BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

PEOPLE OF THE STATE OF ILLINOIS,	)	
Complainant,	)	
ENVIRONMENTAL LAW AND POLICY CENTER, on behalf of PRAIRIE RIVERS NETWORK and SIERRA CLUB, ILLINOIS CHAPTER,	)	PCB 2010-061 and 2011-002 (Consolidated – Water – Enforcement)
Intervenor,	)	
v.	)	
FREEMAN UNITED COAL MINING CO., L.L.C., and SPRINGFIELD COAL COMPANY, L.L.C.,	)	
Respondents.	)	

SPRINGFIELD COAL COMPANY, LLC'S RESPONSE TO PRAIRIE RIVERS NETWORK AND SIERRA CLUB'S MOTION FOR SUMMARY JUDGMENT

Respondent Springfield Coal Company, LLC ("Springfield Coal"), pursuant to 35 Ill. Admin. Code §§ 101.500 and 101.516, responds to Prairie Rivers Network and Sierra Club's Motion (the "Intervenors") for Summary Judgment dated April 27, 2012 (the "Motion"). The Intervenors' Motion should be denied since there are numerous genuine issues of material fact and those facts which are not contested support Springfield Coal's affirmative defenses.

INTRODUCTION

Since August 31, 2007, Springfield Coal has owned and overseen the operation of the Industry Mine located in Industry, Illinois ("Industry Mine"). Springfield Coal purchased the Industry Mine from Freeman United Coal Company, LLC ("Freeman United") effective August

31, 2007. Prior to that time, Springfield Coal had no ownership or operational interest in the Industry Mine. The operation of the Industry Mine is conducted pursuant to the permit numbers 16, 180, 261, 305, 334, 341, and 357 issued by the Illinois Department of Natural Resources, Office of Mines and Minerals.

On April 2, 1999, the Illinois Environmental Protection Agency ("IEPA") issued NPDES Permit No. IL0061247 (the "NPDES Permit") to Freeman United for the operation of the Industry Mine. On August 15, 2003, Freeman United submitted to the IEPA a timely application for the renewal of the NPDES Permit. On August 14, 2007, Springfield Coal submitted to the IEPA a written request to transfer the NPDES Permit from Freeman United to Springfield Coal, thereby assuming responsibility for permit compliance. Although the renewal application for the NPDES permit was submitted almost nine years ago, the IEPA has completely failed to act on the application.

The present action by the People of the State of Illinois (the "State") and the Intervenors seeks to impose penalties against Freeman United and Springfield Coal for matters dating back over eight years, to January 2004. During this time, both Freeman United and Springfield Coal have worked cooperatively with the IEPA through the compliance commitment agreement process and the submission of compliance plans which called for the active treatment of water prior to its discharge to the receiving streams. In particular, from August 30, 2007, until August 30, 2009, Springfield Coal was operating under a Compliance Commitment Agreement ("CCA") with the IEPA at the Industry Mine.

Of significance in this case is that on July 21, 2003, the Industry Mine's NPDES Permit was modified to significantly lower the sulfate effluent limitation to the limits that currently exist in the NPDES Permit (i.e., as low as 500 mg/l). Prior to July 21, 2003, the NPDES Permit had

an effluent limitation for sulfate of 3500 mg/l. From 1989 up to July 21, 2003, the Industry Mine had zero exceedances of the sulfate effluent limitation in its NPDES Permit. On September 8, 2008, the Illinois Pollution Control Board (the "Board") adopted a revised water quality standard for sulfate, thereby rejecting the flawed 500 mg/l standard (which continues to remain in Springfield Coal's NPDES Permit) and putting in place a higher calculated limit. Since the NPDES Permit was modified on July 21, 2003, to lower the sulfate limitation to what is currently in the NPDES Permit (and which was rejected by the Board close to four years ago), the Intervenors allege that there have been 232 exceedances of the sulfate effluent limitation through September 2011.

IEPA started the regulatory process to revise the sulfate standard in October 2006, a year prior to Springfield Coal purchasing the Industry Mine. Despite the change of the sulfate standard in 2008, Springfield Coal's NPDES Permit will continue to contain the former 500 mg/l effluent limit until IEPA acts upon the 2003 renewal application. IEPA's inaction on the NPDES Permit renewal has created an environment where conduct that would be proper under the permit for which Springfield Coal has applied is deemed violative of standards that have been rejected now for years, but which the State and the Intervenors continue to seek to enforce.

The timing of the Intervenors' motion is both curious and frustrating. On November 29, 2011, during a telephone status conference, the Intervenors informed the Board and the parties that they planned to file a separate motion for summary judgment on Counts I and II of the complaint.[1] Months later, on January 30, 2012, the Intervenors informed the Board that they were "still working" on their motion for summary judgment.[2] On March 6, 2012, the State filed

[1] *See* Hearing Officer Order, November 29, 2011.

[2] *See* Hearing Officer Order, January 30, 2012.

its Motion for Partial Summary Judgment on Counts I and II of the complaint. Importantly, the Intervenors waited until April 27 to file their motion for summary judgment, the same day that Freeman United and Springfield Coal were required to submit their responses to the State's Motion for Partial Summary Judgment.

The timing is hardly coincidental. The Intervenors' arguments are essentially identical to those already raised by the State. In the Motion, the Intervenors are moving for partial summary judgment on Count II, the same count that the State moved for partial summary judgment on March 6, 2012. The Intervenors could have easily signed on with most, if not all, of the State's Motion for Partial Summary Judgment or filed its own Motion closer to the time of the State's Motion. Instead, the Intervenors have filed their own separate Motion, a Motion that burdens Freeman United and Springfield Coal to provide two separate responses. The Motion also wastes the Board's valuable time and resources in reviewing extra paperwork to adjudicate similar, if not identical, issues. Moreover, the Intervenors appear to delight in making statements that are unsupported by facts, are inflammatory in tone, and do not advance the issues in this case.[3] Instead of responding in the same manner, Springfield Coal provides this Response to the Board to address the many factual issues raised and ignored by the Intervenors.

Although the Intervenors try to portray the issues in this case as very simplistic, there are material factual issues in dispute and defenses that Springfield Coal has raised that preclude the granting of the Motion. Similar to its response to the State's Motion for Partial Summary Judgment, in this response, Springfield Coal makes two different kinds of arguments: (1) arguments that address liability issues; and (2) arguments that address penalty demands and a

[3] *See* Motion, at 7 – 8 (stating, among other things, that "Springfield Coal still has not produced a serious plan to remedy the violations of its existing permit. Instead of hiring a consultant to develop a compliance solution, Springfield Coal has attempted to rationalize its ongoing level of noncompliance as unimportant. This blatant disregard for the authority of the regulations under which the mine operates cannot be tolerated . . .")

request for a cease and desist order. With respect to the first general category of issues involving liability, Springfield Coal argues as follows:

- (I) Since the Intervenors moved for summary judgment, the Board must construe the evidence strictly against the Intervenors. A motion for summary judgment should be denied when there are genuine issues of material fact.

- (II) Substantial discrepancies exist between the violations alleged by the Intervenors as compared to those alleged by the State raising significant factual issues which preclude the entry of summary judgment.

- (III) Sixty-six of the alleged violations do not constitute as violations because of significant factual deficiencies. Consequently, nearly twenty percent of the violations that the Intervenors allege are, in fact, not violations.

- (IV) The Springfield Coal Compliance Commitment Agreement precludes the Intervenors from pursuing all violations against Springfield Coal from August 30, 2007 to August 30, 2009. There is a significant issue of material fact regarding the existence of the Springfield Coal Compliance Commitment Agreement since the Intervenors fail to even mention it in their Motion. Board precedent dictates that summary judgment is not appropriate when the parties dispute the existence of a compliance commitment agreement.

- (V) Contrary to the Intervenors' allegations, Springfield Coal has submitted numerous compliance plans and invested significant amounts of financial resources, time, and effort into compliance with the NPDES Permit. The existence of these undertakings alone demonstrates that there are issues of material fact that are in dispute in this matter.

- (VI) Since the water quality standard for sulfate was changed in 2008, the Intervenors should not be allowed to pursue violations against Springfield Coal for exceedances of the sulfate effluent limitation in the NPDES Permit which are based on the rejected standard. The current NPDES Permit sulfate effluent limitations are problematic, not the Industry Mine's discharges.

- (VII) Prior to any mining activity, there were constituents in the streams traversing the Industry Mine site at background concentrations above the NPDES Permit effluent limitations. Fundamental material factual issues exist as to whether these historic background concentrations along with current upstream concentrations also above permit limits — and not the Industry Mine operations — caused exceedances of Springfield Coal's NPDES Permit.

- (VIII) The Intervenors cannot enforce the manganese and pH effluent limitations in the NPDES permit against Springfield Coal pursuant to applicable Illinois regulations.

With respect to the second category of issues, Springfield Coal argues that the Intervenors' demand for a cease and desist order and civil penalties is improper and unprecedented because:

- (IX) A cease and desist order against Springfield Coal for future violations of the NPDES Permit is not appropriate or supported by the facts, especially since there are many factual discrepancies that will impact the Board's review and analysis of the statutory factors listed in 415 ILCS 5/33(c). Board precedent governs that a cease and desist order is not appropriate at summary judgment.

- (X) Illinois case law and Board precedent hold that the Intervenors improperly demand the imposition of civil penalties against Springfield Coal during the summary judgment phase. In addition, the Intervenors' penalty demand of $38,510,000 against Springfield Coal is completely inappropriate and unprecedented. There are also many factual discrepancies that will impact the Board's review and analysis of the statutory factors listed in 415 ILCS 5/33(c) and 415 ILCS 5/42(h) that should be addressed in a hearing.

Ultimately, Springfield Coal will demonstrate in its response that, in addition to its numerous defenses, there are many issues of fact sufficient to preclude partial summary judgment and that it is inappropriate to assess penalties at this time. This is supported by the numerous exhibits attached to Springfield Coal's Response and two detailed affidavits of Thomas J. Austin dated April 27, 2012 ("April 2012 Affidavit") and June 6, 2012 ("June 2012 Affidavit"). The April 2012 Affidavit and the June 2012 Affidavit are attached as Exhibits 1 and 2, respectively.

ARGUMENTS REGARDING LIABILITY ISSUES

I. The Standard of Review for the Granting of a Motion for Summary Judgment is High, and the Evidence Must be Construed in Favor of Springfield Coal

Because the Intervenors moved for summary judgment, the Board must construe the evidence strictly against the Intervenors and liberally in favor of Springfield Coal. *See, e.g.*, *Colvin v. Hobart Bros.*, 156 Ill. 2d 166, 170 (Ill. 1993) ("The Court must consider all the evidence before it strictly against the movant and liberally in favor of the nonmovant.").

Summary judgment is a "drastic means" of disposing of litigation, and, therefore, it is only appropriate when the "resolution of a case hinges on a question of law and the moving party's right to judgment is clear and free from doubt." *See In re Estate of Hoover*, 155 Ill. 2d 402, 410 (Ill. 1993). Moreover, the right to summary judgment must be "clear beyond question," and "[i]f the court is presented with any set of facts about which reasonable [persons] 'might disagree,' summary judgment should be denied." *See Kay v. Mundelein*, 36 Ill. App. 3d 433, 437 (Ill. App. Ct. 1976).

In deciding whether a factual question precluding summary judgment exists, courts must consider all of the evidence on file, and they have a duty to construe the evidence liberally in favor of Springfield Coal. *See Hoover*, 155 Ill. 2d at 410-11; *see also Schmahl v. A.V.C. Enter., Inc.*, 148 Ill. App. 3d 324, 327 (Ill. App. Ct. 1986) ("In deciding whether a factual question precluding summary judgment exists, courts are admonished to construe evidence strictly against the party moving for summary judgment and liberally in favor of the motion's opponent."). In determining the existence of a genuine issue of material fact, courts must consider the pleadings, depositions, admissions, exhibits, and affidavits on file in the case. *See, e.g., Purtill v. Hess*, 111 Ill.2d 229, 240 (Ill. 1986). A triable issue of fact exists when there is a dispute as to material facts or the material facts are undisputed but reasonable persons might draw different inferences from the facts. *See Hoover*, 155 Ill. 2d at 411. In other words, summary judgment should be denied if reasonable persons could draw divergent inferences from the undisputed facts. *See Pyne v. Witmer*, 129 Ill.2d 351, 358-59 (Ill. 1989).

If the court finds that the record contains "any material issues of genuine fact, the motion for summary judgment must be denied." *See Hoover*, 155 Ill. 2d at 411. Moreover, summary judgment should be denied when a defendant has an opportunity to prove a valid affirmative

defense that may bar the plaintiff's relief. *See Fed. Deposit Ins. Co. v. Maris*, 121 Ill. App. 3d 894, 901 (Ill. Ct. App. 1984). In considering the undisputed evidence and the law, the Board should deny the Intervenors's Motion.

II. Substantial Discrepancies Exist Between the Violations Alleged by the Intervenors as Compared to Those Alleged by the State, Raising Significant Factual Issues That Preclude the Entry of Summary Judgment

In their Motions for Summary Judgment, both the State and the Intervenors allege that they reviewed the discharge monitoring reports ("DMRs") submitted for the Industry Mine and the NPDES Permit and have based their allegations of violations on the information contained in the DMRs and the NPDES Permit. However, vast differences exist in the number of violations that are alleged by the State versus the Intervenors based on the same DMRs and NPDES Permit. Obviously significant factual issues exist which should preclude the granting of summary judgment to both the State and the Intervenors where these parties come to extremely different conclusions as to the number of alleged violations that have occurred based upon the same documents. *See, e.g., Kay v. Mundelein*, 36 Ill. App. 3d at 437 (holding that a motion for summary judgment should be denied if the court is presented with "any set of facts about which reasonable [persons] might disagree"). These are not just minor discrepancies of one or two alleged violations. In many instances, the numbers are not even close. The following table summarizes the number of exceedances of the NPDES Permit alleged against Springfield Coal by the State in its Motion for Summary Judgment versus the Intervenors in their Motion:

Constituent	Number of Violations Alleged by the State of Illinois Against Springfield Coal	Number of Violations Alleged by the Intervenors Against Springfield Coal	Discrepancy Between Excursions Alleged By State vs. Intervenors. Number and Percentage
Iron	11	40	29 73%
Manganese	81	135	54 40%
Sulfate	103	124	21 17%
TSS	17	30	13 43%

pH	8	12	4	33%
Settleable Solids	0	1	1	100%
Total	**220**	**342**	**122**	**36%**

The discrepancies between the numbers of violations alleged by the State versus the Intervenors is even more striking since the Intervenors actually looked at a shorter time period (Sept. 2007 – Sept. 2011) than reviewed by the State (Sept. 2007 – Dec. 2011). It is puzzling how the Intervenors can come up with an extra 122 alleged violations as compared to the State while reviewing a shorter time period. If the Board were to grant summary judgment to the State and the Intervenors, it raises a dilemma. Would summary judgment be granted for 220 violations, 342 violations, or some other number? To grant summary judgment, a moving party's right to judgment must be "clear and free of doubt." *See In re Estate of Hoover*, 155 Ill. 2d 402, 410 (Ill. 1993). Because of these discrepancies, and viewing this information most favorably to Springfield Coal, granting summary judgment to either the Intervenors or the State is inappropriate.[4]

III. Sixty-Six of the Alleged Violations (or nearly Twenty Percent of the Violations) Do Not Constitute as Violations Because of Significant Factual Deficiencies

The Intervenors, without supporting affidavits,[5] have alleged in their Motion that Springfield Coal had 342 exceedances of the effluent limitations in its NPDES Permit.

[4] In response, the Intervenors may try to argue that there are no or only minor discrepancies between their Motion and the State's. If the Intervenors do this, it raises a question as to whether the Intervenors' claims alleging NPDES Permit violations are duplicative of the State's claims in this case and therefore, as Freeman United argues in its Response to the Intervenors' Motion for Summary Judgment dated June 6, 2012, Count II of the Intervenors' Complaint should be dismissed. The Board may need to revisit its Order of July 15, 2010 in this case in which the Board held that the Intervenors' claims related to NPDES violations in this case are not duplicative of the State's.

[5] The only evidence of NPDES violations that the Intervenors cite are discovery responses from Springfield Coal and a set of DMRs. *See* Motion, at 4-7. Notably, the Intervenors do not rely upon any affidavits or other documents (such as Larry Crislip's affidavit submitted on behalf of the State) that testify as to whether there are exceedances of the NPDES Permit. The Intervenors also do not properly authenticate the evidence documenting the violations alleged in the Motion.

Springfield Coal has spent considerable time and effort reviewing each one of the violations that have been alleged by the Intervenors. Springfield Coal has compared the information in the Intervenors' Motion with the DMRs and the data supporting the DMRs. *See* Exhibit 2, at ¶5. As a result of this review, Springfield Coal has identified 66 instances in which the Intervenors have alleged there to be violations, when in fact no such violations have occurred. *See id.* These 66 instances comprise nearly 20% of the violations alleged by the Intervenors.

Most significantly, the Intervenors allege against Springfield Coal a total of 121 exceedances of the monthly average effluent limitations in the NPDES Permit. *See* Motion, at 4-6. However, at least 61 of these should not be considered violations. The DMRs and/or supporting documentation for these 61 occurrences indicate that less than three samples were taken in those particular months. *See* Exhibit 2, at ¶5. According to 35 IAC 406.101,[6] three grab samples are required in order to have a monthly average. As a result, these should not be considered violations. 35 IAC 406.101 provides in pertinent part that:

> Section 406.101 Averaging
>
> a) Compliance with the numerical standards of this part shall be determined on the basis of 24-hour composite samples averaged over any calendar month. In addition, no single 24-hour composite sample shall exceed two times the numerical standards prescribed in this part nor shall any grab sample taken individually or as an aliquot of any composite sample exceed five times the numerical standards prescribed in this part.
>
> b) Subsection (a) of this section notwithstanding, if a permittee elects monitoring and reporting by grab samples as provided in Section 406.102(f), then compliance with the numerical standards of this part shall be determined on the basis of three or more grab samples averaged over a calendar month. In addition, no single grab sample shall exceed two times the numerical standards prescribed in this part.

[6] In Springfield Coal's Response to the State's Motion for Summary Judgment, Springfield Coal cited 35 IAC 304.104, which also sets forth the requirement that three grab samples are required in order to have a monthly average. 35 IAC 406.101 may be the more appropriate regulation to cite because it is contained in the Board's Mine Related Water Pollution regulations.

(emphasis added).

In addition, the Intervenors allege that in April 2008, June 2008, and February 2011 Springfield Coal's discharges for Outfall 017 exceeded its permit limit. However, Outfall 017 was not discharging during these three months. *See* Exhibit 2, at ¶5. In September 2010, Intervenors allege that there was a discharge of sulfate at Outfall 009 at a concentration of 1136 mg/L. However, this is actually an averaged value and the NPDES Permit does not have a monthly average effluent limitation for sulfate; therefore, this is not an exceedance of the effluent limitation in the NPDES Permit. *Id.* And, in January 2010, the Intervenors allege that the Industry Mine's discharge at Outfall 019 had a pH of 9.04, when actually the DMR shows a pH value of 8.38, which is not a violation of the NPDES Permit. *Id.*

In short, because 66 of the violations alleged by the Intervenors are in fact not violations of Springfield Coal's NPDES Permit, the Intervenors' Motion should be denied as to those alleged violations.

IV. The August 30, 2007 Springfield Coal Compliance Commitment Agreement Precludes the Intervenors From Pursuing Violations During the Two-Year Term of the Agreement and Creates a Significant Factual Dispute Barring Summary Judgment

The Intervenors, like the State, should not be allowed to pursue alleged violations against Springfield Coal during the time Springfield Coal was operating under a CCA with the IEPA from August 30, 2007, through August 30, 2009 (the "Springfield Coal CCA"). *See* Exhibit 3. The Springfield Coal CCA bars the Intervenors from enforcing all violations and/or exceedances during this two-year time period. Significantly, as discussed in Springfield Coal's Response to the State's Motion for Partial Summary Judgment, because the State refutes that the Springfield Coal CCA was in effect from 2007 to 2009, there is a substantial factual dispute between the parties regarding whether the Springfield Coal CCA should be recognized. Instead of repeating

these arguments, Springfield Coal expressly incorporates all of the arguments and the corresponding exhibits from its response to the State's Motion for Partial Summary Judgment into this response.[7]

Inexplicably, the Intervenors fail to mention the Springfield Coal CCA in its Motion. Not once in its entire Motion did the Intervenors address the existence of the Springfield Coal CCA or the factual disputes surrounding the creation of the Springfield Coal CCA. Nor did the Intervenors discuss how, in 1997, the Board refused to dismiss an affirmative defense alleging that a CCA existed in an enforcement action initiated by the State. *See People of the State of Illinois v. Midwest Grain Prod. of Illinois, Inc.*, 1997 WL 530544, at *4 (PCB 97-179) (Aug. 21, 1997). Rather, the Intervenors baselessly assert that Springfield Coal should be liable for 342 violations under the Illinois Environmental Protection Act without addressing how an enforceable Springfield Coal CCA would significantly reduce the number of alleged violations. *See* Motion, at 3.

It is appropriate to remind the Board of the factual dispute between the parties involving the existence of the Springfield Coal CCA. The existence of the Springfield Coal CCA prevents the Intervenors from enforcing any violations during a two year period. For this reason alone, Intervenors' Motion should be denied.

V. Springfield Coal has Submitted Numerous Compliance Plans to the IEPA and has Spent Considerable Time and Resources to Comply with the NPDES Permit, Thereby Demonstrating that the Intervenors' Factual Allegations are Incorrect and Summary Judgment is not Warranted

The Intervenors allege that Springfield Coal has not submitted a compliance plan that addresses pollution issues at Industry Mine. *See* Motion, at 2. Contrary to the Intervenors'

[7] *See* Springfield Coal's Response to the People of the State of Illinois' Motion for Partial Summary Judgment dated April 27, 2012, pp. 6 – 12, and corresponding Exhibits 1, 1A – 1M, and 2.

unsupported allegation, Springfield Coal has submitted numerous compliance plans and updates to IEPA for the Industry Mine. Including the two-year Springfield Coal CCA, Springfield Coal has submitted six compliance plans to IEPA detailing work Springfield Coal is undertaking at the Industry Mine in order to achieve compliance with the NPDES Permit. *See* Exhibit 2, at ¶6. In addition to the August 30, 2007 Springfield Coal CCA, these plans were submitted to IEPA on February 18, 2010, May 7, 2010, June 3, 2010, June 30, 2011, and August 1, 2011, and are attached hereto as Exhibits 3 – 8, respectively. The plans describe work which included: lining surface water channels leading to the ponds with limestone rip rap; increasing the capacity of Pond 19 to provide a two-cell treatment system; regular and ongoing treatment of various ponds with hydrated limestone slurry, soda ash briquettes, and potassium permanganate; use of windmills in the ponds for aeration and to allow for better mixing of the slurry and briquettes; installation of a 400' underground ash slurry wall upgradient of Pond 19 to treat groundwater seeps prior to the water entering Pond 19; and dredging and removal of accumulated sediments from ponds 18, 19 and 26. *See* Exhibits 3 – 8. Springfield Coal has also had numerous discussions and meetings with IEPA staff regarding these plans and the work undertaken.

The existence of these compliance plans alone demonstrates that there are issues of material fact that are in dispute in this matter. It is inappropriate for the Intervenors to be demanding that the Board grant summary judgment in this matter when the Intervenors assert incorrect information regarding the existence of compliance plans. Clearly there are factual disputes among the parties regarding the existence of compliance plans at Industry Mine. These issues of material fact, construed in favor of Springfield Coal, are significant enough that the Board should not grant summary judgment to the Intervenors. *See, e.g., In re Estate of Hoover*, 155 Ill. 2d at 411.

The Intervenors also have tried to argue that Springfield Coal has "attempted to rationalize its ongoing level of noncompliance as unimportant" and that Springfield Coal's actions amount to a "blatant disregard for the authority of the regulations. *See* Motion, at 7 – 8. The Intervenors offer no support for these assertions.

In reality, Springfield Coal has invested a significant amount of financial resources, time, and effort into complying with its NPDES Permit. For example, Springfield Coal has spent over $600,000 in undertaking the work under the compliance plans and work outside of the compliance plans to help maintain compliance with the NPDES Permit. *See* Exhibit 2, at ¶6. Moreover, Springfield Coal utilizes talented professionals to assist in, among other things, developing compliance plans and ensuring that Springfield Coal complies with the terms of its NPDES Permit. *See* Exhibit 2, at ¶7. Although the Intervenors have alleged that Springfield Coal has not used a consultant to develop a compliance solution,[8] Springfield Coal has employed three licensed professional engineers from 2007 to the present at the Industry Mine. *Id.* These engineers have significant experience in environmental management and remediation, civil engineering, construction engineering, mining engineering, and management of coal combustion waste. *Id.* They have worked at consulting firms in the past, and two of the engineers each have over twenty-five years of experience in the industry, with one engineer serving as Springfield Coal (and formerly Freeman United's) Environmental Engineer/Project Engineer for over thirty years.[9] *Id.*

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[8] *See* Motion, at 7-8 ("Instead of hiring a consultant to develop a compliance solution, Springfield Coal has attempted to rationalize its ongoing level of noncompliance as unimportant").

[9] Steven C. Phifer, P.E., served as Freeman United's Environmental Engineer/Project Engineer from 1978 to 2008 and is serving as Springfield Coal's Environmental Engineer from 2010 to the present. *See* Exhibit 2, at ¶7. Craig A. Schoonover, P.E., has over twenty-five years of experience in environmental management, engineering, and permitting. *Id.* If the Board requests, Springfield Coal will be happy to provide the resumes of the three professional engineers who have assisted Springfield Coal from 2007 to the present.

In sum, the Intervenors' allegations regarding Springfield Coal's level of commitment to compliance are baseless and factually inaccurate, raising significant factual discrepancies that should preclude the granting of summary judgment to the Intervenors.

VI. The Intervenors Should Not be Allowed to Pursue Violations Against Springfield Coal for Exceedances of the Effluent Limitation in the NPDES Permit for Sulfate Because the Water Quality Standard for Sulfate has Changed

The sulfate effluent limitation in Springfield Coal's NPDES permit, which is set at 500 mg/l (daily maximum), is based upon a sulfate water quality standard which was officially rejected by the Board in September 2008,[10] and which the State knew for years before then was not based in science and was inappropriate for mining operations. *See* Exhibit 9 (Testimony of Robert Mosher, IPCB R07-09, Feb. 5, 2007). The current water quality standard for sulfate as set forth in 35 IAC 302.208 is now a calculated standard based upon the hardness and chloride content of the receiving water. Under this new standard, Springfield Coal would have had significantly fewer exceedances for sulfate over the last three years. Specifically, in their Motion, the Intervenors have alleged that from the time Springfield Coal began operating the Industry Mine in September 2007 through September 2011, Springfield Coal had 124 excursions of the sulfate effluent limitation in its NPDES Permit. *See* Exhibit 2, at ¶4. However, if Springfield Coal had been subject to the new increased sulfate standard during this four-year period, there would have been 91 fewer excursions, a reduction of almost 75%. *Id.*

A. The Current NPDES Permit Sulfate Effluent Limitations are Problematic, Not the Industry Mine's Discharge

[10] *In the Matter of: Triennial Review of Sulfate and Total Dissolved Solids Water Quality Standards: Proposed Amendments to 35 Ill. Adm. Code 302.102(b)(6), 302.102(b)(8), 302.102(b)(10), 302.208(g), 309.103(c)(3), 405.109(b)(2)(A), 409.109(b)(2)(B), 406.100(d); Repealer of 35 Ill. Adm. Code 406.203 and Part 407; and Proposed New 35 Ill. Adm. Code 302.208(h)*, IPCB R07-009 (Oct. 18, 2006); 30 Ill. Reg. 14978 (Sept. 19, 2008).

On July 21, 2003, the Industry Mine's NPDES Permit was modified to a significantly lower sulfate effluent limitation than the limits that currently exist in the NPDES Permit (i.e., as low as 500 mg/l). *See* Exhibit 2, at ¶8. Prior to July 21, 2003, the NPDES Permit had an effluent limitation for sulfate of 3500 mg/l. *Id.* From 1989 to July 21, 2003, the Industry Mine had zero exceedances of the sulfate effluent limitation in its NPDES Permit. *Id.* Springfield Coal operated for fifteen years without any exceedances of the sulfate effluent limitation. However, since the NPDES Permit was modified on July 21, 2003, to a sulfate limitation lower than that which is currently in the NPDES Permit (and which was rejected by the Board nearly four years ago), the Intervenors allege that there have been 232 exceedances of the sulfate effluent limitation through September 2011.

This is remarkable that the Industry Mine went for 15 years without a single exceedance of the sulfate effluent limitation in its NPDES Permit, and then over the last eight years there are allegedly 232 exceedances! Importantly, during this time, the operations of the Industry Mine did not change in any significant way that would materially affect the concentrations of sulfate being discharged. *See* Exhibit 2, at ¶8. The only thing that changed was that the NPDES Permit was modified to lower the sulfate limitation seven-fold. All of a sudden, after July 21, 2003, a discharge which had been compliant with the sulfate standard a few days earlier, suddenly became an alleged violation. While Springfield Coal recognizes that effluent limits change and that Springfield Coal needs to strive to comply with its permit, Springfield Coal is caught in the "catch-22" situation where the State and the Intervenors are alleging violations against Springfield Coal based upon a standard everyone knows is flawed and for which treatment to achieve compliance is not practical.[11] In short, the Board should not punish Springfield Coal by

[11] *See, e.g.,* Exhibit 9 (Testimony of Robert Mosher, IPCB R07-09, Feb. 5, 2007) discussed in Section VI(C) below.

holding it in violation of the sulfate limitation in the NPDES Permit when the limitation itself is the problem, not the Industry Mine's discharge.

B. After Nine Years, the State Has Not Yet Issued an Updated NPDES Permit for the Industry Mine

On April 2, 1999, IEPA issued the NPDES Permit to Freeman United for the operation of the Industry Mine. *See* Exhibit 10, at p. 2 (July 21, 2003 IEPA Letter to Freeman United). On August 15, 2003, Freeman United submitted to the IEPA a timely application for the renewal of the NPDES Permit. *See* Exhibit 11 (August 15, 2003 Freeman United's Permit Renewal Application). On August 14, 2007, Springfield Coal submitted to the IEPA a written request to transfer the NPDES Permit from Freeman United to Springfield Coal, thereby assuming responsibility for permit compliance. *See* Exhibit 12. The IEPA has yet to take final action in response to the application for renewal of the NPDES permit submitted almost nine years ago.

On July 20, 2010 — seven years after the renewal application was originally filed — Springfield Coal met with IEPA to discuss the current case and the status of the NPDES renewal application. When asked at the meeting where in the queue Springfield Coal's renewal application was for consideration, IEPA informed Springfield Coal that "it was not even in the queue." *See* Exhibit 1, at ¶21. The State has also specifically admitted that no action has been taken on the application. *See* State's Response to Springfield Coal's Affirmative Defenses, July 29, 2010, ("State's Response to Affirmative Defenses"), at ¶5. Now, nearly two years have passed since the meeting in 2010, and the NPDES Permit still has not been renewed.

C. Since 2006, IEPA has Known that the Sulfate Limitation in the Industry Mine's NPDES Permit Cannot be Met and that Sulfate is Not Treatable by any Practical Means

As the Intervenors are undoubtedly aware, on October 2006, a year before Springfield Coal purchased the Industry Mine, IEPA filed with the Board proposed amendments to the water

quality standards to raise the sulfate standard.[12] As part of the regulatory rulemaking proceedings, the IEPA submitted expert testimony in support of the raised sulfate standard. IEPA's expert, Robert Mosher, testified about the history of the sulfate standard, its application to mining operations, and the inability to practically treat for sulfate. Mr. Mosher testified that:

> General Use water quality standards for sulfate (500 mg/L) and TDS (1,000 mg/L) have existed in Illinois regulations since 1972. These standards were adopted to protect aquatic life and agricultural uses, however, few modern studies were available to determine appropriate values. Adopted standards stemmed more from the opinion of a few experts than from documented scientific experiments. Because coal mine effluents in particular are often high in sulfate, a special standard was developed that is unique to mine discharges and is found in Title 35, IAC, Subtitle D, Mine Related Water Pollution. Adopted in 1984, this sulfate standard of 3,500 mg/L also was not documented by the kind of aquatic life toxicity or livestock tolerance studies that are now expected in standards development. Under existing General Use water quality standards, permitting many mine discharges without the special rules provided in Subtitle D would be problematic because many mines cannot meet General Use sulfate and TDS standards in effluents at the point of discharge and do not qualify for conventional mixing zones. . . . [R]egardless of the source, sulfate and many of the other constituent of TDS are not treatable by any practical means.

See Exhibit 9 (emphasis added). It took two years for this rulemaking to become final on September 4, 2008.

The Intervenors should not be allowed to seek violations against Springfield Coal for excursions of an effluent standard that the State knew in 2006 was not based in science, could not be achieved by the mining industry, was not achievable through treatment, and was ultimately rejected by the Board. In fact, IEPA sent Freeman United a letter on April 12, 2007 (four months before Springfield Coal owned the mine) stating that, because of the pending Sulfate Water Quality Standards Regulations, IEPA was requesting additional water quality information from Freeman "[i]n preparation for the permit renewal and/or modification for your facility . . . ." *See* Exhibit 13 (April 12, 2007 IEPA Letter to Freeman United). Now, it has been

[12] *See* Exhibit 9.

over five years since that letter and over three and a half years since the new sulfate standard was adopted by the Board, but Springfield Coal's NPDES permit has yet to be reissued with the raised sulfate standard.

D. The Revised Sulfate Standard Significantly Reduces the Intervenors' Alleged Number of Violations Against Springfield Coal

The Intervenors make many references to the sheer number of alleged violations against Springfield Coal, while knowing that the State's delay in reissuing Springfield Coal's permit is causing more excursions. Notably, over one-third of the total excursions alleged in the Intervenors' Motion against Springfield Coal are for sulfate exceedances. Despite the State's inaction on the NPDES Permit renewal application, the State and the Intervenors have been very active in pursing Springfield Coal for penalties associated with sulfate excursions that would have been far less had the State issued the NPDES Permit in a timely manner. Springfield Coal understands that the State has limited resources and personnel and that these may be contributing factors to the nine-year delay in reissuing the permit. However, the Intervenors should not be allowed to capitalize on the State's delay and seek penalties against Springfield Coal for circumstances caused by the State's delay.

The change in the sulfate standard should act as an automatic amendment of Springfield Coal's NPDES Permit or, at a minimum, should serve to preclude the Intervenors (much less the State) from pursuing violations based upon a standard that has been rejected. The Intervenors' Motion should be denied for all alleged excursions of the sulfate effluent limitation in the NPDES Permit because Springfield Coal purchased the Mine in September 2007, unless the Intervenors can prove that the discharge from the Industry Mine would have exceeded the current sulfate water quality standard. The Board should not impose violations upon Springfield

Coal for sulfate excursions where IEPA has admitted that the sulfate limitation in the NPDES Permit could not be met and that there is no practical way to treat for sulfate.

In addition, since no discovery has yet been undertaken in this case, granting summary judgment at this juncture is premature. Additional facts may be uncovered through discovery that may shed additional light on the State's actions in delaying the permit reissuance.

VII. Genuine Issues of Material Facts Exist Regarding Whether Background Concentrations of Constituents in the Receiving Streams at the Industry Mine Have Caused Exceedances of the NPDES Permit Effluent Limitations

Before there was any mining activity by the Industry Mine, there were elevated levels of a number of constituents, including sulfate, manganese, iron, total suspended solids (TSS), and pH in the surface water on the property. *See* Exhibit 1, at ¶22; Exhibit 14; Exhibit 15. Sampling of the streams traversing the Industry Mine property was conducted in 1979 prior to the Industry Mine commencing operations on the property. This sampling showed that there were elevated levels of a number of constituents, including sulfate, manganese, iron, TSS, and pH in the surface water. Exhibit 1, at ¶22; Exhibit 14; Exhibit 15. This sampling identified the following constituents and maximum concentrations: manganese (10.4 mg/l), sulfates (601 mg/l), and iron (3.54 mg/l). All of these concentrations would be considered exceedances of the Industry Mine's current NPDES permit. Exhibit 1, at ¶22; Exhibit 14; and Exhibit 15. The IEPA has known about these issues for years, and this is not a contested fact because the State "admits that levels of sulfates and manganese in surface water runoff from the site have been documented through sampling and analyses prior to mining activities at the site and that some concentrations of sulfates and manganese exceeded some of the NPDES permit limits." State's Response to Affirmative Defenses, at 3.

In 1991 and 1992, the Industry Mine planned to expand its operations and had samples taken of surface water runoff in the areas where many of the now-existing ponds were to be built. *See* Exhibit 1, at ¶23. This area had been subject to some previous historic underground coal mining by other companies. *Id.* This sampling identified the following constituents and maximum concentrations in the surface water runoff: manganese (20.7 mg/l), sulfates (900 mg/l), Iron (15.6 mg/l), TSS (120 mg/l), and pH (3.45). *Id.*; *see also* Exhibit 16. All of these concentrations would be considered exceedances of Springfield Coal's current NPDES Permit. Exhibit 1, at ¶23; Exhibit 16.

In addition, in the Spring of 2006, Freeman United commissioned Key Agricultural Services, Inc., to prepare a Manganese Case Study of the Industry Mine. *See* Exhibit 1, at ¶11; *see also* Exhibit 17. The study undertook soil sampling of both reclaimed soil at the mine and undisturbed soil adjacent to the mine location. The soils were sampled for pH and manganese. The Case Study identified that the undisturbed soil exhibited lower pH levels and higher manganese levels than the reclaimed soils. The Case Study concluded that "the Mn levels found in the water of retention pond 19 are most likely due to the naturally occurring Mn levels of the soil material in the region and not due to acid rock drainage." Exhibit 17.

Moreover, sampling of the streams upstream of the Industry Mine over the last several years has shown elevated levels of constituents, and in a number of instances, at concentrations that exceed the effluent limitations in Springfield Coal's NPDES Permit. *See* Exhibit 1, at ¶24. Sampling of the streams traversing the Industry Mine property since 2003 has regularly shown that the concentrations of iron, chlorides, and TSS are at higher concentrations upstream of Industry Mine rather than downstream. *Id.* Moreover, the upstream sampling has identified regular occurrences of iron, TSS, and settleable solids at concentrations in excess of Springfield

Coal's NPDES Permit. *See* Exhibit 2, at ¶11. The following are the effluent limitations in the NPDES Permit and examples of the upstream sampling results:

NPDES Permit Limits	Iron - mg/l	Total Suspended Solids (TSS) mg/l	Settleable Solids ml/l
30 Day Avg.	3.0	35	
Daily Max	6.0	70	0.5

Date of Upstream Sample	Iron – mg/l	Total Suspended Solids (TSS) mg/l	Settleable Solids ml/l
7/18/2003	32.5	1900	1.2
3/5/2004	4.77	153	
4/22/2009		63	
10/30/2009	12.4	83	
11/30/2009		167	
1/24/2010		86	
3/11/2010	4.86	203	
7/21/2010	18.3	387	
2/28/2011	19.6	114	1.0
4/25/2011		73	
5/25/2011	36.2	760	

Exhibit 2, at ¶11; *see also* Exhibit 18.

These facts are very significant in light of 35 IAC 406.103 which provides an exception to a permittee having to meet an effluent limitation in its NPDES permit if background concentrations are the cause of the exceedances. Section 406.103, entitled "Background Concentrations," provides:

> Because the effluent standards in this part are based upon concentrations achievable with conventional treatment technology that is largely unaffected by ordinary levels of contaminants in intake water, they are absolute standards that must be met without subtracting background concentrations. However, it is not the intent of these regulations to require users to clean up contamination caused essentially by upstream sources or to require treatment when only traces of contaminants are added to the background. Compliance with the numerical effluent standards is therefore not required when effluent concentrations in excess of the standards result entirely from the contamination of influent before it enters the affected land. Background concentrations or discharges upstream from affected land are rebuttably presumed not to have caused a violation of this part.

(emphasis added). This section clearly provides a defense to a permittee such as Springfield Coal when exceedances of the effluent limitations in its NPDES permit result from contaminants in the influent water before it enters the affected land. The facts presented above, particularly when construed in favor of Springfield Coal as required when considering a motion for summary judgment, raise significant issues of fact as to whether background concentrations are the cause of many of the exceedances that the Intervenors allege. Although the regulation states that background concentrations from affected land are rebuttably presumed not to have caused a violation, this regulatory presumption merely places the burden on Springfield Coal to prove this at a hearing; it in no way eliminates the significant factual issues that exist with regard to this matter. In short, material factual issues exist that raise doubts as to whether background concentrations of contaminants are causing the exceedances of Springfield Coal's NPDES permit. These material factual issues preclude this Board's granting of the Intervenors' Motion.

VIII. Because the State and the Intervenors Cannot Enforce the Manganese and pH Effluent Limitations in the NPDES Permit Against Springfield Coal, there are Additional Material Factual Issues that Bar Summary Judgment for the Intervenors

There are material issues involving whether the Intervenors or the State can enforce the manganese and pH effluent limitations in the NPDES Permit. 35 IAC 406.106 sets forth an effluent limitation for manganese of 2.0 mg/l. This same limit is included in the NPDES Permit. However, §406.106(b)(2) goes on to state:

> The manganese effluent limitation is applicable only to discharges from facilities where chemical addition is required to meet the iron or pH effluent limitations. The upper limit of pH shall be 10 for any such facility that is unable to comply with the manganese limit at pH 9.

This regulatory section is clear that where chemical addition is not required to meet the iron or pH effluent limitations, the 2.0 mg/l manganese effluent limitation is not applicable. Chemical

addition has been conducted at Ponds 18 and 19 on a periodic basis.[13] *See* Exhibit 1, at ¶25. The chemical addition at Ponds 18 and 19 was mainly conducted to lower the manganese concentrations by attempting to raise the pH in the ponds. *Id.* Since this chemical addition was actually done to lower the manganese concentrations, and not to meet the pH or iron effluent standards, all of the manganese excursions alleged by the Intervenors against Springfield Coal related to Ponds 18 and 19 should also be dismissed. In addition, alleged exceedances of the manganese effluent limit at other ponds should be dismissed unless the Intervenors can show that chemical addition was being conducted at the time of the alleged exceedance.

Also, according to §406.106(b)(2), if a facility is unable to comply with the manganese effluent limitation, then the pH effluent limit is 10 instead of 9. Springfield Coal's NPDES Permit provides an upper limit for pH of 9. The Intervenors have alleged seven exceedances of the pH limit where the actual discharge was measured as having a pH greater than 9 but less than 10. If a pH limit of 10 is applicable to the Industry Mine's discharge pursuant to §406.106(b)(2), then seven of the twelve pH excursions alleged in the Intervenors' Motion would not be considered violations as a matter of law.

On April 21, 2010, Springfield Coal sent IEPA a letter requesting clarification of the application of §406.106(b)(2) to the effluent limitations in the NPDES Permit. *See* Exhibit 1, at ¶20; *see also* Exhibit 19. To date, Springfield Coal has not received a response to its letter. *See* Exhibit 1, at ¶20. Springfield Coal would find it troubling if the Intervenors or the State are allowed to take a position in this case that §406.106(b)(2) does not eliminate the manganese effluent limitation in Springfield Coal's NPDES Permit, when the State had failed to provide any guidance when Springfield Coal specifically reached out to IEPA looking for clarification.

13/ Chemical addition has also been conducted very sporadically at Ponds 26, 2, and 3. *See* Exhibit 1, at ¶25.

These issues of material fact, construed in favor of Springfield Coal, are significant enough that the Board should not grant summary judgment to the Intervenors. *See, e.g., In re Estate of Hoover*, 155 Ill. 2d at 411.

ARGUMENTS REGARDING PENALTY AND CEASE/DESIST ORDER DEMANDS

IX. The Intervenors' Request for a Cease and Desist Order is Procedurally Improper and Involves Significant Issues of Material Fact that Preclude Summary Judgment

As previously discussed, the Board should deny the Intervenors' Motion because Springfield Coal has established genuine issues of material fact as to liability. Therefore, the Board need not consider the Intervenors' request for penalties and a cease and desist order because the Intervenors have not established Springfield Coal's liability as a matter of law. In the alternative, even if the Board decides that the Motion could be granted as to Springfield Coal's liability, the Board must deny the Motion with regard to the demand for a cease and desist order and penalties. The entry of a cease and desist order and amount of monetary penalties mandate a factual, qualitative analysis of statutory factors that is wholly inappropriate at this stage of the litigation. Since the entry of a cease and desist order is at the Board's discretion and not as a matter of law, it is therefore inappropriate at summary judgment.

A. This Board Cannot Grant a Cease and Desist Order on a Motion for Summary Judgment Because the Analysis Requires a Fact-Intensive Application of Factors

As the Intervenors correctly identify, in order to enter a cease and desist order, this Board must apply a highly fact-specific analysis pursuant to 415 ILCS 5/33(c) ("Section 33(c) Factors"). Although the Board has authority under Section 33(c) to enter a cease and desist order, the entry of a cease and desist order is subject to the Board's discretion. Section 33(a) expressly provides that "[s]uch order may include a direction to cease and desist . . . ." (emphasis added). To determine if the Board should exercise its discretion to enter a cease and

desist order, it "shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits," including the five Section 33(c) Factors (emphasis added).[14]

The Intervenors' request that the Board enter a cease and desist order is procedurally improper at summary judgment and has been previously rejected by the Board. For example, in *Env'l Site Devel. v. White & Brewer Trucking*, PCB 96-180, 1997 WL 735012 (Nov. 20, 1997), the petitioners sought a cease and desist order on summary judgment, and the Board denied the motion, because the respondent raised a genuine issue of material fact as to one of the statutory factors. The Board concluded that "entry of an order directing [respondent] to cease and desist is not appropriate at this time." *Id.* at *11; *see also Kildeer v. Village of Lake Zurich*, PCB 88-173, 1989 WL 74593 (Feb. 23, 1989), at *2 ("[N]o hearing has been held in this proceeding, and thus the Board cannot at this time issue any cease and desist order."). In fact, the Intervenors' own cited authority reveals that a cease and desist order should not be granted on summary judgment. *See* Motion, at 9 (citing *Illinois v. State Oil Co.*, PCB 97-103 (March 20, 2003) (a cease and desist order was entered after an evidentiary hearing, not at summary judgment)). The Board's own precedent requires it to deny the entry of a cease and desist order on summary judgment.

B. There are Significant Factual Disputes Related to the Section 33(c) Factors that Preclude the Entry of a Cease and Desist Order at this Time

As previously discussed, the Board need not entertain the Intervenors' argument that a cease and desist order should be considered, much less entered, on summary judgment, because

[14] The Section 33(c) Factors are: "(i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people; (ii) the social and economic value of the pollution source; (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved; (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and (v) any subsequent compliance."

the Intervenors have not established Springfield Coal's liability as a matter of law. Springfield Coal's explanation regarding why the Board must deny Intervenors' Motion as to liability is highly relevant to the Board's determination with regard to a cease and desist order. For that reason, Springfield Coal incorporates its foregoing arguments here, and it briefly reiterates the primary considerations relevant to denying Intervenors' request to enter a cease and desist order.

Intervenors provide only two reasons that a cease and desist order should be entered. First, Intervenors argue it is proper given Springfield Coal's "continuous permit violations and refusal to come into compliance with the terms of its permit."[15] As already discussed, the Springfield Coal CCA and the other compliance plans are relevant to Springfield Coal's compliance and create genuine issues of material fact. In addition, there are factual disputes between the parties regarding the number of alleged permit violations, whether background contamination is the cause of the permit exceedances, the effect of the change in the sulfate water quality standard, the delay of the IEPA in reissuing the NPDES Permit, and the effect of the Board's Mine Related Water Pollution regulations on the facility's discharge. A cease and desist order is improper given the factual discrepancies.

Second, the Intervenors also argue that a cease and desist order will have "a prospective deterrent effect on current and future Act violators." Motion, at 9. However, the deterrent effect of a cease and desist order to other persons is not even included in the Section 33(c) factors the Board is to consider in determining whether to issue such an order. In fact, it is well recognized that Illinois courts do not condone the Board's use of sanctions "to make an example of [respondents]." *Trilla Steel Drum Corp. v. Pollution Control Bd.*, 180 Ill.App.3d 1010, 1015 (1989).

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[15] Although Intervenors do not cite the statute in its discussion, Springfield Coal assumes Intervenors are referring Section 33(c)(v), "any subsequent compliance." Motion, at 9.

This Board is statutorily required to consider "all the facts and circumstances" relevant to the entry of a cease and desist order per the Section 33(c) Factors. This would require a hearing where detailed evidence would be presented on each of the factors. For example, in Section 33(c)(i) when talking about the "degree of injury" the alleged exceedances have caused, the Board will need to consider that, in April of 2010, IEPA proposed that Grindstone Creek, which runs through the Industry Mine, be removed from Illinois Section 303(d) Impaired Water List for sulfates. *See* State's Response to Affirmative Defenses, at ¶ 7 ("The Complainant admits that the Illinois EPA proposed in April 2010 that Grindstone Creek be de-listed from the Section 303(d) Report."). This request was precipitated because of the change in the water quality standard for sulfate adopted by the Board in 2008. Mr. Mosher, IEPA's expert, provided relevant testimony regarding raising the sulfate standard during the 2007 rulemaking. Mr. Mosher testified that:

> Studies of aquatic life communities downstream from high sulfate and TDS discharges appeared to show that organisms incur no detrimental effect from concentration of these pollutants higher than the existing water quality standards.

See Exhibit 9.

Also, in considering the "suitability or unsuitability of the pollution source to the area in which it is located" as required in Section 33(c)(iii), the Board would need to consider the facts that the Industry Mine is located where the natural resource is found, it has been an area of coal mining for decades, and is far away from any large populated areas. In addition, under Section 33(c)(iv), when considering the "technical practicability and economic reasonableness" of reducing or eliminating the discharges, the Board would need to take into consideration the background concentrations of constituents in the area (discussed above) and Mr. Moser's expert testimony that "[u]nder existing General Use water quality standards, permitting many mine discharges without the special rules provided in Subtitle D would be problematic because many

mines cannot meet General Use sulfate and TDS standards in effluents at the point of discharge. . . . [R]egardless of the source, sulfate and many of the other constituent of TDS are not treatable by any practical means." Exhibit 9.

In sum, the issuance of a cease and desist order on summary judgment is wholly inappropriate at this time since it is premature, there are many issues of disputed facts, and further discovery and an evidentiary hearing are required in order for the Board to fully evaluate the facts pursuant to the Section 33(c) Factors.

X. The Intervenors' Demand for Civil Penalties is Improper and Unprecedented

The Intervenors spend over four pages of the Motion demanding that Springfield Coal and Freeman United be assessed specific monetary penalties. The Intervenors claim that the Board should impose a $38,510,000 fine against Springfield Coal. The Intervenors argue that Springfield Coal should be liable for the maximum dollar amount because Springfield Coal's "blatant disregard for the authority of the regulations under which the mine operates cannot be tolerated." *See* Motion, at 8 – 9. Similar to the State's Motion for Partial Summary Judgment, the Intervenors' demands are unjustified, unprecedented, and improper, especially at this stage of the proceeding.

A. The Intervenors Improperly Demand the Imposition of Civil Penalties in the Motion

The Intervenors demand that the Board award a specific amount of penalties at the summary judgment phase. In short, the Intervenors are out of line in demanding damages at this stage of the proceedings. Importantly, Illinois case law dictates that the amount of damages to be awarded is a factual question that courts should leave to further evidentiary hearings after liability is determined. *See Mobil Oil Corp. v. Maryland Cas. Co.*, 288 Ill.App.3d 743, 758 (Ill. App. Ct. 1997) ("The amount of fees to be awarded was a factual question that the circuit court

left to further evidentiary presentation and argument, after finding liability on summary judgment."). The amount of damages is "uniquely a question of fact" to be determined by the court and not by a dismissal action. *See Doe v. Montessori Sch. Of Lake Forest*, 287 Ill.App.3d 289, 301 (Ill. App. Ct. 1997).

In fact, the Board, on several occasions, has held that it is improper to evaluate and determine penalties at the summary judgment phase. *See Illinois v. Chemetco, Inc.*, 1998 Ill. ENV LEXIS 67, at *2, 29-30 (PCB No. 96-76) (Feb. 19, 1998) (refusing to assess a penalty at summary judgment because the factual disputes "preclude the Board from assessing a penalty without a hearing"); *see also Illinois v. Cmty. Landfill Co, Inc.*, 2002 Ill. ENV LEXIS 583, at *2, 24-25 (PCB No. 97-193) (Oct. 3, 2002) (holding that the Board will not rule on penalty issues at the summary judgment phase and will instruct the parties to proceed to an evidentiary hearing).

If the Board eventually determines that any penalties may be appropriate in this matter, an evidentiary hearing is the suitable venue to discuss the amount of penalties. During a hearing, both the Intervenors and Springfield Coal will be able to present evidence regarding what penalties are applicable, if any. This approach is consistent with both Illinois case law as well as with Board precedent.

B. The Intervenors Seek Penalties that are Unprecedented and Unjustified

Even if a motion for summary judgment was the proper forum for the imposition of penalties, the level of civil penalties being pursued by the Intervenors against Springfield Coal is completely inappropriate and unprecedented based upon the facts of this case and the Board's prior decisions. The Intervenors' penalty demand of $38.5 million against Springfield Coal is beyond incredible. This is particularly true when compared with penalties in other Clean Water Act enforcement cases before the Board. During the last eight years, there were only fifteen

Board CWA enforcement cases in which the final penalty was even over $25,000.[16] Of these fifteen cases, the average penalty amount was approximately $56,918,[17] and the highest was only $135,000.[18] It is important to note that there are dozens and dozens of other CWA enforcement cases in which the penalties have been less than $25,000, and the average of all CWA enforcement cases before the Board during the past three years is $11,716.32.[19] These penalties are not even in the same universe as the $38.5 million that the Intervenors are demanding from Springfield Coal. Based upon these calculations alone, the penalty demanded by the Intervenors is completely without merit.

Springfield Coal fails to see how this case warrants a penalty that is many multiple times higher than any other CWA enforcement case ever before the Board. Even the State of Illinois in its motion even admits that the requested penalties are excessive: "In making these recommendations, the Complainant [the State] is fully aware that a hundred thousand dollar penalty for effluent violations by any operator of any Illinois coal mine exceeds all of the previous penalties imposed by Illinois courts or the Board in similar circumstances." *See* State

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[16] *See* http://www.ipcb.state.il.us/cool/external/cases.aspx (the Board's website providing information regarding final penalties in cases before the Board). To locate similar cases to the present one, under the "Search Criteria," the "Case Type" is "Enforcement" and the "Media Type" is "Water." Upon reviewing all of the cases before the Board that meet this criteria, only fifteen (15) cases had final penalties of over $25,000. Please note that any cases that are still pending or were dismissed before the Board were not evaluated for the purposes of these calculations.

[17] *See* PCB 04-98 ($125,000); PCB 04-138 ($80,000); PCB 04-194 ($30,000); PCB 05-66 ($135,000); PCB 05-110 ($60,000); PCB 05-163 ($65,000); PCB 06-16 ($28,000); PCB 07-29 ($27,000); PCB 07-124 ($84,570); PCB 08-29 ($30,000); PCB 08-044 ($55,000); PCB 09-003 ($40,000); PCB 11-003 ($40,000); PCB 11-019 ($25,699.68); and PCB 12-001 ($28,500). The average penalty for these fifteen cases is $56,917.97.

[18] *See People of the State of Illinois v. Petco Petroleum Corporation.*, PCB 05-66 (Feb. 2, 2006) (Opinion and Order, $135,000).

[19] In 2009, the number of cases resolved before the Board that were not dismissed or are currently outstanding was 21. The total penalties in all of these cases was $275,500, and the average penalty was $13,119.05. In 2010, the number of cases resolved before the Board that were not dismissed or are currently outstanding was 11. The total penalties in all of these cases was $95,828.34, and the average penalty was $8,711.67. In 2011, the number of cases resolved before the Board that were not dismissed or are currently outstanding was 8. The total penalties in all of these cases was $106,545.88, and the average penalty was $13,318.24.

of Illinois' Motion for Partial Summary Judgment, at 18. Since the State of Illinois believes that a $100,000 penalty is high, it stands to reason that the State would agree that the Intervenors' $38,510,000 demand is ridiculous and does not help to further a resolution in this case.

Somehow the Intervenors feel that the maximum penalty is necessary to deter future violations from Springfield Coal and the other coal mine operators in Illinois. Motion, at 10. Yet, the Intervenors rely upon no case law, Board decisions, or authority to demonstrate that a thirty-eight million dollar penalty is appropriate against Springfield Coal. The Intervenors have failed to demonstrate that a thirty-eight million dollar penalty has been assessed against other companies before or will serve as a deterrent to other mines. The Intervenors' brazen attempt to drive Springfield Coal out of business by demanding millions of dollars in penalties without a formal evidentiary hearing is, at best, unsubstantiated and baseless. "Penalties are imposed primarily to aid in enforcement of the Act rather than to impose punishment and must be commensurate with the seriousness of the infraction." *Trilla Steel Drum Corp.*, 180 Ill.App.3d at 1013. The Intervenors have failed to demonstrate that these penalties are appropriate or reasonable in its Motion, and, as a result, the Intervenors' penalty demand should be denied.

C. Significant Factual Discrepancies Will Impact the Board's Evaluation of the Section 33(c) Factors and the Section 42(h) Criteria

The Intervenors attempt to argue that, in weighing the Section 33(c) Factors and the statutory criteria outlined in 415 ILCS 5/42(h)[20] ("Section 42(h) Criteria"), the Board is able to

[20] The Section 42(h) Criteria are: "In determining the appropriate civil penalty to be imposed under subdivisions (a), (b)(1), (b)(2), (b)(3), or (b)(5) of this Section, the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors: (1) the duration and gravity of the violation; (2) the presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act; (3) any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance; (4) the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act; (5) the number, proximity in time, and gravity of previously adjudicated violations of this Act by the respondent; (6) whether the

demonstrate that the State is entitled to summary judgment regarding penalties. For example, the Intervenors discuss only one of the eight Section 42(h) Criteria. *See* Motion, at 10; Section 42(h)(3).[21] The Intervenors attempt, in a cursory manner, to demonstrate that Springfield Coal has enjoyed economic benefits as a consequence of its past and present violations because it has an "economic advantage over competing Illinois mines by failing to abide by state law." *See* Motion, at 10-11. Notably, the Intervenors provide no evidence supporting this assertion. The Intervenors do not evaluate any of the other Section 42(h) Criteria, much less the Section 33(c) Factors, as it relates to specific monetary penalties. The same discussion applies here as discussed above regarding why a cease and desist order is inappropriate at this time. Currently, there are many factual disputes that exist between the parties, and the Board has not had an opportunity to hear evidence specific to the penalty factors. This makes any decision on penalties premature at this time.

Notably, the Board has already addressed this exact issue. Curiously, the Intervenors fail to cite, much less address, these Board decisions in its Motion. In *Illinois v. Chemetco, Inc.*, the Board concluded that because there were factual disputes regarding the Section 33(c) Factors and the Section 42(h) Criteria, these disputes "preclude the Board from assessing a penalty without a hearing." *See Illinois v. Chemetco, Inc.*, 1998 Ill. ENV LEXIS 67, at *29 (PCB No. 96-76) (Feb. 19, 1998). The Board has specifically held that an evidentiary hearing is the appropriate venue for parties to present factual arguments regarding the Section 33(c) Factors and the Section 42(h)

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respondent voluntarily self-disclosed, in accordance with subsection (i) of this Section, the non-compliance to the Agency; (7) whether the respondent has agreed to undertake a "supplemental environmental project," which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act, but which the respondent is not otherwise legally required to perform; and (8) whether the respondent has successfully completed a Compliance Commitment Agreement under subsection (a) of Section 31 of this Act to remedy the violations that are the subject of the complaint."

[21] Although the Motion cited Section 42(h)(4), it appears that the Intervenors are discussing Section 42(h)(3) involving economic benefits.

Criteria. *See Illinois v. Cmty. Landfill Co, Inc.*, 2002 Ill. ENV LEXIS 583, at *24-25 (PCB No. 97-193) (Oct. 3, 2002) (holding that the Board will not rule on the penalty issues at the summary judgment phase, especially because the Board's evaluation of the Section 42(h) Criteria involves an evaluation of factual determinations, and the Section 42(h) Criteria is "not appropriately discussed in an order on cross motions for summary judgment").

There is no reason that the Board should deviate from its previous decisions in which it has refused to evaluate the Section 33(c) Factors and Section 42(h) Criteria until after the summary judgment stage and after an evidentiary hearing. Accordingly, the Intervenors' demand for the Board to issue penalties at this stage of the proceeding is improper and should be denied.

In addition, the Intervenors attempt to argue that the Board should penalize Springfield Coal by having the State of Illinois recover an amount equal to its investment in the Industry Mine from the Illinois Coal Competitive Grants. *See* Motion, at 11. The Intervenors' argument is completely irrelevant both to this case and to a motion for summary judgment for two reasons. First, this is the inappropriate time, much less the inappropriate venue, to be raising this issue. The Illinois Coal Competitiveness Grants are awarded through the Illinois Department of Commerce & Economic Opportunity ("DCEO").[22] If the Intervenors have an issue with the awarding of such grants, they should raise the issue with the DCEO. Second, Springfield Coal has never received any grants under this program related to the Industry Mine. Springfield Coal has only received one Illinois Coal Competitiveness Grant and it was for the purchase and installation of miner safety-rescue chambers at Springfield Coal's Crown III Mine.[23]

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[22] *See, e.g.*, http://www.ildceo.net/dceo/Bureaus/Coal/Programs/Coal+Competitiveness+Program.htm.

[23] *See* Motion, Exhibit 7, at p. 29 (Grant no. 09-483009 to Springfield Coal Company, LLC for Miner Safety-Rescue Chambers: "Springfield Coal will purchase and install rescue chambers throughout the Crown III Mines to improve

CONCLUSION

WHEREFORE, Respondent, Springfield Coal Company, LLC, respectfully requests that the Illinois Pollution Control Board deny the Intervenors' Motion for Summary Judgment and for any other relief that the Board determines is appropriate.

Dated: June 6, 2012

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By: _____

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safety of the miners in the event of a mine disaster. Chambers will have the capacity of housing 44 miners for each section and two additional chambers for miners working out of the section.")

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

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. FREEMAN UNITED COAL MINING CO., L.L.C., and SPRINGFIELD COAL COMPANY, L.L.C., Respondents.	)	PCB 2010-061 and 2011-002 Consolidated – Water – Enforcement

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NOTICE OF ELECTRONIC FILING

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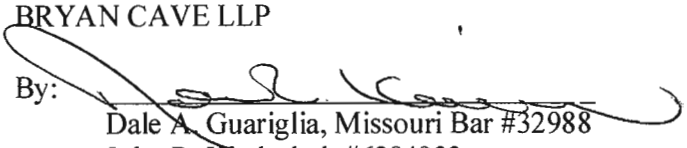
PLEASE TAKE NOTICE that on June 6, 2012, I electronically filed with the Clerk of the Pollution Control Board, Springfield Coal Co., LLC's Response to Prairie Rivers Network and Sierra Club's Motion for Summary Judgment, copies of which are herewith served upon you.

BRYAN CAVE LLP

By: 

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