC, and SPRINGFIELD)
COAL CO., LLC,)
)
Respondents.)

ENVIRONMENTAL LAW AND)
POLICY CENTER, on behalf of PRAIRIE)
RIVERS NETWORK and SIERRA CLUB,)
ILLINOIS CHAPTER,)
)
Complainant,)
)
v.) PCB 2011-002
) (Enforcement – Water)
FREEMAN UNITED COAL MINING) (Consolidated)
CO., LLC, and SPRINGFIELD)
COAL CO., LLC,)
)
Respondents.)

ORDER OF THE BOARD (by G.L. Blankenship):

The Board today rules on several motions in this proceeding. For the reasons stated below, the Board denies the motions to strike, dismiss and challenge the sufficiency of the intervenor’s complaint and directs that this action proceed to hearing.

Below the Board first sets forth the procedural history of this case. The Board next details the relevant statutory and regulatory provisions. The Board summarizes the motions to dismiss as well as the intervenor's response. The Board will then set forth the reasons for the Board's decision.

PROCEDURAL BACKGROUND

On February 10, 2010, the People of the State of Illinois (People) filed a four-count complaint against Freeman United Coal Mining Co., LLC (Freeman United), and Springfield Coal Co., LLC (Springfield Coal), concerning a strip mine near Industry in McDonough and Schuyler Counties (Industry Mine). In 2007, Freeman United sold the Industry Mine to Springfield Coal. The People allege that the respondents violated Sections 12(a) and 12(f) of the Environmental Protection Act (Act) (415 ILCS 5/12(a) and (f) (2008)) by discharging iron, manganese, sulfates, pH and TSS into waters of the State in excess of permit limits so as to cause or tend to cause water pollution in Illinois in combination with matter from other sources. The Board accepted the People's complaint for hearing on February 18, 2010.

The Environmental Law and Policy Center (ELPC) filed a motion to intervene in this proceeding on February 25, 2010, on behalf of Prairie Rivers Network and the Illinois Chapter of the Sierra Club. The ELPC's motion was accompanied by a complaint. The People filed their response to the motion on March 1, 2010. Freeman United filed its response on March 9, 2010. Neither complainant nor Freeman United objected to the ELPC's motion to intervene in this matter.

On March 15, 2010, Springfield Coal timely filed its response to the ELPC's Motion, requesting that the Board enter an order denying the ELPC's request to intervene in this matter. The ELPC filed a motion for leave to reply to Springfield United's response on March 25, 2010. This motion was also accompanied by the ELPC's reply. On April 2, 2010, Springfield Coal filed a motion for leave to reply to the ELPC's reply, as well as an accompanying reply. On April 9, 2010, Freeman United filed its response to the ELPC's and Springfield Coal's motions for leave to reply. Finally, on April 14, 2010, the ELPC filed a motion for leave to reply to Freeman United's response, accompanied by a reply.

On April 15, 2010, the Board granted the ELPC's motion to intervene. On May 20, 2010, the Board granted Dale A. Guariglia's motion to appear *pro hac vice* on behalf of Springfield Coal.

On May 14, 2010, Freeman United filed a motion to strike and/or dismiss intervenor's complaint (Freeman MTD). On the same day, Springfield Coal filed a motion to strike, alternative motion to dismiss, and alternative motion to challenge the sufficiency of the ELPC's complaint (Springfield Coal MTD). The ELPC filed its response to the respondents' motion to strike, alternative motions to dismiss, and alternative motion to challenge the sufficiency of Intervenor's complaint in intervention (ELPC Response) on May 28, 2010.

STATUTORY AND REGULATORY BACKGROUND

Section 101.202 of the Board’s procedural rules defines “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. Adm. Code 101.202.

Under section 101.202 of the Board’s procedural rules, a matter is “duplicative” when:

[T]he matter is identical or substantially similar to one brought before the Board or another forum. *Id.*

Section 101.402(e), regarding intervention of parties, states:

An intervenor will have all the rights of an original party to the adjudicatory proceeding, except that the Board may limit the rights of the intervenor as justice may require. The limits may include providing that: the intervenor is bound by Board and hearing officer orders already issued or by evidence already admitted; that the intervenor does not control any decision deadline; and that the intervenor cannot raise issues that were raised or might more properly have been raised at an earlier stage of the proceeding. 35 Ill. Adm. Code 101.402(e).

The Board’s procedural rules state in regards to staying a complaint:

If the respondent timely files a motion under Section 103.212(b) or 35 Ill. Adm. Code 101.506, the 60-day period to file an answer described in subsection (d) of this Section will be stayed. The stay will begin when the motion is filed and end when the Board disposes of the motion. 35 Ill. Adm. Code 103.204(e).

Motions made by respondents alleging that a citizen’s complaint is duplicative or frivolous must be filed no later than 30 days following the date of service of the complaint upon the respondent. Motions under this subsection may be made only with respect to citizen’s enforcement proceedings. Timely filing the motion will, pursuant to Section 103.204(e) of the Subpart, stay the 60 day period for filing an answer to the complaint. 35 Ill. Adm. Code 103.212(b).

THE ENVIRONMENTAL LAW AND POLICY CENTER’S COMPLAINT

The ELPC sets forth four causes of action in its complaint: discharge without a valid National Pollutant Discharge Elimination System (NPDES) permit (Count I), NPDES permit violations (Count II), water pollution violations (Count III), and water quality standard violations (Count IV).

The ELPC contends that Freeman United did not effectively transfer NPDES Permit No. IL0061247 (permit) to Springfield Coal. ELPC Complaint (Compl.) at 9. Freeman United and

Springfield Coal sent a letter to the Illinois Environmental Protection Agency (IEPA) on August 14, 2007 requesting transfer of the permit “effective no sooner than September 1, 2007.” *Id.* The ELPC states that this transfer request was ineffective as it did not specify a date for transfer of the permit responsibility and was not sent at least thirty days in advance of the earliest transfer date, as required under the federal regulations governing the NPDES program.¹ The ELPC believes that Freeman United remains the permittee for the permit and remains liable for any and all violations of the conditions of the permit which have taken place at the Industry Mine, including those after Springfield Coal began operation of the mine. *Id.* The ELPC further states that Springfield Coal has been operating the Industry Mine without a permit and that every discharge of pollutants into the receiving waters during its control of the facility has been a discharge without a permit in violation of 33 U.S.C. § 1311(a) and 415 ILCS § 5/12(f). *Id.* In the alternative, the ELPC believes that Freeman United remains liable for all violations of the permit that occurred prior to the permit transfer, and Springfield Coal is liable for all violations of the permit that have occurred after the permit became effective. *Id.* at 10.

The ELPC states that the permit imposes effluent limitations for iron, manganese, sulfates, pH and total suspended solids (collectively, contaminants), applicable to discharges from the mine. *Id.* at 11. The ELPC believes that both respondents are liable for the violations of the terms and conditions of the permit and lists numerous instances where the respondents caused or allowed the discharge of these contaminants in excess of their daily and/or monthly permitted average effluent limitations. *Id.* at 12-21. The ELPC notes that monitoring records in the respondents’ possession may show additional discharges in excess of the effluent limitations imposed by the permit. *Id.* at 21. The ELPC contends that, by repeatedly discharging the contaminants in violation of the permit, Freeman United or Springfield Coal (or both) violated Section 12(f) of the Act, 415 ILCS § 5/12(f) (2008), and Section 301 of the Clean Water Act, 33 U.S.C. § 1311 (2006).

The ELPC believes that the respondents have violated Section 12(a) of the Act, 415 ILCS § 5/12(a) (2008) by causing or tending to cause water pollution. *Id.* at 23. The ELPC states that the respondents violated this section by causing or allowing the discharge of the contaminants from at least January 2004 until September 2009 into waters of the State so as to cause or tend to cause water pollution in Illinois in combination with matter from other sources. *Id.* The ELPC asserts that these discharges from the Industry Mine in excess of the permitted concentration levels have likely created a nuisance or rendered such waters harmful or detrimental or injurious to agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life. *Id.*

¹ The ELPC cites 40 C.F.R. § 122.63 (2009), stating that a permit transfer may take place as a minor modification provided that “a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the Director.” *Id.* The ELPC also cites 40 C.F.R. § 122.61, which states in part that an NPDES permit may be automatically transferred to a new permittee if “[t]he current permittee notifies the Director at least 30 days in advance of the proposed transfer date in paragraph (b)(2) of this section[.]” among other prerequisites. *Id.*

Lastly, the ELPC states that the respondents have caused or allowed the discharge of sulfates into Grindstone Creek and its tributaries so as to cause or contribute to a violation of the water quality standard applicable pursuant to Section 302.208(h) of the Board's Water Quality Standards, 35 Ill. Adm. Code § 302.208(h). *Id.* at 26. The ELPC contends that this violation further violates Sections 12(a) and 12(f) of the Act, 415 ILCS § 5/12(a), (f) (2008) and Section 301 of the Clean Water Act, 33 U.S.C. § 1311 (2006).

**MOTIONS TO STRIKE, DISMISS AND/OR CHALLENGE
THE SUFFICIENCY OF THE ELPC'S COMPLAINT**

The Board will first summarize the arguments in the Freeman MTD and the Springfield MTD, followed by the ELPC's response.

**Freeman United's Motion to Strike and/or
Dismiss the Intervenor's Complaint**

Freeman United sets forth several reasons as to why the Board should strike and/or dismiss the ELPC's complaint. Freeman MTD at 1.

Intervenor's First Cause of Action should be stricken

Freeman United states that Count I of the ELPC's complaint should be stricken because the cause of action – and the related allegations that aver that Freeman United remains liable for violations of the Act occurring after September 1, 2007 – go beyond the facts and allegations in the People's complaint. *Id.* at 3. Freeman United believes this inappropriately expands the scope of the enforcement hearing. *Id.*

Freeman United correctly quotes the Board's April 15, 2010 order which states that the ELPC "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." April 15, 2010 Bd. Order at 10, citing Saline County Landfill, Inc. v. IEPA, PCB 02-108, slip op. at 6 (Apr. 18, 2002). In that case, the County of Saline intervened in a permit appeal proceeding and attempted to file a counter-motion for summary judgment. *Id.* at 4. The Board held that the County could not file a counter-motion for summary judgment in favor of the Agency where the Agency had not done so. *Id.*

On September 1, 2007, Freeman United sold the Industry Mine to Springfield Coal. *Id.* On August 14, 2007, Freeman United and Springfield Coal notified the IEPA of the sale and requested transfer of the Industry Mine NPDES permit from Freeman United to Springfield Coal. *Id.* Neither Freeman United nor Springfield Coal received any response from the IEPA. *Id.* at 5.

In the almost three years since the IEPA received notice of the transfer, the IEPA never raised any objection to the transfer of the NPDES permit from Freeman United to Springfield Coal. *Id.* Freeman United believes this to mean that the IEPA deemed the permit transfer effective in September, 2007 and that the IEPA considers Springfield Coal to be the current permittee. *Id.*

Freeman United states that the IEPA never objected or responded to the August 14, 2007 letter and never notified Freeman United or Springfield Coal that it intended to modify or revoke the NPDES permit. *Id.* Freeman United quotes Standard Condition 13 of the NPDES permit, which requires the IEPA, after receiving a notice letter, 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.” *Id.* at 5-6.

Freeman United notes that the IEPA understood that the NPDES permit had been transferred to Springfield Coal, as can be seen from a notice of violation letter that the IEPA sent Springfield Coal on October 8, 2009, for alleged violations of the NPDES permit. *Id.* at 6. In response, Springfield Coal submitted a compliance plan to the IEPA on February 18, 2010. *Id.* at 5. Furthermore, the IEPA referred this case to the People to bring an enforcement action against Springfield Coal as the current permittee under the NPDES permit. *Id.* at 6. Freeman United also points to the fact that all of the alleged violations in the People’s complaint which occurred after September 1, 2007, are brought exclusively against Springfield Coal. *Id.*

Freeman United believes that, by filing a citizen complaint seeking to enforce the Act, the ELPC is acting as a private attorney general. *See Int’l Union v. Caterpillar Inc.*, PCB 94-240, slip op. at 36 (Aug. 1, 1996). *Id.* As such, Freeman United feels that the ELPC is bound by the IEPA’s determination that the NPDES permit was effectively transferred to Springfield Coal. *Id.* For all these reasons, Freeman United believes that the ELPC’s first cause of action impermissibly expands the scope of this enforcement proceeding and is barred by the principal of estoppel. *Id.* at 6-7.

Intervenor’s Complaint is Frivolous and Duplicative of the People’s Complaint

Freeman United believes it is not liable for any alleged violations occurring after September 1, 2007, because Freeman United did not maintain control over the Industry Mine after selling it to Springfield Coal. *Id.* at 7. Freeman United quotes an earlier Board decision which states “[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.” *Id.*, citing *People v. Prior*, PCB 02-177, slip op. at 26 (May 6, 2004), citing also *People v. A.J. Davinroy Contractors*, 249 Ill. App. 3d 788, 793, 618 N.E.2d 1282, 1286 (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.”).

Freeman United states that the ELPC’s complaint is frivolous because any claims that can be asserted against Freeman United are for past violations. *Id.* at 8. Freeman United points out that, under the Act, “[a]ny person may file with the Board a complaint . . . against any person allegedly violating the Act . . .” *Id.*, citing 415 ILCS § 5/31(d)(1). The ELPC cannot claim that Freeman United is presently “violating the Act” because any violations which Freeman United may allegedly be responsible for, occurred prior to the sale of the Industry Mine on September 1, 2007. *Id.* Freeman United further supports this point by addressing a United States Supreme Court case which held that, under the Clean Water Act, citizens can only seek injunctive relief and civil penalties for ongoing violations of the Act. *Id.*, citing *Gwaltney of Smithfield, Ltd. V.*

Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987). The Supreme Court justified its decision by pointing out that the language of the statute was in the present tense. *Id.*, citing Gwaltney, 484 U.S. at 59. Freeman United believes that the same principal should be applied to the Act's citizen complaint provision, which is also written in the present tense. *Id.* at 9.²

Freeman United also argues that no injunctive relief is available to the ELPC as Freeman United no longer owns the Industry Mine and all of its alleged violations occurred in the past. *Id.* Thus, the ELPC will not be impacted materially by any final determination relating to Freeman United. *Id.* Therefore, the only relief available are civil penalties paid to the State treasury and the ELPC will not be impacted materially by any final determination relating to Freeman United. *Id.*

Finally, Freeman United states that the only potentially viable claims in the ELPC's complaint are duplicative of the People's complaint. *Id.* Freeman United believes that, since all of the claims in the ELPC's complaint are frivolous as to Freeman United, and duplicative of the claims in the People's complaint, the ELPC's complaint should be dismissed in its entirety. *Id.* at 10.

Freeman United requests that the Board strike the ELPC's first cause of action and all subsequent allegations relating to that cause of action to the extent they are based on the ELPC's theory that the NPDES permit was not effectively transferred to Springfield Coal, or dismiss the ELPC's complaint in its entirety. *Id.*

Springfield Coal's Motion to Strike, Alternative Motion to Dismiss, and Alternative Motion to Challenge the Sufficiency of the Intervenor's Complaint

Springfield Coal states that this Board has well established that an intervenor must take the case as he finds it. Springfield MTD at 2, citing Diesing v. City of Crystal Lake, PCB 91-30 (Nov. 7, 1991). Springfield Coal compares the current case to the Diesing case, where the Board prevented an intervenor in an enforcement case from filing a complaint, stating that the intervenor has to take the case as it finds it. *Id.* Springfield Coal also points out that the Board in Diesing noted that the complaint merely restated the issues set forth by the original complainants. *Id.* Springfield Coal believes that, by allowing the ELPC to intervene in this case, the ELPC will be changing the case and not taking the case as it finds it. *Id.*

In the alternative to striking the complaint for the above reasons, Springfield Coal moves that the Board strike the ELPC's complaint for being duplicative and frivolous. *Id.* Springfield Coal notes that both complaints have four causes of action. *Id.* at 3. The second cause of action

² Freeman United distinguishes a previous Board order in which the Board allowed a private citizen to maintain a suit against a violator despite the fact that the source of the violation had been remedied. See Shelton v. Crown, PCB 96-53 (Oct. 2, 1997). *Id.* Freeman United points out that, in Shelton, the alleged offender continued to own and operate the source of the violation, which was not remedied until one year after the citizen suit was filed. *Id.* Freeman United also notes that the Shelton case did not have any involvement by the People of the State of Illinois. *Id.*

of the ELPC's complaint is "virtually identical" to Counts I and II of the People's complaint (alleging "virtually identical" violations of effluent discharges, including dates of alleged violations and identical types of materials allegedly released into the environment). *Id.* Springfield Coal also notes that the third cause of action of the ELPC's complaint is identical to Counts III and IV of the People's complaint, with only minor clerical changes. *Id.*

Springfield Coal further argues that the ELPC's complaint is duplicative in that the first and fourth counts in the ELPC's complaint, while not included in the People's complaint, are causes of action that the People considered filing but chose not to pursue. *Id.* Springfield Coal supports this position by citing to two letters attached as exhibits to the Springfield MTD in which the People sent a draft complaint to counsel for the ELPC and Springfield Coal. *Id.* That original draft, which is also attached to the Springfield MTD, contained five counts.

The fifth count of that draft alleged violations of the State's water quality standards. *Id.* Springfield Coal alleges that, prior to the filing of the complaint, the People informed Springfield Coal that they decided not to include this count in the final complaint because changes in the water quality standards over the last few years called into question whether such violations existed. *Id.* at 3-4. Springfield Coal believes that the Board should respect this prosecutorial discretion and not allow the ELPC to pursue this claim. *Id.* at 4.

Similarly, Springfield Coal argues that Count I of the ELPC's complaint is also duplicative. *Id.* Springfield Coal states that, even though notice of the permit transfer was only sent to the Agency 15 days prior to the transfer instead of the 30 days required by the permit, the Agency reviewed the transfer notice in 2007 and has had plenty of time to challenge the allegedly deficient transfer since – yet has chosen not to do so. *Id.* As such, Springfield Coal believes that the ELPC's complaint is duplicative since most of the complaint is word-for-word identical to the People's complaint, and those claims that are different still relate to the same set of facts and are claims that the People consciously chose not to pursue. *Id.*

Finally, Springfield Coal argues that the ELPC's complaint is frivolous since it is 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. *Id.* Springfield Coal states that an intervenor must take the case as it finds it, and the ELPC's complaint is frivolous since past Board rulings have held that such claims cannot be pursued. *Id.* at 5. Springfield Coal therefore requests that the ELPC's complaint be dismissed. *Id.*

Springfield Coal also notes that, pursuant to 35 Ill. Adm. Code §§ 103.204(e) and 103.212(b), the filing of its motion shall stay the 60-day answer period on the ELPC's complaint. *Id.*

Springfield Coal requests that the Board grant its motion to strike, alternative motion to dismiss, and alternative motion to challenge the sufficiency of the ELPC's complaint. *Id.*

The Environmental Law and Policy Center's Response

The ELPC argues that its complaint is not duplicative. ELPC Response at 5. In support, the ELPC notes that two of the counts in its complaint are not found in the People's complaint. *Id.* The ELPC contends that, since the causes of action are not ones brought before the Board or another forum, they cannot be considered duplicative under the Board's rules. *Id.*, citing United City of Yorkville v. Hamman Farms, PCB 08-96, slip op. at 6 (Apr. 2, 2009) (in which the Board held, among other reasoning, that (a) additional violations affect the relief requested, and (b) the Board also considers 'whether the two "complaints are based on different theories."' Robert Smith v. Heritage Tool & Die Manufacturing, Inc., PCB 99-145, slip op. at 2 (June 3, 1999)).

The ELPC acknowledges that its second and third causes of action closely track claims made by the People, but insists that there are substantial differences between the two complaints. *Id.* While the ELPC and the People allege the same permit violations based on concentrations reported in the mine's Discharge Monitoring Reports (DMRs), the ELPC's complaint also raises the possibility that Freeman United is still liable for these violations due to its failure to comply with the regulations governing transfer of the NPDES permit. *Id.* at 5-6. The ELPC contends that both Freeman United and Springfield Coal are liable for the NPDES permit violations and the water pollution caused by these violations on or after September 1, 2007. *Id.* at 6, citing Prior, PCB 02-177, slip op. at 26, 37 (holding both owner/operator and non-owner/operator permittee of a facility liable for violations). This allegation could impose liability for three years of additional violations on Freeman United. *Id.*, citing United City of Yorkville, PCB 08-96, slip op. at 6 (where Board considered time frame of the two actions in determining whether the citizen complaint was duplicative).

The ELPC also alleges that monitoring data within the respondents' possession may show additional violations – an allegation not brought up in the People's complaint. *Id.* It is the ELPC's position that these additional violations will be found in the respondents monitoring data (where the respondents took multiple samples during a single month), each of which violated the daily maximum effluent limits contained in the NPDES permit, and which can only be specifically alleged following discovery. *Id.* at 6-7. The ELPC further notes that there are several similar instances in the DMRs from the Industry Mine. *Id.* at 7.

The ELPC seeks relief not sought by the People's complaint, *i.e.* that the Board issue an order under Section 33 of the Act requiring the respondents to immediately cease and desist from violations of the Act. *Id.*, citing United City of Yorkville, PCB 08-96, slip op. at 6 (where the Board looked to whether the relief requested differed in deciding whether the citizen complaint was duplicative).

The ELPC believes that Illinois law provides an intervenor the opportunity to raise issues "which are inextricably interrelated with those raised in the original suit." *Id.*, citing Lake States Eng'g Corp. v. One Naperville Corp., 148 Ill. App. 3d 836, 841-42, 499 N.E.2d 657, 660 (2nd Dist. 1986). The ELPC states that this rule was set down by Strader v. Board of Education, 351 Ill. App. 438 (3rd Dist. 1953), which allows intervenors to raise questions which "were so interrelated to questions raised in the principal suit that the decision would affect the outcome." *Id.* at 7-8, citing Lake States Eng'g Corp., 148 Ill. App. 3d at 842 (quoting Strader, 351 Ill. App.

at 460 (which allowed an intervenor to raise a new issue that was within the scope of the general prayer for relief contained in the original pleading and therefore does not raise an additional issue.).

The ELPC contends that its complaint seeks to raise only new issues that are inextricably interrelated with the claims already raised within the scope of the People's general prayer for relief. *Id.* at 9. In support of this position, the ELPC cites Lake States Eng'g Corp. *Id.* at 8. There, the intervenor sought to raise claims within the scope of the general prayer for relief. The court found that allowing the intervenor to raise the new issues would avoid a multiplicity of suits and conserve judicial resources. The ELPC believes that the rule that an intervenor "must take the case as he finds it" does not render ELPC's complaint either duplicative or frivolous and that none of the cases cited by the respondents hold to the contrary. *Id.* at 9.

The ELPC points out that in both the Saline County and Diesing cases, neither intervenor sought to raise new claims or issues. *Id.* at 10. The ELPC also contends that the Board in Saline County denied the intervenor's attempt to move for summary judgment based on a previously-issued hearing officer scheduling order that bound the intervenor from filing any counter-motions for summary judgment. *Id.* The ELPC notes that no schedule or hearing officer order precluding the ELPC from filing its complaint exists in the present case. *Id.*

The ELPC disagrees with Freeman United's position that the permit transfer complied with the applicable regulations merely because the Agency did not object to the transfer (a requirement under Section (c) of standard condition 13 of the permit). *Id.* at 11. Rather, the ELPC notes the entirety of the permit condition, which it contends must be read in its entirety under Illinois law:

Standard Condition 13 of NDPEs Permit No. IL0061247 reads as follows:

Transfer of permits. A permit may be automatically transferred to a new permittee if:

- (a) The current permittee notifies the Agency at least 30 days in advance of the proposed date;
- (b) The notice includes a written agreement between the existing and new permittees containing a specific date for transfer of permit responsibility, coverage and liability between the current and new permittees; and
- (c) The Agency does not 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. *Id.*

The ELPC contends that Illinois law requires that the permit be read (and that Freeman United must satisfy the permit) in its entirety. *Id.* at 12, citing People ex rel. Madigan v. Illinois Commerce Comm'n, 231 Ill. 2d 370, 380, 899 N.E.2d 227, 232 (2008); MD Electrical

Contractors, Inc. v. Abrams, 228 Ill. 2d 281, 287, 888 N.E.2d 54, 58 (2008); and People v. Parcel of Property Commonly Known as 1945 North 31st St., 217 Ill. 2d 481, 501, 841 N.E.2d 928, 940 (2005).

The ELPC believes that, since Freeman United did not comply with the regulations incorporated into the permit, its transfer request was ineffective and it therefore remains subject to the conditions of the permit. *Id.* The ELPC quotes Standard Condition 1 to the permit, which reads in part “[t]he permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Act and is grounds for enforcement action, permit termination, revocation and reissuance, modification, or for denial of a permit renewal application.” *Id.* at 12-13.

The ELPC disagrees with Freeman United’s position that the ELPC is estopped from contesting the permit transfer as private attorneys general merely because the IEPA was aware of the transfer and acted as though it was completed. *Id.* at 13. Rather, the ELPC contends that Congress envisioned robust public participation where government enforcement had not been diligently prosecuted. *Id.*, citing Friends of the Earth v. Laidlaw Env’tl. Servs. (TOC), Inc., 528 U.S. 167, 177-78 (2000). The ELPC also contends that such a position would be at odds with the principle that requests for variances or permit modifications are “carried out on the polluter’s time, not the public’s.” *Id.*, citing U.S. Steel Corp. v. Train, 556 F.2d 822, 846 (7th Cir. 1977).

The ELPC further disagrees with Freeman United’s contention that it cannot be held liable for any violations occurring after September 1, 2007, since it did not maintain control over the premises. *Id.* Freeman United cited Prior, PCB 02-177, slip op. at 26. The ELPC notes that the Board in Prior stated that “[o]wnership of property is not a prerequisite to violating the Act or Board rules against causing or allowing improper emissions.” *Id.*, citing Prior, PCB 02-177, slip op. at 6. The Board in Prior held the named permittee liable for violations at the facility in question even though he had sold the facility and neither owned nor operated it. *Id.* at 13-14. The ELPC argues that, as in Prior, “[t]o hold that [the named permittee] is not liable here would contradict the Act and case law, as well as promote sham operating arrangements at the expense of the environment.” *Id.* at 14.

The ELPC states that Freeman United’s contention that civil penalties are insufficient to provide standing is contradicted by Laidlaw. *Id.* In Laidlaw, the U.S. Supreme Court held that civil penalties can serve to redress a citizen plaintiff’s injury in a Clean Water Act enforcement suit, despite the fact that they are paid to the government and not the citizen plaintiff, because they serve to deter future violations. *Id.* The ELPC also notes that it has alleged in good faith that Freeman United remains the named permittee at the mine and is thus liable for the continuing violations. *Id.*, citing Gwaltney, 484 U.S. at 64 (holding that the Clean Water Act “confers jurisdiction over citizen suits when the citizen-plaintiffs make a good faith allegation of continuous or intermittent violation.”).

The ELPC states that Freeman United has ignored Section 33 of the Illinois Environmental Protection Act, 415 ILCS 5/33, which reads in part as follows:

It shall not be a defense to findings of violations of the provisions of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order, or a bar to the assessment of civil penalties that the person has come into compliance subsequent to the violation, except where such action is barred by any applicable State or federal statute of limitation. *Id.* at 14-15.

The ELPC argues that the Board, in Shelton v. Crown, interpreted Section 33 to provide “ample statutory authority . . . for the Board to find a violation of the Act or Board regulations in cases where compliance has been achieved subsequent to a violation.” *Id.* at 15, citing Shelton, PCB 96-53, slip op. at 11. It is ELPC’s position that the Board surely has the same authority to hold the named permittee liable where there are ongoing violations at a permitted facility. *Id.*

The ELPC states that its complaint raises only those issues within the scope of the People’s existing complaint. *Id.* The ELPC complaint raises violations not addressed by the People. *Id.* It is not duplicative and not frivolous sine the Board has authority to hear claims of ongoing violations. *Id.* Lastly, the ELPC believes that it has standing to raise these claims against the named permittee and the current owner and operator of the Industry Mine. *Id.*

DISCUSSION

The Board will first set forth the legal standard for considering a motion to dismiss on the sufficiency of the pleadings. The Board will then address the motions of the respondents.

Standard For Granting Motion to Dismiss

In ruling on a motion to dismiss, the Board looks to Illinois civil practice law for guidance. *See, e.g.,* United City of Yorkville, PCB 08-96, slip. op. at 14-15 (Oct.16, 2008); People v. The Highlands, LLC, PCB 00-104, slip op. at 4 (Oct. 20, 2005); Sierra Club and Jim Bensman v. City of Wood River and Norton Environmental, PCB 98-43, slip op. at 2 (Nov. 6, 1997); Loschen v. Grist Mill Confections, Inc., PCB 97-174, slip op. at 3-4 (June 5, 1997). 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.,* Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004); *see also* In re Chicago Flood Litigation, 176 Ill. 2d 179, 184, 680 N.E.2d 265, 268 (1997); Board of Education v. A, C & S, Inc., 131 Ill. 2d 428, 438, 546 N.E.2d 580, 584 (1989). “[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.” Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003).

Freeman United’s Motion to Dismiss

Freeman United has presented several grounds for why the ELPC’s complaint should be dismissed. Specifically, Freeman United claims that (1) the complaint would impermissibly broaden the proceeding, (2) the ELPC is estopped from challenging the transfer, (3) the ELPC’s complaint is frivolous as to Freeman United since Freeman United no longer owns the Industry

Mine and the ELPC does not have standing to allege wholly past violations, and (4) the ELPC's complaint is duplicative of the People's complaint. The Board will address each of these arguments separately below.

The ELPC's complaint would not impermissibly broaden the proceeding

Freeman United contends that the ELPC, as an intervenor, must take the case as it finds it. Freeman MTD at 3. In support of this position, Freeman United cites Saline County Landfill, PCB 02-108, slip op. at 6. Freeman United states that the Board held in that case that the intervenor could not file a counter-motion for summary judgment because an intervenor must take the case as it finds it. *Id.* at 4. However, this is a misreading of the case. While it is true that the Board did not allow the intervenor to file a counter-motion for summary judgment, the reasoning behind the decision differs to that given by Freeman United. The Board denied the motion in Saline County Landfill due to a previous hearing officer scheduling order in that case prohibiting the only other party at the time from filing any counter-motion for summary judgment. Saline County Landfill, PCB 02-108, slip op. at 6. The intervenor in Saline County Landfill was therefore bound by the previous scheduling order prohibiting the motion, and not because merely filing such a motion would impermissibly broaden the proceeding. At this time, no such scheduling order exists in this case.

Illinois law does allow for an intervenor to raise new claims or issues in a proceeding. See Lake States Eng'g Corp., 148 Ill. App. 3d at 841-42 (providing an intervenor with the opportunity to raise issues which are inextricably interrelated with those raised in the original suit); and Strader, 351 Ill. App. 438 (allowing intervenor to raise questions which were so interrelated to questions raised in the principal suit that the decision would affect the outcome).

The ELPC contends that the issues raised in its complaint are inextricably interrelated to those in the People's complaint. The Board agrees with this position. Both the People's complaint and the ELPC's complaint raise allegations regarding violations of the NPDES permit at the Industry Mine. The ELPC's complaint seeks to only raise new issues that are related with the claims already raised within the scope of the People's general prayer for relief. Allowing the ELPC's complaint in this case would not impermissibly broaden the proceeding.

The ELPC is not estopped from filing its complaint

Freeman United cites a previous Board decision in which the Board noted that, by filing a citizen complaint seeking to enforce the Act, the intervenors were acting as private attorneys general. Freeman MTD at 6, citing Int'l Union, PCB 94-240 at 36. Freeman United believes that, as private attorneys general, the ELPC is therefore bound by the Agency's determination that the NPDES permit was effectively transferred to Springfield Coal. *Id.*

Freeman United does not give any citation in support of this position. Indeed, the Board is unable to find, either in Int'l Union or any other decision, any supporting argument as to why

such an Agency determination would bind the ELPC.³ The ELPC is not bound by any Agency determination and is therefore not estopped from filing its complaint.

The ELPC's complaint is not frivolous as to Freeman United and the ELPC does have standing to bring its complaint

Freeman United argues that it is not liable for any alleged violations occurring after September 1, 2007 (the date it transferred the mine over to Springfield Coal) and that the ELPC is only able to bring claims for ongoing violations of the Act. Freeman MTD at 7-8. Freeman United therefore claims that the ELPC lacks standing to file its complaint since any allegations against Freeman United are for wholly past violations. *Id.* at 8.

Count I of the ELPC's complaint alleges that Freeman United ineffectively transferred the NPDES permit to Springfield Coal. ELPC Complaint at 9. The ELPC believes that, because the permit transfer was ineffective, Freeman United has not been relieved of its duty to comply with all conditions of the permit and remains liable for any and all violations of the conditions of the permit. *Id.*

The ELPC correctly notes that Illinois law supports the concept that permits should be read in their entirety. ELPC Response at 12. On this basis, the ELPC alleges that Freeman United remains subject to the conditions of the permit because of an ineffective transfer to Springfield Coal. *Id.* This allegation appears to have been raised in good faith. Furthermore, 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 Beers*, PCB 04-204, slip op. at 2. The ELPC has sufficiently pled its allegations and, if taken as true, would result in Freeman United being held liable for violations of the NPDES permit beyond the September 1, 2007 date, up to and including any ongoing violations. The ELPC clearly has standing to bring its complaint under Section 31(d) of the Act.

The ELPC's complaint is not duplicative of the People's complaint

Under the Board's procedural rules, a complaint is duplicative when it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. The Board has previously looked at a variety of factors in determining whether or not a complaint is duplicative, including (1) whether the two complaints are based on different theories, (2) whether the two actions involved the same time frame, and (3) whether the relief

³ The full quote from the previous Board decision reads:

Under Section 31(b) of the Act, the complainants have filed this citizens' enforcement action bringing to our attention (and to that of the public) the remediation management methods employed at this particular facility and to an existing groundwater problem. *In doing so, the complainants have performed the function of private attorneys general, safeguarding their important voice in Illinois' process and serving a vital function in ensuring environmental protection.* *Int'l Union*, PCB 94-240, slip op. at 37. (Emphasis added).

requested in Board and court proceedings differed. *See United City of Yorkville*, PCB 08-96, slip op. at 5-6 (Apr. 2, 2009).

The ELPC's complaint in this case is not duplicative of the complaint filed by the People. The two complaints are based upon different theories. Count I and Count IV of the ELPC's complaint are not touched upon in the People's complaint. The ELPC, in Count II and Count III, also raises the possibility that Freeman United remains liable for the alleged violations, an allegation not raised in the People's complaint. Furthermore, the two complaints do not involve the same time frame. The ELPC's allegations against Freeman United extend beyond September 1, 2007, which is the date that the People's allegations against Freeman United end. This Board has previously held that additional violations alleged and a longer period of alleged violations affects the relief requested. *Id.* In this case, the ELPC's complaint not only raises new violations, but also extends the length of the existing violations by a period of three years against Freeman United. As such, the ELPC's complaint is not duplicative of the People's complaint.

For all these reasons, Freeman United's motion to strike and/or dismiss the ELPC's complaint is denied.

Springfield Coal's Motion to Dismiss

Springfield Coal states that the ELPC's complaint should be dismissed because (1) the ELPC must take the case as it finds it and filing a complaint is trying to change the case, and (2) the ELPC's complaint is duplicative and frivolous of the People's complaint. The Board addresses each of these arguments below.

The ELPC "taking the case as it finds it" does not bar the ELPC from filing its complaint

Springfield Coal contends that allowing the ELPC's complaint would not be taking the case as it finds it. Springfield MTD at 2 (citing the Diesing decision in which the Board denied an intervenor's request to file a complaint). The Board in Diesing noted that the complaint the intervenor sought to file "merely restated the issues set forth [by the complainants] and did not state new issues." Diesing, PCB 91-30, slip op. at 2. The ELPC complaint does not seek to merely restate the issues set forth in the People's complaint, but states new issues as outlined above.⁴ Illinois law supports an intervenor raising new issues so long as those issues are

⁴ The Board in Diesing, in stating that "an intervenor must take the case as he finds it," cites to a previous court decision in Lake States Eng'g, 148 Ill. App. 2d at 841-42. The full citation from that case is as follows:

The extent to which an intervening petitioner may alter the issues is contemplated by the general rule that an intervenor must take the case as he finds it and the proceedings cannot be changed by introducing new matters not relevant to the controversy or which unduly complicate it. The key word here is relevancy. We believe that the trial court, in exercising its discretion, should admit the issues and parties which are inextricably interrelated with those raised in the original suit. (Internal citation omitted).

“inextricably interrelated” with those in the original suit. Furthermore, there is no order in this case restricting the ELPC from filing its complaint. As such, the ELPC is clearly “taking the case as it finds it” and is not barred from filing its complaint.

The ELPC’s complaint is not duplicative and frivolous

The Board incorporates its above discussion regarding this matter here and only addresses new concerns raised by Springfield Coal.

Springfield Coal notes in its motion that Count I and Count IV of the ELPC’s complaint are alleged violations that the People considered filing but did not include in its filed complaint. Springfield MTD at 4. As such, Springfield Coal believes that the Board should “respect this prosecutorial discretion” and not allow the ELPC to present a charge that the State chose not to pursue. *Id.* However, Springfield Coal does not cite any authority supporting this position. The mere fact that the People chose not to pursue these claims does not preclude another party from pursuing them on their own. The Board cannot and will not question the reasoning behind the People’s decision to exclude these allegations and, when reading the facts in a light most favorable to the ELPC, must take the allegations as true. See Beers, PCB 04-204, slip op. at 2. The ELPC’s complaint is not duplicative of the People’s complaint.

Springfield Coal contends that the ELPC’s complaint is frivolous as the Board does not have the authority to grant the sought relief. Springfield MTD at 4-5, citing Diesing. As previously discussed, this is an incorrect interpretation of the Diesing case and the Board is clearly within its jurisdiction to allow the ELPC to file its intervenor complaint.

For all these reasons, Springfield Coal’s motion to strike, alternative motion to dismiss, and alternative motion to challenge the sufficiency of the ELPC’s complaint is denied.

The Board accepts the ELPC’s complaint for hearing and, for purposes of administrative efficiency, directs the Clerk to assign the ELPC’s complaint a new docket number. The Board, on its own motion, consolidates the two cases unless and until such time as the parties request otherwise.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 15, 2010, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board