BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

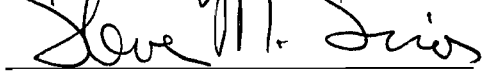
IN THE MATTER OF:

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.	)	

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on June 6, 2012, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, Freeman United Coal Mining Company, LLC's Response to the Prairie Rivers Network and Sierra Club's Motion for Summary Judgment and Request for Reconsideration of Freeman United's Motion to Strike and/or Dismiss Intervenors' Complaint, a copy of which is attached hereto and herewith served upon you.

By: 
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CERTIFICATE OF SERVICE

NOW COMES Steven M. Siros, counsel for Respondent, Freeman United Coal Mining Company, LLC, a Delaware limited liability company and provides proof of service of the attached Freeman United Coal Mining Company, LLC's Response to the Prairie Rivers Network and Sierra Club's Motion for Summary Judgment and Request for Reconsideration of Freeman United's Motion to Strike and/or Dismiss Intervenors' Complaint and Notice of Electronic Filing upon the parties listed on the attached Service List, by having a true and correct copy affixed with proper postage placed in the U.S. Mail at Jenner & Block LLP, 353 North Clark Street, Chicago, IL 60654-3456, on June 6, 2012.

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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.	)	

FREEMAN UNITED COAL MINING COMPANY, LLC'S RESPONSE TO THE PRAIRIE RIVERS NETWORK AND SIERRA CLUB'S MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR RECONSIDERATION OF FREEMAN UNITED'S MOTION TO STRIKE AND/OR DISMISS INTERVENORS' COMPLAINT

Respondent, Freeman United Coal Mining Company, LLC ("Freeman United"), by its attorneys, hereby files its response to the Prairie Rivers Network and Sierra Club, Illinois Chapter's (collectively, the "Sierra Club") Motion for Summary Judgment (the "Sierra Club's Motion") and Request for Reconsideration of Freeman United's Motion to Strike and/or Dismiss Intervenors' Complaint. As discussed below, because the claims now being advanced by the Sierra Club are duplicative of the State's enforcement claims, the Sierra Club's claims against Freeman United should be dismissed. In the event that the Illinois Pollution Control Board (the

"Board") declines to dismiss the Sierra Club's claims against Freeman United, there are disputed issues of fact which require the Board to deny the Sierra Club's Motion.

INTRODUCTION

In 2010, in its pleadings seeking to convince the Board that its complaint was not frivolous or duplicative of the pending State enforcement proceeding, the Sierra Club represented that the claims it was bringing differed dramatically from those already being asserted by the State. The Board accepted these representations at face value and denied Freeman United's request to dismiss the Sierra Club's complaint. In its Motion, however, the Sierra Club makes no effort to advance these "unique" claims; instead, the claims the Sierra Club now asserts are substantially similar to the claims already being asserted by the State (although the Sierra Club has erroneously inflated the number of alleged violations and its penalty demand in an effort to make it appear that its claims and request for relief differs substantially from that of the State). Since the claims now being advanced by the Sierra Club are duplicative of those advanced by the State in its Motion, the Board should reconsider its previous order denying Freeman United's motion to dismiss the Sierra Club's claims against it.

In the event that the Board declines to dismiss the Sierra Club's claims against Freeman United, the Sierra Club is not entitled to summary judgment against Freeman United for many of the same reasons that the State is not entitled to summary judgment on its enforcement claims. Like the State, the Sierra Club relies solely on Freeman United's discharge monitoring reports ("DMRs") in support of its Motion and there are disputed factual issues as to whether the violations alleged in the Sierra Club's complaint constitute violations of the Illinois Environmental Protection Act (the "Act"). In addition, the Sierra Club sat on its rights for years before seeking to intervene in the State's enforcement proceeding. In light of the Sierra Club's

unreasonable delay, the equitable doctrine of laches acts to bar the Sierra Club's claims against Freeman United.

FACTUAL OVERVIEW

Freeman United owned and operated the Industry Mine until August 31, 2007, when it sold the mine to Springfield Coal. (April 27, 2012 Affidavit of Thomas J. Austin, attached as Exhibit 1 to Freeman United's Motion for Summary Judgment and Response to the State's Motion for Partial Summary Judgment and attached hereto as Exhibit 1 with referenced internal exhibits ("Austin Aff. A"), ¶1.) On April 2, 1999, the Illinois Environmental Protection Agency (IEPA) issued an NPDES permit to Freeman United authorizing discharges from its Industry Mine to various area waterways. (Sierra Club's Complaint, ¶27.) As required by its NPDES permit, Freeman United submitted quarterly DMRs that provided IEPA with detailed information on the specific levels of regulated substances in discharges from various outfalls at the Industry Mine. (Austin Aff. A, ¶3-4.)

The Sierra Club, without supporting affidavits[1], contends that Freeman United's DMRs reported discharges in excess of its permitted limits for iron, manganese, sulfates, total suspended solids ("TSS"), pH, and settleable solids from various outfalls at the Industry Mine. The Sierra Club's Motion ignores, however, the historical context surrounding these discharges.

[1] The only evidence of NPDES violations that the Sierra Club cites to are discovery responses from Springfield Coal and a set of DMRs. (*See* Sierra Club's Motion, Ex. 3.) However, Springfield Coal's discovery response was limited to the time period from August 31, 2007 through November 2011 and Springfield Coal specifically disavowed knowledge of effluent discharges prior to the date that it acquired the mine from Freeman United. (Respondent Springfield Coal Mining Co. LLC's Responses to Petitioner Prairie River Network's First Requests to Admit, Interrogatories, and Request for Production of Documents from Springfield Coal ("Response to Sierra Club's Discovery Request"), Request to Admit No. 19 and Document Request No. 1.) The DMRs attached in Ex. 5 of the Sierra Club's Motion are unauthenticated. Although Freeman United does not dispute that it submitted DMRs to IEPA as required by its NPDES permit, the Sierra Club has failed to provide, via affidavit or otherwise, properly authenticated evidence documenting the violations alleged in its Motion.

On August 15, 2003, Freeman United submitted to IEPA a timely application for renewal of its NPDES permit. (State's Motion for Partial Summary Judgment ("State's Motion") at 2; People's Response to Affirmative Defenses by Springfield Coal, LLC, ¶5; Freeman United's August 15, 2003 Permit Renewal Application, attached hereto as Exhibit 2.) IEPA took no action with respect to Freeman United's permit renewal request. (People's Response to Affirmative Defenses by Springfield Coal, LLC, ¶5; Austin Aff. A, ¶21.) Instead, IEPA initiated an enforcement action against Freeman United in 2005 with respect to alleged violations of the Industry Mine's NDPES permit. (Austin Aff. A, ¶5.)

On May 19, 2005, Freeman United and IEPA entered into a compliance commitment agreement (the "2005 CCA") which outlined specific steps that Freeman United would take with respect to effluent discharges from the Industry Mine. (Austin Aff. A, ¶6.) There is no dispute that Freeman United fully complied with its CCA. (People's Response to Affirmative Defenses by Freeman United Coal Mining Company, LLC ("State Answer"), ¶8; State's Motion at 7.)

On March 30, 2007, a few months prior to expiration of the 2005 CCA, Freeman United submitted a proposed CCA extension to IEPA. (Austin Aff. A, ¶12.) On August 30, 2007, Freeman United submitted a revised CCA that identified additional steps that it would take to minimize the total manganese levels in the effluent discharge from Outfall 19 (the "2007 CCA"). (Austin Aff. A, ¶15.) IEPA acknowledges that it never formally responded to Freeman United's August 2007 CCA (State Answer, ¶8), although IEPA later verbally advised Springfield Coal that it should continue to operate pursuant to the 2007 CCA. (Austin Aff. A, ¶16.) On August 31, 2007, Freeman United sold the Industry Mine to Springfield Coal Company, LLC. (Austin Aff. A, ¶1.)

During the entire period that Freeman United operated the Industry Mine, notwithstanding the Sierra Club's claims that its members live within the affected watersheds and are directly affected and concerned by discharges from the Industry Mine (Sierra Club's Motion for Leave to Intervene, ¶¶2-3.), there is no evidence that the Sierra Club ever advised Freeman United of any issues that the organizations had with respect to the Industry Mine's effluent discharges and/or Freeman United's compliance with the Act. Instead, the Sierra Club bided its time, waiting until years after Freeman United had sold the Industry Mine, to file this complaint seeking millions of dollars in civil penalties.

As to the specific violations alleged in the Sierra Club's complaint, there are factual disputes as to whether the Industry Mine's effluent discharges did in fact constitute violations of the Act. Specifically:

- Since the water quality standard for sulfate was proposed for revision in 2006, the Sierra Club should not be allowed to pursue violations against Freeman United for exceedances of the outdated sulfate effluent limitation in the NPDES permit;

- 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 Freeman United's NPDES permit;

- The Sierra Club cannot seek to enforce the manganese and pH effluent limitations in the NPDES permit against Freeman United pursuant to applicable Illinois regulations; and

- A number of exceedences of monthly average effluent limitations alleged by the Sierra Club should not be considered violations because fewer than the number of samples required by the regulations to calculate a monthly average were taken in those particular months.

These factual disputes require that the Board deny the Sierra Club's request for summary judgment against Freeman United.

ARGUMENT

I. Reconsideration of Freeman United's Motion to Strike and/or Dismiss the Sierra Club's Motion.

As an initial matter, Freeman United requests that the Board reconsider its July 15, 2010 order ("Board Order"). In that order, the Board concluded that the Sierra Club's complaint was not duplicative of the State's complaint in large part because the Sierra Club was seeking unique relief: a determination from the Board that Freeman United was liable for alleged violations that occurred after Freeman United sold the Industry Mine to Springfield Coal. (Board Order at 15.)

In this Motion, however, the Sierra Club has made no effort to argue that Freeman United is responsible for effluent discharges that occurred after Freeman United sold the Industry Mine to Springfield Coal. Instead, the Sierra Club clearly attributes alleged violations occurring prior to August 31, 2007 to Freeman United and alleged violations occurring after August 31, 2007 to Springfield Coal. (Sierra Club's Motion at 2-7.) The Sierra Club's penalty request seeks to impose penalties on Freeman United for only pre-August 31, 2007 discharges and on Springfield Coal for all post-August 31, 2007 discharges. (Sierra Club's Motion at 9.)

Since the Sierra Club does not assert post-August 31, 2007 violations with respect to Freeman United, its complaint against Freeman United is now duplicative of the State's complaint and should be dismissed. (*See Rulon v. Double D Gun Club*, PCB 03-7, slip op. at 2 (Aug. 22, 2002); 35 Ill. Adm. Code 103.212(a).) Count II of the Sierra Club's complaint and Count I of the State's complaint both seek to impose liability on Freeman United for alleged violations of the Industry Mine's effluent discharge limits.[2] Counts III in the Sierra Club and

[2] Although the Sierra Club may contend that it has identified additional NPDES violations beyond those violations alleged in the State's complaint, most (if not all) of the violations alleged in the Sierra Club's complaint appear to have been lifted directly from the State's complaint. For

State complaints both allege violations of Section 12(a) of the Act. Count IV of the Sierra Club's complaint alleges violations of standards that even the Sierra Club concedes only become applicable on or after September 8, 2008 (Sierra Club's Complaint at ¶63), long after Freeman United sold the Industry Mine. Count I of the Sierra Club's complaint (Discharge Without a Valid NPDES Permit) also doesn't apply to Freeman United.

Because the relief now being sought by the Sierra Club is substantially duplicative of the relief sought in the State's complaint (Counts II and III)[3] and/or does not apply to Freeman United (Counts I and IV), Freeman United respectfully requests that the Board reconsider its July 15, 2010 order denying Freeman United's Motion to Dismiss the Sierra Club's complaint against Freeman United in its entirety.[4]

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those additional violations that were raised for the first time in the Sierra Club's Motion, as further discussed in Section III, the Sierra Club has either improperly characterized the alleged violations and/or applied an improper standard. When evaluated globally, it is clear that the Sierra Club's claims against Freeman United are substantially duplicative of the State's claims.

[3] Since the Sierra Club seeks to impose liability for wholly past violations, we would again note that the United States Supreme Court has held that citizen suits alleging Clean Water Act ("CWA") violations can only seek injunctive relief and penalties for ongoing CWA violations. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987). The language in the Act is similar to the CWA in that it also is written in the present tense. Since none of the Sierra Club's claims against Freeman United relate to ongoing violations of the Act (now or at the time of filing of the complaint), we respectfully submit that the holding in *Gwaltney* provides an independent basis for the Board to dismiss the Sierra Club's claims against Freeman United.

[4] There is no legal precedent that would allow the Sierra Club to reverse course and later argue that Freeman United is somehow responsible for post-August 31, 2007 discharges from the Industry Mine. In the event, however, that the Board were to allow the Sierra Club to later adopt an inconsistent position, Freeman United respectfully submits that adjudication of that specific issue is a threshold matter that must be addressed before the Sierra Club should be entitled to seek summary judgment on any of its other claims.

II. Summary Judgment Standard

In reviewing the Sierra Club's Motion, the Board is required to construe the evidence strictly against the Sierra Club and liberally in favor of Freeman United. *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 if 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 (2d Dist. 1975).

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 Freeman United. *See Hoover,* 155 Ill. 2d at 410-11; *see also Schmahl v. A.V.C. Enters., Inc.*, 148 Ill. App. 3d 324, 327 (1st Dist. 1986) ("In deciding whether a factual question precluding summary judgment exists, courts are admonished to construe the 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 (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 should have an opportunity to prove a valid affirmative defense that may bar the plaintiff's relief. *See Fed. Deposit Ins. Corp. v. Maris,* 121 Ill. App. 3d 894, 901 (1st Dist. 1984). In considering the undisputed evidence and the law, the Board should deny the Sierra Club's Motion.

III. Freeman United's Compliance Commitment Agreement Precludes the Sierra Club from Pursuing Violations Against Freeman United

Like the State, the Sierra Club should not be allowed to pursue alleged violations against Freeman United for the time that Freeman United was operating under a CCA with IEPA. The State concedes that it both accepted Freeman United's 2005 CCA and that Freeman United fully complied with the 2005 CCA. (State's Motion at 6; State Answer, ¶8.) The State further concedes that Freeman United submitted the 2007 CCA, to which the State provided no written response.[5] (State's Motion at 6; State Answer, ¶8.) As a result, on September 30, 2007, by operation of law, Freeman United's 2007 CCA was deemed accepted by IEPA. 415 ILCS 5/31(a)(9). There is nothing in the record to indicate that IEPA ever advised Freeman United that it was in violation of either of the CCAs nor is there evidence in the record that the Sierra Club ever objected to these CCAs or sought to intervene in the underlying enforcement matter that resulted in these CCAs. As such, the existence of these CCAs should bar the Sierra Club

[5] Notwithstanding that IEPA verbally authorized Springfield Coal to comply with the procedures set forth in the 2007 CCA (Austin Aff. A, ¶16), IEPA's failure to provide a written response to the 2007 CCA resulted in the CCA being deemed accepted by operation of law. 415 ILCS 5/31(a)(9).

from enforcing alleged violations and/or exceedances against Freeman United that occurred between May 15, 2005 and August 31, 2007 (the pendency of Freeman United's CCAs) (162 of the violations alleged in the Sierra Club's Motion).

IV. There Are Factual Issues With Respect to The Sierra Club's Alleged NPDES Violations

There are also disputed factual issues as to whether the violations alleged in the Sierra Club's complaint are in fact violations of the Act. These factual issues preclude the Board's entry of summary judgment in favor of the Sierra Club.

A. There Is a Disputed Issue of Fact as to Whether the Sulfate Effluent Discharges from the Industry Mine Constituted Violations of the Act

The sulfate effluent limitation in the Industry Mine NPDES permit, which is set at 500 mg/L (daily maximum), is based upon a sulfate water quality standard which IEPA proposed to amend in October 2006 (and which ultimately was amended in 2008).[6] The current water quality standard for sulfate is now a calculated standard based upon the hardness and chloride content of the receiving water, as set forth in 35 Ill. Admin. Code §302.208. Under the new standard, the Industry Mine would have had significantly fewer exceedances for sulfate over the last three years.

In October 2006, IEPA filed with the Board proposed amendments to the water quality standards to raise the sulfate standard. As part of the regulatory rulemaking proceedings, the IEPA submitted expert testimony in support of the raised sulfate standard. IEPA's expert,

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[6] *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)*, PCB R07-009 (Oct. 18, 2006); 30 Ill. Reg. 14978 (Sept. 19, 2008).

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 Testimony of Robert Mosher, IPCB R07-09 at 2, Feb. 5, 2007 (emphasis added).

Although it took over two years for this rulemaking to become final, the Sierra Club should not be allowed to assert violations against Freeman United for excursions of an effluent standard that 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. As such, the Sierra Club should be barred from pursuing post-October 2006 alleged violations of the Industry Mine's sulfate effluent limits (38 alleged violations) unless the Sierra Club can prove that the discharge would have exceeded the current sulfate water quality standard (which it has not done in its Motion).

B. There Are Disputed Issues of Fact as to Whether the Background Concentrations of Constituents in the Receiving Streams Are the Cause of the Exceedances Alleged in the Sierra Club's Motion

There are also genuine issues of material fact with respect to whether background

concentrations of constituents in the receiving streams at the Industry Mine have caused the exceedances of the NPDES permit effluent limitations that are the subject of the Sierra Club's complaint. For example, there is evidence that prior to Freeman United's activities on the Industry Mine property, 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. (Austin Aff. A, ¶22.) Sampling of the streams traversing the property was conducted in 1978 prior to the Industry Mine's commencing operations, and this sampling showed elevated levels of a number of constituents, including sulfate, manganese, iron, TSS, and pH in the surface water. (*Id.*; June 6, 2012 Affidavit of Thomas J. Austin, attached hereto as Exhibit 3 ("Austin Aff. B"), ¶10) This sampling identified the following constituents and maximum concentrations: manganese (10.4 mg/l), sulfates (601 mg/l), and iron (3.54 mg/l). (Austin Aff. A, ¶22.) All of these concentrations would be considered exceedances of the Industry Mine's current NPDES permit. (*Id.*; *see also* Austin Aff. A, Ex. 1J and 1K) In fact, the State has acknowledged 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 levels of sulfates and manganese exceeded some of the NPDES permit limits." (State Answer, ¶11.) The Sierra Club has presented no evidence to the contrary.

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. (Austin Aff. A, ¶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* Austin Aff. A, Ex. 1L.) All

of these concentrations would be considered exceedances of the Industry Mine's current NPDES permit. (*Id.*)

In addition, in the Spring of 2006, Freeman United commissioned Key Agricultural Services, Inc. to prepare a Manganese Case Study of the Industry Mine. (Austin Aff. A, ¶11; *see also* Austin Aff. A, Ex. 1D.) 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." (*Id.*)

Further, sampling of the streams traversing the Industry Mine property over the last several years has regularly shown elevated concentrations of certain constituents, and, in a number of instances, at concentrations that exceed the effluent limitations in the Industry Mine NPDES Permit. (Austin Aff. A, ¶24; Austin Aff. B, ¶11.) Sampling of the streams traversing the Industry Mine property since 2003 has regularly shown that the concentrations of iron, chlorides, and TSS occur at higher concentrations upstream of Industry Mine than downstream. (*Id.*) Moreover, the upstream sampling has identified regular occurrences of iron, TSS, and settleable solids at concentrations in excess of the Industry Mine's NPDES permit. (*Id.*) 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	

(*Id.*; *see also* Austin Aff. A, Ex. 1M.)

These sampling results are significant because 35 Ill. Admin. Code 406.103 provides that compliance with numerical effluent standards is not required "when effluent concentrations in excess of the standards result entirely from the contamination of influent before it enters the affected land," and that "[b]ackground concentrations or discharges upstream from affected land are rebuttably presumed not to have caused a violation of this part." In other words, this paragraph provides a defense to a permittee where exceedances of the effluent limitations in an NPDES permit result from contaminants in the influent water before it enters the affected land. Again, the Sierra Club has presented no contrary evidence and material factual issues therefore exist as to whether background concentrations of contaminants have caused the exceedances of the Industry Mine NPDES permit, affecting all 283 of the alleged Freeman United violations in the Sierra Club's Motion.

C. The Sierra Club Also Cannot Enforce the Manganese and pH Effluent Limitations in the NPDES Permit Against Freeman United, Thereby Raising Additional Material Issues Barring Summary Judgment

There are also material issues regarding whether the Sierra Club can enforce the manganese and pH effluent limitations in the NPDES permit, as 35 Ill. Admin. Code

406.106(b)(2) states that the manganese effluent limitation of 2.0 mg/l is "applicable only to discharges from facilities where chemical addition is required to meet the iron or pH effluent limitations." In other words, where chemical addition is not required to meet the iron or pH effluent limitations, the 2.0 mg/l manganese effluent limitation does not apply. Although chemical addition has been conducted at Ponds 18 and 19 on a periodic basis,[7] the purpose of the chemical addition was to lower the manganese concentrations and not to meet the pH or iron effluent standards. (Austin Aff. A, ¶25.) As such, all of the manganese excursions alleged by the Sierra Club 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 Sierra Club can show that chemical addition was being conducted in order to meet the iron or pH effluent limitations at the time of the alleged exceedance, which it has not done.

Also, in situations where a facility is unable to comply with the manganese effluent limitation at pH 9, the regulations specify that the pH effluent limit be revised to 10. (35 Ill. Admin. Code 406.106(b)(2).) The Industry Mine NPDES permit provides an upper limit for pH of 9. The Sierra Club's Motion has alleged exceedances of the pH limit where the actual discharge was measured as having a pH greater than 9 but less than 10. (Sierra Club's Motion, Ex. 3, p. 24) If a pH limit of 10 is applicable to the Industry Mine's discharge pursuant to § 406.106(b)(2), then certain pH excursions alleged in the Sierra Club's Motion would not be considered violations.

Finally, as stated in Freeman United's 2005 CCA, the waters being collected in Pond 19 at the Industry Mine constituted "Reclamation Area" drainage governed by 35 Ill. Admin. Code

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[7] Chemical addition has also been conducted very sporadically at Ponds 26, 2, and 3. (*See* Austin Aff. A, ¶25.)

406.109 and thus should not have been subject to any manganese limitations. Although Freeman United continued to monitor its manganese discharges from Outfall 19 as part of its CCA obligations, that does not change the fact that discharges from Outfall 19 should not have been subject to manganese effluent limitations. There is therefore a disputed issue of fact with respect to the Sierra Club's alleged violations of the manganese and pH effluent limits (109 of the violations alleged in the Sierra Club's Motion).

D. There Are Disputed Issues of Fact As to Whether Certain Exceedances Alleged in the Sierra Club's Motion Were Violations of Monthly Average Effluent Limitations.

Sixty-nine exceedences of the monthly average effluent limitations in the NPDES permit alleged by the Sierra Club also should not be considered violations because fewer than three samples were able to be taken in those particular months. (See descriptions of "Code 1" and "Code 3" in Sierra Club's Motion, Ex. 3.) 35 Ill. Admin. Code 304.104 provides in pertinent part that:

> **Section 304.104 Averaging**
>
> a) Except as otherwise specifically provided, proof of violation of the numerical standards of this Part shall be on the basis of one or more of the following averaging rules:
>
> 1) No monthly average shall exceed the prescribed numerical standard.
>
> . . .
>
> b) Terms used in subsection (a) shall have the following meanings:
>
> 1) The monthly average shall be the numerical average of all daily composites taken during a calendar month. A monthly average must be based on at least three daily composites.

(Emphasis added.) Similarly, 35 Ill. Admin. Code 406.101, which applies specifically to mine

waste effluent and water quality standards, requires three grab samples in order to calculate a monthly average:

> **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.

(Emphasis added.)

For those months when Freeman United was unable to obtain the requisite three samples from its outfall, these regulations recognize that it would be inappropriate to calculate a monthly average. To that end, the Board should reject the Sierra Club's request for summary judgment for 69 of the 81 alleged violations of the monthly effluent limits where there were not at least three daily composites.

V. The Sierra Club's Claims Against Freeman United are Barred by Laches

As required by its NPDES permit, each of Freeman United's quarterly DMRs provided detailed information on the specific discharges from each of the Industry Mine's outfalls. (Austin Aff. A, ¶4.) The Sierra Club could have easily availed itself of the information contained in these DMRs (which one would assume the Sierra Club's individual members would have done in light of their heightened concerns with respect to the discharges from the Industry Mine). However, instead of acting promptly following Freeman United's submission of its DMRs, the Sierra Club waited until long after Freeman United sold its Industry Mine to file the

complaint now pending before the Board. The Sierra Club's failure to exercise appropriate diligence with respect to the claims it now asserts should result in those claims being barred by laches.

Laches is an equitable doctrine that bars relief when a defendant has been misled or prejudiced due to a plaintiff's delay in asserting a right. *See City of Rochelle v. Suski*, 206 Ill. App. 3d 497, 501 (2d Dist. 1990); *People v. State Oil Co.*, PCB 97-103 (May 18, 2000). The doctrine applies to environmental enforcement matters brought before the Board. *See People v. Stein Steel Mills Servs., Inc.*, PCB 02-1, slip op. at 3, 4 (Apr. 18, 2002) (rejecting the argument that "laches is an affirmative defense only to actions in equity, not enforcement actions before the Board" and stating that "[t]he Board has held that laches may apply to the Board in its governmental capacity"). In order to succeed on its laches defense, Freeman United must demonstrate (i) lack of diligence by the Sierra Club and (ii) prejudice to Freeman United. *See e.g., Van Milligan v. Bd. of Fire & Police Comm'rs*, 158 Ill. 2d 85, 89 (1994).

Each time Freeman United submitted its DMRs, it put into the public record detailed information concerning its effluent discharges. However, until seeking to intervene in the State's lawsuit, the Sierra Club ignored Freeman United's purported "egregious" violations. The Sierra Club cannot reasonably dispute that Freeman United has been prejudiced by the Sierra Club's unreasonable delay. The Sierra Club seeks in excess of $26 million in civil penalties from Freeman United for alleged violations that occurred from January 2004 through August 31, 2007. Of course, Freeman United had a good faith belief that its CCAs resolved all outstanding discharge violations at the time of the CCAs' acceptance by IEPA, (Austin Aff. A, ¶9), and the Sierra Club did nothing to dissuade Freeman United from that belief. Instead, the Sierra Club remained silent, allowing potential penalties to accrue while Freeman United continued to act in

good faith reliance on the State-approved CCAs. Under any definition of the term, Freeman United has been prejudiced by the Sierra Club's excessive delay.

Because the Sierra Club sat on its rights for an unreasonable length of time, with resulting prejudice to Freeman United, the doctrine of laches should bar the Sierra Club from the relief it seeks. In any event, summary judgment is appropriate only when the "moving party's right to judgment is clear and free from doubt." *See Hoover*, 155 Ill. 2d at 410. Summary judgment should be denied in this case since material facts exist with respect to whether the Sierra Club in fact failed to exercise appropriate diligence and whether Freeman United was prejudiced by the Sierra Club's excessive delay.

VI. The Sierra Club's Request For Penalties Is Premature and Inappropriate

For the reasons discussed above, the Board should either dismiss the Sierra Club's claims against Freeman United or deny the Sierra Club's Motion; the Board therefore has no need to consider the Sierra Club's penalty request. In the event, however, that the Board were to entertain the Sierra Club's request, Freeman United provides this response.

A. The Sierra Club's Request is Procedurally Improper

The Sierra Club's request that the Board impose penalties at this stage is procedurally improper and has previously been rejected by the Board. For example, in *People v. Cmty. Landfill Co., Inc.*, PCB 97-193, slip op. at 10 (Apr. 5, 2001), the Board agreed that an evaluation of costs and penalties at the summary judgment phase was premature. In fact, in a later decision in that same case, the Board granted partial summary judgment and then ordered that the matter proceed to a hearing on the remaining counts and to determine the appropriate penalty for the counts for which summary judgment was granted. *People v. Cmty. Landfill Co., Inc.*, PCB 97-

193 (Oct. 3, 2002). *See also People v. Chemetco, Inc.*, PCB 96-76 (Feb. 19, 1998) (granting partial summary judgment but refusing to assess a penalties without an evidentiary hearing).

The reason that these Board decisions refused to impose civil penalties at the summary judgment phase should be obvious; penalty determinations require the Board to make factual findings with respect to specific statutory factors which simply cannot be decided at the summary judgment phase. As discussed below, there are additional material disputed issues of fact that preclude the Board's imposition of civil penalties at the summary judgment phase.

B. There Are Significant Factual Disputes With Respect to the Section 33(c) Factors and the Section 42(h) Criteria

In order to impose civil penalties, the Board must consider all of the facts and circumstances surrounding the alleged violations, including the factors and criteria set forth at 415 ILCS 5/33(c) and 415 ILCS 5/42(h).[8] The Sierra Club, however, ignores most of these statutory criteria. Instead, the Sierra Club asks this Board to impose $26.3 million in penalties against Freeman United (1) to deter future violation of the Act; (2) because of the period of time

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[8] The Section 33(c) factors are: (1) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people; (2) the social and economic value of the pollution source; (3) 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; (4) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and (5) any subsequent compliance. 415 ILCS 5/33(c).

The Section 42(h) criteria are: (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 the requirements of the Act; (3) any economic benefits accrued because of delay in compliance; (4) the amount of civil penalty that will serve to deter further violations; (5) the number, proximity in time, and gravity of previously adjudicated violations; (6) whether the respondent has self-disclosed; (7) whether the respondent undertook a supplemental environmental project; and (8) whether the respondent has completed any CCA that might exist. 415 ILCS 5/42(h). The last 42(h) factor was added to the statute in August 2011.

and severity of the alleged violation; (3) because Freeman United wasn't diligent in complying with the NPDES permit; and (4) because Freeman United realized an economic benefit from its alleged non-compliance. (Sierra Club's Motion at 10-11.) However, not only does the Sierra Club incorrectly calculate the maximum theoretical penalties that can be awarded under the Act, but the Sierra Club also ignores facts that undermine its penalty argument and, at the same time, mischaracterizes facts that it relies on to support its penalty argument.

1. The Sierra Club Erroneously Calculated The Theoretical Maximum Penalties

As an initial point, as discussed above, there are significant issues of material fact with respect to all 283 of Freeman United's alleged violations that are the subject of the Sierra Club's Motion. More specifically, however, turning to the alleged violations of the monthly average discharge limitations, the Sierra Club erroneously calculated the maximum theoretical penalties that could be attributed to each of these alleged violations. For each alleged violation of the monthly average limits, the Sierra Club assumed a maximum penalty of $300,000: thirty violations at $10,000 per day. (Sierra Club's Motion at 9-10 and Ex. 3.)

However, 69 of the 81 alleged monthly average violations do not meet the statutory criteria necessary to support a violation of the monthly average effluent limits because fewer than three samples were used to yield a monthly average value, contrary to the averaging rule described in 30 Ill. Admin. Code 304.104. (*See* Section III.D.) The impact of these 69 alleged violations on the total maximum theoretical penalty is significant – removing them changes the maximum potential penalty from $26,320,000 to $5,620,000.

With respect to the remaining 12 alleged violations of the monthly average limits, the Sierra Club also erroneously assumes continuous discharges from these outfalls. (Sierra Club's Motion at 10.) In fact, however, many of the Industry Mine outfalls did not discharge on a daily

basis. (Austin Aff. B, ¶ 9.) The Sierra Club has presented no evidence with respect to the specific number of days that the Industry Mine discharged from its outfalls. The Sierra Club therefore has no factual basis to support its claim that each alleged violation of the monthly average limit constitutes 30 distinct violations for purposes of its maximum penalty calculation.

The Sierra Club has impermissibly inflated the number of alleged violations of the monthly average in order to calculate a distorted maximum theoretical penalty. Eliminating these erroneous calculations reduces the Sierra Club's theoretical maximum penalty calculation from $26,320,000 to $2,020,000.[9]

2. The Facts Do Not Support the Sierra Club's Penalty Demand

In addition to the Sierra Club's errors in calculating the maximum theoretical penalties that it contends should be imposed by the Board, the Sierra Club also selectively chooses the statutory criteria that it believes supports its penalty demand while ignoring criteria that undermine its penalty demand.

First, without citation to authority, the Sierra Club argues that imposition of maximum civil penalties is necessary to deter future violations of the Act. (Sierra Club's Motion at 9.) Since Freeman United hasn't owned or operated the Industry Mine since August 31, 2007, imposing civil penalties on Freeman United would have no deterrent effect on Freeman United.

The Sierra Club next argues that the "ongoing record of violations demonstrates a lack of diligence in attempting to comply with the effluent limits" in the NPDES permit. (*Id.* at 10.) The facts, however, demonstrate that Freeman United has acted in a very diligent manner while it

[9] We have been unable to identify a single instance where the Board has imposed the maximum theoretical penalty on any violator of the Act. As further discussed in Section V.C, the factual circumstances in this case do not warrant the Board's deviation from its established practice.

owned and operated the Industry Mine. The Sierra Club conveniently ignores that since August 15, 2003, the Industry Mine's NPDES permit renewal application has been sitting on IEPA's desk awaiting approval. (People's Responses to Affirmative Defenses by Springfield Coal, LLC, ¶5; Austin Aff. A, ¶21.) Had IEPA acted in a timely manner, a newly issued NPDES permit would have incorporated effluent limitations that were reflective of the current regulatory standards. (*See, e.g.*, Austin Aff. B, ¶4 and Austin Aff. A, Ex. 1E regarding the revised sulfate limits.) The Board certainly should not impose penalties for alleged violations that were a direct result of IEPA's failure to act in a timely and diligent manner.

The Sierra Club also conveniently ignores that on the one occasion that IEPA notified Freeman United of an issue concerning its effluent discharges, Freeman United promptly acted and proposed and entered into a CCA with IEPA. Presumably, at least at the time, the Sierra Club concurred with the actions taken by Freeman United as it made no effort to file a citizen suit or otherwise comment on the CCA or Freeman United's compliance with the Industry Mine's NPDES permit (until now). Again, the Board should not impose penalties for the period of time that Freeman United was working cooperatively with IEPA.

Finally, the Sierra Club argues that the Board is required to ensure that the penalty is at least as great as any economic benefit realized by Freeman United as a result of the non-compliance. (Sierra Club's Motion at 10.) However, the Sierra Club presents no evidence that Freeman United realized any economic benefit as a result of the violations alleged in the Sierra Club's complaint.[10] As such, this factor does not support the Sierra Club's claim for the imposition of maximum penalties on Freeman United.[11]

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[10] The Sierra Club also references two Illinois Coal Competitiveness grants that Freeman United received and expresses frustration that the Industry Mine would participate in a program

Furthermore, although not discussed in the Sierra Club's Motion, many of the other Section 33(c) and 42(h) criteria are supportive of Freeman United's position that this is not an appropriate case for the imposition of civil penalties. For example, the State has conceded that the Industry Mine has social and economic value to the State. (State's Motion at 11.) With respect to the technical practicability and economic reasonableness of reducing and/or eliminating the complained of discharges, testimony before the Board has already demonstrated the technical impracticability of compliance with certain of the previous effluent limits. *See* Testimony of Robert Mosher, IPCB R07-09 at 2 (Feb. 5, 2007) (testifying that under the State's existing water quality standards, "regardless of the source, sulfate and many of the other constituents of [total dissolved solids] are not treatable by any practical means" at mines in Illinois). The Sierra Club has presented no evidence on these issues.

Clearly there are significant disputed issues of fact (and law) with respect to a number of the Section 33(c) factors and 42(h) criteria that should preclude the Board's imposition of penalties against Freeman United at this stage. *See People v. Cmty. Landfill Co., Inc.*, PCB 96-

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intended to create new jobs and support cutting-edge clean coal technology development, mine safety, coal production and coal delivery. (Illinois Department of Commerce & Economic Opportunity FY2012 RFP Letter, available at http://www.ildceo.net/NR/rdonlyres/DDC50437-DDA5-40EE-9F5B-43C125267898/0/HobackRFPletter08192011.pdf.) The grants are available for such projects as "improvements to mining equipment and operations that will result in increased mine productivity and output, job retention or job creation"; and "installation of equipment, facilities and processes needed for carbon dioxide capture, management and storage/utilization from coal-fueled plants." (Illinois Coal Competitiveness Program Application Procedures, available at http://www.ildceo.net/NR/rdonlyres/7878A299-5E13-400E-AADB-7522D1F663AA/0/1Coal_Competitiveness_Program_Application_02072011.doc.) These grants, however, have nothing to do with any alleged economic benefit that might have been realized by Freeman United and therefore have no bearing on the Sierra Club's penalty demand.

[11] Although the Sierra Club makes passing reference to the period of non-compliance and extent of the violations, as discussed in Section III, there are significant disputed issues of fact concerning whether the violations alleged in the Sierra Club's Motion did in fact constitute violations of the Act.

76, slip op. at 10 (Apr. 5, 2001) (refusing to impose penalties at summary judgment stage as evaluation of the penalty criteria involves factual determinations that are not the appropriate subjects of a summary judgment motion). Rather, the issue of penalties should only be addressed after a finding of liability and after the parties have had the opportunity to present evidence on the statutory factors to the Board.

C. The Sierra Club Seeks Penalties that are Unprecedented and Unjustified

Even if a motion for summary judgment was the proper forum for the imposition of penalties (which it is not), in our Motion for Summary Judgment and Response to the State's Motion for Partial Summary Judgment, we noted that the State's request that the Board make an example of Freeman United by imposing civil penalties in excess of $341,000 was unprecedented and unjustified. The Sierra Club's request that the Board impose civil penalties in excess of $26 million is even more unprecedented and unjustified.

During the last eight years, there were only fifteen CWA enforcement cases where the Board's final penalty was over $25,000.[12] Of these fifteen cases, the average penalty amount was approximately $56,918,[13] and the highest was $135,000.[14] It is important to note that there

[12] *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.

[13] *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.

are many dozens of other CWA enforcement cases where the penalties have been less than $25,000. Notably, the average of all CWA enforcement cases before the Board during the past three years was as follows: 2009 was $13,119.05;[15] 2010 was $8,711.67;[16] and 2011 was $13,318.24.[17] These penalties are orders of magnitude less than the $26.3 million in penalties that the Sierra Club asks the Board to impose.

Even if the Sierra Club were entitled to the relief it seeks (which it is not), this is not the appropriate case for the Board to allow the Sierra Club to reset the penalty levels for effluent violations from a coal mine, especially without having provided the parties with the opportunity to present their case to the Board through an evidentiary proceeding. As such, if this matter should ever proceed to a penalty phase, the Board should deny the Sierra Club's request that the Board ignore prior precedent in order to set an example with respect to Freeman United.

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[14] *See People v. Petco Petroleum Corp.*, PCB 05-66 (Feb. 2, 2006) ($135,000) (State alleged respondent violated 415 ILCS 5/12(a) and (d) (2004) and 35 Ill. Adm. Code 302.203, 304.105, 304.106, 302.208(g) "by causing or allowing water pollution and violating the chloride water quality standard"; the violations allegedly resulted from spills and leaks totaling approximately 1,100 barrels of salt water and 20 barrels of crude oil).

[15] 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. The average penalty was $13,119.05.

[16] 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. The average penalty was $8,711.67.

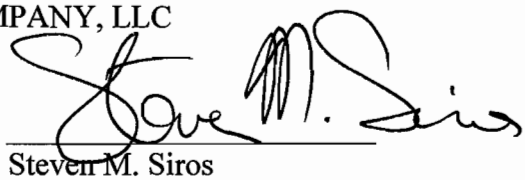
[17] In 2011, the number of cases resolved before the Board that were not dismissed or are currently outstanding was 8. The total penalties in all of these cases was $106,545.88. The average penalty was $13,318.24.

Conclusion

For the reasons set forth above, the Sierra Club is not entitled to summary judgment on Count II of its complaint. Furthermore, Freeman United respectfully requests that the Board reconsider Freeman United's Motion to Strike and/or Dismiss Intervenors' Complaint.

Respectfully submitted,

FREEMAN UNITED COAL MINING COMPANY, LLC

By: 
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