**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF:

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

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

Respondent Springfield Coal Company, LLC ("Springfield Coal"), pursuant to 35 Ill. Admin. Code §§101.500 and 101.516, files its Reply to Prairie Rivers Network and Sierra Club's (the "Intervenors") Reply Regarding their Motion for Summary Judgment dated April 27, 2012 (the "Motion"). The Intervenors' Motion for Summary Judgment should be denied since there are numerous genuine issues of material fact that the Intervenors simply cannot dispute.

## INTRODUCTION

The Inervenors' Reply Regarding their Motion for Summary Judgment ("Intervenors' Reply") contains many inaccuracies and mischaracterizations that cannot go unaddressed. For

example, on page 22 of the Intervenors' Reply,[1] the Intervenors state that Respondents have not raised "any disputed facts relevant to the penalty determination." This is blatantly incorrect. Springfield Coal spends over seven pages of its Response to the Intervenors' Motion for Summary Judgment ("Springfield Coal's Response") discussing the disputed facts relevant to the penalty determination.[2] Instead of continuing to list examples of the Intervenors' questionable arguments and statements, and out of respect for the Board's time, Springfield Coal will only respond to the new and substantive arguments that the Intervenors have raised in the Intervenors' Reply. As discussed below, all of these arguments clearly demonstrate that summary judgment is not appropriate, because there are genuine issues of material fact in dispute in this matter, and therefore, the Intervenors have not met their legal burden. *See, e.g., In re Estate of Hoover,* 155 Ill. 2d 402, 210 (Ill. 1993) (stating that summary judgment is a "drastic means" of disposing of litigation and is only appropriate when "resolution of a case hinges on a question of law and the moving party's right to judgment is clear and free from doubt").

## I. The Intervenors Have Alleged 121 Additional Violations than Alleged by the State, and this Substantial Discrepancy in the Number of Alleged Violations Precludes the Entry of Summary Judgment

The Intervenors admit that both the State of Illinois (the "State") and the Intervenors rely on the same documents (i.e., the discharge monitoring reports ("DMRs") submitted for the Industry Mine and the NPDES Permits) to determine the number of alleged violations against Springfield Coal. However, the Intervenors suggest that the State did a less than adequate job in reviewing the documents, stating: "[r]ecognizing that the State has limited resources to devote to

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[1] The Intervenors did not choose to number the pages in the Intervenors' Reply. Assuming that the first page of the Intervenors' Reply is page 1, it appears that the sentence "Respondents have not raised any disputed facts relevant to the penalty determination" is on page 22.

[2] *See* Springfield Coal's Response to the Intervenors' Motion for Summary Judgment, pp. 26 – 29 (discussing the significant factual disputes related to 415 ILCS 5/33(c) and pp. 32-34 (discussing the significant factual discrepancies related to 415 ILCS 5/33(c) and 415 ILCS 5/42(h)).

any particular enforcement action, Petitioners undertook a painstaking review that compared the discharges admitted in the DMRs to the effluent limitations that Springfield Coal admits are required by the NPDES Permit."[3] As the Board is aware, the IEPA and the Illinois Attorney General's Office are the governmental agencies in Illinois that are empowered with the authority and responsibility to identify and enforce the environmental laws in the State of Illinois. It is doubtful that these agencies did not also do a painstaking review of these same documents. Although the Intervenors pat themselves on the back for supposedly finding 121 additional violations against Springfield Coal not noticed by the State while reviewing the same documents,[4] the Intervenors have only underscored how there are significant factual disputes between the State and the Intervenors (much less the Intervenors and Springfield Coal) regarding the number of alleged violations.

Moreover, even though the Intervenors conducted such a painstaking review of the DMRs, the Intervenors concede that they made errors in their review. For example, the Intervenors recognized that they errantly included a violation for September 2010 from Outfall 009 and committed a "transcription error" whereby three alleged violations that originally appeared in the Outfall 017 column should have been presented in the Outfall 018 column.[5] Accordingly, the Intervenors have revised Exhibit 3 from the Intervenors' Motion for Summary Judgment, and the number of alleged violations has been reduced. Clearly the Intervenors' original Motion for Summary Judgment had errors. How can the Board be expected to grant

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3 *See* Intervenors' Reply at p. 4.

4 *Id.*

5 *Id.* at p. 17.

summary judgment in this matter when the Intervenors have to revise the number of alleged violations?

Case law supports the Board denying the Intervenors' motion for summary judgment because, at a minimum, the State and the Intervenors are reviewing the same documents but are arriving at strikingly different conclusions as to the number of alleged violations. *See Robinson v. Builders Supply & Lumber Co.,* 223 Ill. App. 3d 1007, 1013-14 (Ill. App. Ct. 1991)(denying the motion for summary judgment because the parties reached different conclusions from reviewing the same documents, because when the facts allow for "more than one conclusion, including one unfavorable to the movant, motion for summary judgment should be denied"); *see also Beverly Bank v. Alsip Bank,* 106 Ill. App. 3d 1012, 1017 (Ill. App. Ct. 1982) (reversing summary judgment for the plaintiff because the parties reached different conclusions from reviewing the same documents and holding that "if facts admit of more than one conclusion or inference, including one unfavorable to the moving party, a summary judgment should be denied"). This is a textbook example of a significant factual discrepancy in a lawsuit. The discrepancy between the excursions alleged by the State and those alleged by the Intervenors against Springfield Coal is 121 violations, or approximately 36%.[6] In short, reasonable people (i.e., the State, the Intervenors, Freeman United, and Springfield Coal) are disagreeing as to the number of alleged violations; accordingly, the Intervenors' Motion for Summary Judgment should be dismissed. *See, e.g., Kay v. Mundelein*, 36 Ill. App. 3d 433, 437 (Ill. App. Ct. 1976) (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").

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[6] *See* Springfield Coal's Response to the Intervenors' Motion for Summary Judgment, pp. 8 – 9

## II. The August 30, 2007 Springfield Coal Compliance Commitment Agreement was Properly Created by Statute and was in Effect from 2007 to 2009

The Intervenors attempt to argue that the Springfield Coal 2007 CCA submitted to IEPA on August 30, 2007, was not valid because it did not meet the statutory requirements of 415 ILCS 5/31(a)(9) when it was submitted. The Intervenors go as far as to state that Respondents attempted to "unilaterally" obtain the Springfield Coal 2007 CCA when it submitted an "unsolicited CCA extension proposal."[7] The Intervenors' argument has both factual and legal flaws. First, Intervenors fail to cite the statute that was in effect in 2007 when the CCA was submitted, but they instead cite the current statute as amended in August 23, 2011.[8] In 2007, the applicable statute stated:

> The Agency's failure to respond to a written response submitted pursuant to subdivision (2) of this subsection (a), if a meeting is not requested, or subdivision (5) of this subsection (a) if a meeting is held, or within the time period otherwise agreed to in writing by the Agency and the person complained against, shall be deemed an acceptance by the Agency of the proposed Compliance Commitment Agreement for the violations alleged in the written notice issued under subdivision (1) of this subsection (a) as contained within the written response.

*See* 2011 Ill. Legis. Serv. P.A. 97-519 (S.B. 1357) (emphasis added).

Second, contrary to the Intervenors' assertions, the Springfield Coal 2007 CCA was a solicited CCA proposal that met the requirements of 415 ILCS 5/31(a)(9). On July 13, 2007, IEPA formally invited Freeman United to submit an "acceptable CCA extension."[9] (herein the "July 13, 2007 Letter"). On August 30, 2007, Freeman United submitted a revised CCA

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7 *Id.* at p. 8.

8 *Id.* at p. 7.

9 *See* Exhibit 1F to Springfield Coal's Response to the People of the State of Illinois' Motion for Partial Summary Judgment (IEPA July 13, 2007 letter to Freeman United). *See also* Springfield Coal's Response to the People of the State of Illinois' Motion for Partial Summary Judgment, pp. 8 – 10, for additional information regarding the formation of the Springfield Coal CCA.

proposal request to IEPA ("August 2007 Extension Letter").[10] Therefore, the August 2007 Extension Letter was a solicited document that the IEPA expected to receive. Also, the August 2007 Extension Letter complied with the terms of 415 ILCS 5/31(a)(9) because it was submitted "within the time period otherwise agreed to in writing by the Agency and the person complained against." Specifically, IEPA's July 13, 2007 letter inviting Freeman United to submit a "CCA extension" provided that "if you wish to submit a further proposal to resolve this matter short of formal enforcement, please do so by September 1, 2007."[11] The August 2007 Extension Letter was submitted to IEPA by this deadline and met all of the requirements of 415 ILCS 5/31(a)(9). Therefore the Springfield Coal 2007 CCA is a valid and enforceable document.

Finally, the Intervenors also argue that the August 30 Extension Letter submitted by Freeman United cannot be valid for Springfield Coal, who closed on the purchase of the Industry Mine that same day.[12] Springfield Coal disagrees with the Intervenors' position, especially since the statutory language does not prohibit a new owner (i.e., Springfield Coal) being assigned a CCA from a former owner (i.e., Freeman United). The Intervenors even recognize that the applicable statute is silent as to this issue.[13] Moreover, this raises the question as to when a CCA becomes effective. Does a CCA become effective on the date it is submitted or after the expiration of the 30-day period if the IEPA fails to respond? These issues underscore that there

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[10] *See* Exhibit 1H to Springfield Coal's Response to the People of the State of Illinois' Motion for Partial Summary Judgment (Freeman United August 30, 2007 letter to IEPA). *See also* Springfield Coal's Response to the People of the State of Illinois' Motion for Partial Summary Judgment, pp. 8 – 10, for additional information regarding the August 2007 Extension Letter.

[11] Springfield Coal is aware that the July 13, 2007 letter from IEPA states that "even though a proposal may be the subject of further consideration, it will not be considered a CCA as referenced in Section 31(a)." However, at worst, this creates a factual issue since the letter also specifically spells out what "an acceptable CCA Extension must include." At best, the fact that IEPA may say that a submission will not constitute a CCA does not trump the language of the statute which deems such submissions to be an acceptable CCA if the IEPA fails to respond.

[12] *See* Intervenors' Reply, p. 8.

[13] *Id.*

are many factual discrepancies between the parties regarding the existence and impact of the Springfield Coal 2007 CCA. On a foundational level, the Intervenors (and the State, for that matter) assert that the Springfield Coal 2007 CCA did not exist, was not created properly pursuant to 415 ILCS 5/31, and was not properly amended. Springfield Coal argues that the Springfield Coal CCA existed, it was properly created pursuant to the applicable statute, and it was properly amended. These are significant facts that are in dispute. The Intervenors' arguments further demonstrate that summary judgment is not warranted.

## III. The Illinois Environmental Protection Act Precludes the Intervenors From Pursuing Claims that are the Subject of a CCA.

The Intervenors argue that the CCAs entered into between the IEPA and the Respondents have no impact upon the claims brought by the Intervenors. The Intervenors assert that a CCA only limits the State in its enforcement authority. In other words, the Intervenors believe their enforcement authority is broader than the IEPA's and the Illinois Attorney General's authority to enforce the environmental laws of the State of Illinois. The Intervenors misconstrue the citizen suit provision in 45 ILCS 5/31(d)(1), which places restrictions upon private citizens when a CCA is in place. 45 ILCS 5/31(d)(1) allows any person to file with the Board a "complaint, meeting the requirements of subsection (c) of this section . . ." (Emphasis added). Subsection (c) of 5/31 is prefaced with the following sentence: "[f]or alleged violations which remain the subject of disagreement between the Agency and the person complained against following waiver pursuant to subdivision (10) of subsection (a) of this Section or fulfillment of the requirements of subsections (a) and (b) of this Section, the Office of the Illinois Attorney General . . . shall issue and serve upon the person complained against a written notice, together with a formal complaint . . ." (Emphasis added). Therefore, Subsection (c) only applies to "alleged violations which remain the subject of disagreement between the Agency and the person complained against."

In other words, violations which are the subject of a CCA (and are therefore not subject to disagreement between the Agency and the person complained against)[14] are not included in types of claims which can be brought under Section 5/31(c) and therefore are not claims that can be brought by an individual under Section 5/31(d). This makes common sense. A citizen should not be provided greater enforcement authority than the State of Illinois. Also, if a person is allowed to bring a citizens' suit while the IEPA is working with a company through a CCA, then it would gut the whole concept of a CCA that the Illinois Legislature put in place as an informal process by which people can work toward compliance without a complaint being filed before the Board. Also, allowing a citizen to bring such an action during the time of a CCA would run counter to the requirement in Section 5/31(d) which precludes claims by individuals which are "duplicative". Clearly, if a citizen is seeking enforcement of alleged violations that are the subject of a CCA, such claims are duplicative.

## IV. The 2005 CCA and the Springfield Coal 2007 CCA Extends to All Related Violations During the Terms of the CCAs.

The Intervenors have asserted that even if the CCAs are enforceable, the CCAs only apply to the original three manganese violations at Outfall 019 which were listed in the NOV issued by IEPA on March 11, 2005.[15] 415 ILCS 5/31(a)(10) states that "the Agency shall not refer the alleged violations which are the subject of the Compliance Commitment Agreement to

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[14] The language of 415 ILCS 5/31(a)(10) makes clear that "alleged violations which remain the subject of disagreement between the Agency and the person complained against" are those which are not subject to a CCA. This section provides: "If the person complained against complies with the terms of a Compliance Commitment Agreement accepted pursuant to subsection (a), the Agency shall not refer the alleged violations which are the subject of the Compliance Commitment Agreement to the Office of the Illinois Attorney General . . . . However, nothing in this subsection is intended to preclude the Agency from continuing negotiations with the person complained against or from proceeding pursuant to the provisions of subsection (b) of this Section for alleged violations which remain the subject of disagreement between the Agency and the person complained against following fulfillment of the requirements of this subsection (a)." (Emphasis added).

[15] *See* Intervenors' Reply, p. 8.

the Office of the Illinois Attorney . . ." (Emphasis added). No judicial or Board decisions were located that provided an interpretation of what this phrase means.

However, a CCA is not a one-time event, but it is a process which lasts over a period of time. A CCA is a process by which an entity is provided an agreed-upon time period in which to make changes to its operations in order to work towards compliance. Both the 2005 CCA and the Springfield Coal 2007 CCA were for a period of two years. The correspondence between IEPA and the Respondents clearly demonstrates that the 2005 CCA and the Springfield Coal 2007 CCA contemplated much more than simply remedying three isolated violations for manganese excursions.[16] For example, both the 2005 CCA and the Springfield Coal 2007 CCA call for two years of ongoing treatment to Pond 019.[17] In addition, IEPA's letter of July 13, 2007, inviting Freeman United to submit a "CCA Extension request", stated that the request "must include a feasible and implementable compliance plan designed to result in an ultimate resolution to the current elevated manganese concentrations in the discharge at Outfall 019 and subsequent water quality standards violations." (Emphasis added).[18] It was obviously clear to IEPA that the "alleged violations which are the subject of the Compliance Commitment Agreement" included more than just the three alleged manganese violations back in 2005, but also included the "current elevated manganese concentrations" in 2007 and "subsequent" violations that may occur.

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16 *See* Exhibits 1B, 1C, 1E, 1F, 1G, 1H, and 1I to Springfield Coal's Response to the State's Complaint.

17 *See* Exhibits 1B and 1H to Springfield Coal's Response to the State's Complaint.

18 *See* Exhibit 1F to Springfield Coal's Response to the State's Complaint.

## V. Sampling to Meet Monthly Average Effluent Limitations Must be Based Upon Three Samples.

Intervenors try to argue that the averaging regulations in 35 IAC 406101 do not "purport to excuse violations" of the monthly average effluent limitations when fewer than three samples are taken.[19] However, that is exactly what Section 406.101 does. It states that "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." (Emphasis added). In other words, three or more samples must be taken in a month in order to determine compliance with the monthly average effluent limitations in a NPDES Permit. If less than three are taken, then compliance with the monthly average effluent limitations cannot be determined.

The Intervenors then try to suggest that the Respondents could have been trying to skirt the requirements in the NPDES Permit by suggesting that a permittee could intentionally take less than three samples per month.[20] The NPDES Permit provides that "there shall be a minimum of nine (9) samples collected during the quarter when the pond is discharging." If the Intervenors believe that the required number of samples have not been taken this raises additional factual issues as to how many samples were taken in each quarter, and if fewer than nine samples were taken, whether the ponds were not discharging at such time. Here again, factual issues exist which should prevent the granting of summary judgment to the Intervenors.

Intervenors also assert that these regulations do not apply to the Respondents.[21] Springfield Coal sees no reason that it would not be able to take advantage of potential defenses which are afforded to it under the effluent standard regulations that are applicable to mining

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19 *See* Intervenors' Reply, p. 9.

20 *Id.* at p. 10.

21 *Id.* at p. 12.

operations in Illinois. In fact, Section 406.101(b) states that "if a permittee elects monitoring and reporting by grab samples as provided in Section 406.102(f), then compliance with the numeric standards of this part shall be determined on the basis of three or more grab samples averaged over a calendar month." (Emphasis added). This section provides a defense for those persons holding NPDES permits (i.e., permittees) against the type of claim that the Intervenors are pushing: that a single grab sample should represent an entire monthly average. This would also be true for the defenses set forth for the alternative effluent limits for pH and manganese (§406.106), and background concentrations (§406.103).

## VI. Springfield Coal has Proferred Substantial Evidence that Background Concentrations of Constituents Have Caused Exceedances of the NPDES Permit Effluent Limitations

Intervenors attempt to argue that Springfield Coal has failed to put forth sufficient facts in the context of its summary judgment motion to overcome the rebuttable presumption in Section 406.103 that the background concentrations are not the cause of the violations. However, the judicial cases the Intervenors cite in support of this argument show that the amount of evidence a non-moving party needs to present in order to defeat a motion for summary judgment, even when there is a rebuttable presumption, is extremely low. Intervenors cite two cases in which there was a rebuttable presumption at issue in a summary judgment phase of a case. In *Smith v. Tri-R Vending*, 249 Ill. App. 3d 654 (1993), summary judgment was granted in the case because the non-moving party "introduced no evidence in opposition to the summary judgment motion." *Id* at 656 (emphasis added). Also, in *Wausau Ins. Co. v. All Chicagoland Moving & Storage Co.*, 333 Ill. App. 3d 1116 (2d Dist. 2002), the appellate court affirmed the trial court's summary judgment because there were "undisputed facts" in the case and the non-moving party "did not present evidence to rebut the presumption that it acted negligently." *Id.* at 1124. If the

Intervenors are relying upon these cases as setting the bar as to how much evidence a non-moving party needs to produce to defeat a motion for summary judgment, even where there is a rebuttable presumption, Springfield Coal has clearly met this burden.

Actually, the Illinois Supreme Court has weighed into this issue and has held that a rebuttable presumption ceases to operate in the face of contrary evidence. *See Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill.2d 452 (1983). "As soon as evidence is produced which is contrary to the presumption which arose before the contrary proof was offered[,] the presumption vanishes entirely." *Id.* (quotation omitted) (collecting cases). In other words, "once evidence is introduced contrary to the presumption, the bubble bursts and the presumption vanishes." *Id.* When the presumption is met, the trier of fact must have an opportunity to "weigh the evidence and consider any and all reasonable inferences that can be drawn from the[] facts." *Id.* at 466.

Springfield Coal will not rehash in this pleading all of the evidence it previously submitted to the Board showing that background concentrations may have caused the exceedances of the effluent limitations in the NPDES Permit. Springfield Coal refers the Board to its Responses to the State's and the Intervenors' Motions for Summary Judgment in which Springfield Coal presents evidence of background sampling taken before the mine began operations, sampling of background soils in the area in 2006, and upstream sampling over the last eight years showing concentrations of constituents at levels greater than the effluent limits in the NPDES Permit.[22] Clearly, there are material issues of fact, which, when viewed most favorably to Respondents, should defeat a motion for summary judgment.

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[22] *See* Springfield Coal's Response to the People of the State of Illinois' Motion for Partial Summary Judgment, pp. 14-17, and Springfield Coal's Response to Prairie Rivers Network and Sierra Club's Motion for Summary Judgment, pp. 20-23.

## VII. The Discharge at Outfall 019 has been in Reclamation Area Drainage Status since 2005, it Therefore Does Not Have a Effluent Limitation for Manganese

In Freeman United's Response to the Intervenors' Motion for Summary Judgment, filed in this case on June 6, 2012 (*see* pp. 15-16), Freeman rightly asserts that Outfall 019 at the Industry Mine was approved by IEPA to be considered "Reclamation Area Drainage" and thus not subject to manganese effluent limitations. Special Condition 8 of the NPDES Permit sets forth the process by which a change in outfall status is to occur:

> The special reclamation area effluent standards of 35 Ill. Admin. Code 406.109 apply only on approval from the Agency. To obtain approval, a request form and supporting documentation shall be submitted 45 days prior to the month the permittee wishes the discharge to be classified as a reclamation area discharge. The agency will notify the permittee upon approval.

As part of Freeman United's CCA proposal in its May 19, 2005 letter to IEPA, Freeman specifically requested that the Agency approve Outfall 019 being put into Reclamation Area Drainage status.[23] The IEPA accepted the CCA and therefore approved Outfall 019 being moved into Reclamation Area Drainage status.[24] IEPA did add the condition that the Industry Mine was to continue to monitor for and report manganese at Outfall 019. Freeman United and Springfield Coal have continued to monitor for and report manganese at Outfall 019. However, just because IEPA wanted Outfall 019 to be sampled for manganese does not change the fact that IEPA approved Outfall 019 being moved into Reclamation Area Drainage status in 2005 and is not subject to a manganese effluent limitation. Once the status of Outfall 019 was changed to Reclamation Area Drainage, this continued thereafter, and remains so today. Therefore, any detections of manganese

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23 *See* Exhibit 1B to Springfield Coal's Response to the State's Complaint.

24 *See* Exhibit 1C to Springfield Coal's Response to the State's Complaint.

at Outfall 019 since 2005 above the previous effluent limitation would not be a violation of the NDPES Permit.

## 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: July 10, 2012

BRYAN CAVE LLP

By: _____

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**NOTICE OF ELECTRONIC FILING**

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PLEASE TAKE NOTICE that on July 10, 2012, I electronically filed with the Clerk of the Pollution Control Board, Springfield Coal Co., LLC's Reply to Prairie Rivers Network and Sierra Club's Reply to Springfield Coal's Response to the Motion for Summary Judgment, copies of which are herewith served upon you.

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