BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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 COMPANY, 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 July 10, 2012, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois Freeman United Coal Mining Company, LLC's Motion for Leave to File a Reply to the Prairie Rivers Network and Sierra Club's Reply Regarding Their Motion for Summary Judgment; and Freeman United Coal Mining Company, LLC's Reply to the Prairie Rivers Network and Sierra Club's Reply Regarding Their Motion for Summary Judgment, copies of which are attached hereto and herewith served upon you.

By: _____
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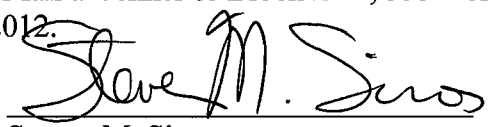
CERTIFICATE OF SERVICE

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 Motion for Leave to File a Reply to the Prairie Rivers Network and Sierra Club's Reply Regarding Their Motion for Summary Judgment; Freeman United Coal Mining Company, LLC's Reply to the Prairie Rivers Network and Sierra Club's Reply Regarding Their Motion for Summary Judgment; 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 July 10, 2012.



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Dated: July 10, 2012

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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,	)	
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FREEMAN UNITED COAL MINING COMPANY, L.L.C., and SPRINGFIELD COAL COMPANY, L.L.C.,	)	
Respondents.	)	

FREEMAN UNITED COAL MINING COMPANY, LLC'S MOTION FOR LEAVE TO FILE A REPLY TO THE PRAIRIE RIVERS NETWORK AND SIERRA CLUB'S REPLY REGARDING THEIR MOTION FOR SUMMARY JUDGMENT

COMES NOW Respondent, Freeman United Coal Mining Company, LLC ("Freeman United"), by and through its attorneys, and hereby files this Motion for Leave to File a Reply to the Prairie Rivers Network and Sierra Club, Illinois Chapter's (collectively, the "Sierra Club") Reply Regarding Their Motion for Summary Judgment. In support of its Motion, Freeman United states the following:

1. The Board has the authority to permit Freeman United to reply to prevent material prejudice. 35 Ill. Adm. Code 101.500(e).

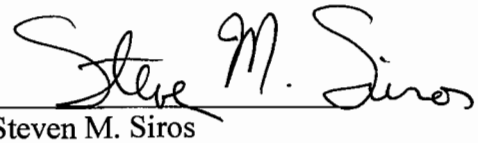
2. Freeman United is compelled to file this Reply to respond to certain new legal arguments and/or factual allegations raised by the Sierra Club in its Reply.

3. Freeman United would be materially prejudiced if its motion for leave to reply were denied.

WHEREFORE, Respondent Freeman United respectfully requests that the Board grant its Motion for Leave to File a Reply to the Prairie Rivers Network and Sierra Club's Reply Regarding Their Motion for Summary Judgment and file the attached Reply.

Respectfully submitted,

FREEMAN UNITED COAL MINING COMPANY, LLC

By: 
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Dated: July 10, 2012

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
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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)**
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FREEMAN UNITED COAL MINING COMPANY, LLC'S REPLY TO PRAIRIE RIVERS NETWORK AND SIERRA CLUB'S REPLY REGARDING THEIR MOTION FOR SUMMARY JUDGMENT

Respondent, Freeman United Coal Mining Company, LLC ("Freeman United"), by its attorneys, hereby files this Reply to the Prairie Rivers Network and Sierra Club, Illinois Chapter's (collectively, the "Sierra Club") Reply Regarding Their Motion for Summary Judgment ("Sierra Club Reply"). Freeman United is compelled to file this Reply to respond to certain new legal arguments and/or factual allegations raised by the Sierra Club in its Reply. Freeman United hereby also incorporates the arguments raised in Springfield Coal's Reply to the Sierra Club's Reply.

ARGUMENT

I. The Sierra Club Offers No Explanation For Its Failure to Seek Relief With Respect to Post-Sale Alleged Violations

In its reply, the Sierra Club makes no effort to explain why the relief it seeks is in fact not now duplicative of the State's claims in light of the Sierra Club's failure to argue that Freeman United somehow is liable for post-sale violations of the Industry Mine's NPDES permit. Instead, the Sierra Club explains that its decision not to seek relief with respect to those claims was made out of respect for the Board's limited time and resources. (Sierra Club Reply at 3.)

While the Sierra Club's expressed desire to not waste the Board's time and resources is commendable, that desire would be better served if the Sierra Club were to discontinue its efforts to seek relief that is duplicative of the relief being sought by the State. Again, the Sierra Club was allowed to intervene because it represented to the Board that it sought unique relief: a determination from this Board that Freeman United was liable for alleged violations that occurred after Freeman United sold the Industry Mine to Springfield Coal. The Sierra Club's failure now to pursue those claims provides ample support for reconsideration by the Board of its July 15, 2010 order denying Freeman United's Motion to Dismiss the Sierra Club's complaint against Freeman United.

II. There Remain Significant Factual Disputes With Respect to the Sierra Club's Alleged NPDES Violations

A. The Sierra Club Should be Barred from Asserting Violations That Were the Subject of the CCA

The Sierra Club contends that the 2005 CCA does not limit its ability to seek to enforce violations that were the subject of the CCA. The Sierra Club provides no citation to any Board decision that has made such a finding nor were we able to find any such decision. Instead, the Sierra Club simply asserts that a CCA limits only IEPA and that "[n]o limits on citizen

enforcement are found" in the Act. (Sierra Club Reply at 6.) In other words, Sierra Club believes its power to enforce the environmental laws of the State of Illinois to be broader than that of IEPA, notwithstanding the Sierra Club's acknowledgment that it stands in the shoes of the State. (Sierra Club Reply at 18.) In support of this belief, the Sierra Club quotes the citizen suit provision in 415 ILCS 5/31(d)(1), construing it as a provision which "explicitly encourages citizen suits regardless of what the Agency chooses to do." (Sierra Club Reply at 6.) However, this provision in fact contains a restriction which applies to private citizens when a CCA is in place.

415 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). Section 5/31(c) is prefaced with the following sentence: "For 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). This introductory clause indicates that subsection (c) 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 successfully completed CCA (and are therefore not subject to disagreement between the Agency and the person complained against)[1] are not included in the types of claims which can be brought under Section 5/31(c) and

[1] 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

therefore are not claims that can be brought by an individual under Section 5/31(d). This interpretation is logical, as a citizen should not be provided greater enforcement authority than the State.

If the Board were to accept the Sierra Club's argument and allow citizen suits where there has been a successful CCA, such a finding would significantly undermine the incentive for regulated entities to enter into CCAs with IEPA, and the intent of the Illinois legislature to establish an informal process by which entities can work toward compliance without necessitating the use of Board time and resources in enforcement actions would be defeated. Since the CCA bars IEPA's ability to refer a matter to the Illinois Attorney General and the Sierra Club stands in the shoes of the State, we respectfully submit that the Sierra Club should similarly be barred from seeking to enforce alleged violations that were addressed by the CCA.[2]

B. The Sierra Club Should Be Barred from Asserting Averaging Violations For Months Where Fewer Than Three Samples Were Taken

Sixty-nine of the alleged exceedances of the average effluent limitations should not be considered violations because fewer than three samples were taken for those particular months.

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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)." 415 ILCS 5/31(a)(10). (Emphasis added).

[2] Sierra Club asserts that the only "alleged violations which are the subject of" the 2005 CCA are the original three manganese violations at Outfall 019 which were listed in the NOV issued by IEPA on March 11, 2005. (Sierra Club Reply at 8.) However, a CCA is a process which extends over a period of time; the 2005 CCA was in place for a period of two years. The 2005 CCA contemplated more than just the three violations listed in the 2005 NOV. For example, the CCA called for two years of ongoing treatment at Pond 019. (April 27, 2012 Affidavit of Thomas Austin, attached to Freeman United's Response to Sierra Club's Motion for Summary Judgment ("Freeman United Response") as Exhibit 1 ("Austin Aff. A"), Exs. 1B, 1C.)

(Freeman United's Response to Sierra Club's Motion for Summary Judgment ("Freeman United Response") at 16.) The Sierra Club makes no effort to dispute the factual premise of Freeman United's argument. Instead, notwithstanding the plain language of the regulation, the Sierra Club contends that 35 Ill. Adm. Code 406.101[3] does not "excuse violations" of the monthly average effluent limitations when fewer than three samples are taken. (Sierra Club Reply at 9.)

The Sierra Club suggests that if the Board were to agree with Freeman United, then permittees would purposefully elect not to sample a third time in a month in order to avoid being in violation of their NPDES permit. (Sierra Club Reply at 9.) There is absolutely no evidence in the record to suggest that Freeman United elected to take fewer than three samples in order to avoid violating the monthly average limits in its permit. The Sierra Club also ignores the testimony from Thomas Austin that the outfalls at the Industry Mine discharge on a sporadic basis, making it possible that a given outfall may have discharged only one or two days in a reporting period, or not at all. (June 6, 2012, Affidavit of Thomas Austin, attached to Freeman United Response as Ex. 3 ("Austin Aff. B"), ¶9.)

The regulations require at least three samples over a calendar month. For 69 of the violations alleged in the Sierra Club's complaint, fewer than three samples were taken in the month. The Sierra Club has offered no evidence in rebuttal. The Sierra Club is therefore not entitled to summary judgment on 69 of its alleged exceedances of the monthly effluent limits. In fact, since the Sierra Club apparently does not dispute that 69 of its alleged violations were for months when fewer than three samples were taken, the Board could grant summary judgment in favor of Freeman United with respect to these alleged violations.

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[3] 35 Ill. Adm. Code 406.101 provides 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); *i.e.*, three or more samples must be taken in a month in order to determine compliance with the monthly average effluent limitations in an NPDES Permit.

C. The Sierra Club Makes No Effort to Dispute the Evidence that Compliance with the Sulfate Limit was Neither Technically Nor Economically Feasible

In its reply, the Sierra Club makes no effort to rebut the fact that compliance with the sulfate limits in the NPDES permit is neither technically nor economically feasible. Instead, the Sierra Club simply repeats its mantra that compliance with the permit limits in the NPDES permit is the only metric that the Board can use to evaluate the Industry Mine's compliance status (notwithstanding that a permit renewal application has been sitting on IEPA's desk for almost a decade).

Because the Sierra Club does not rebut Freeman United's evidence of technical and economic impracticality, Freeman United respectfully submits that the Sierra Club is not entitled to summary judgment with respect to 38 of the alleged violations that are premised on the sulfate limits in the Industry Mine's NPDES permit. In fact, again since the Sierra Club has made no effort to rebut Freeman United's impracticality argument, the Board could grant summary judgment in favor of Freeman United with respect to these 38 alleged violations.

D. The Sierra Club Should Be Barred From Enforcing the Manganese and pH Effluent Limitations in the NDPES Permit

In support of its argument that the Sierra Club should be barred from enforcing the manganese and pH effluent limits in the Industry Mine's NPDES permit, Freeman United presented the testimony of Thomas Austin. (*See* Freeman United Response at 14-16.) The Sierra Club again presents no evidence to rebut Mr. Austin's affidavit. Rather, the Sierra Club seeks to introduce as fact what it believes the intent of IEPA's permit writer was when the permit was issued. (Sierra Club Reply at 14.) The Sierra Club's efforts to testify as to what it believes the permit writer was thinking is inadmissible and should be discounted by the Board.

As discussed in Freeman United's response to the Sierra Club's summary judgment motion (Freeman United Response at 14-16), there is a disputed issue of fact with respect to the alleged violations of the manganese and pH effluent limits, and the Sierra Club is not entitled to summary judgment with respect to those claims.[4]

E. There Remains a Disputed Issue 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

In response to Freeman United's argument that certain background contaminant concentrations exceed the effluent limits in the Industry Mine's NPDES permit, the Sierra Club argues that when the permit was originally issued in 2003, the IEPA permit writer was aware of these exceedances but made a professional judgment not to take these limits into consideration when issuing the permit. (Sierra Club Reply at 15.) However, the Sierra Club does not point to any evidence in the record or otherwise that suggests what the IEPA permit writer knew or took into consideration this information when issuing the NPDES permit in 2003. Again, the Sierra Club improperly speculates as to what the permit writer knew or took into consideration when issuing the permit and the Sierra Club's argument with respect to this point should be discounted.

The Sierra Club makes no effort to rebut the evidence previously provided by Freeman United that certain background concentrations did in fact exceed the effluent limits in the

[4] In response to Freeman United's argument that Outfall 19 was properly subject to the reclamation area effluent limits, Sierra Club argues that no evidence was provided that Freeman United submitted a request for redesignation of the pond to IEPA or that IEPA approved such a redesignation. (Sierra Club Reply at 16.) However, as part of its CCA proposal in its May 19, 2005 letter to IEPA, Freeman United specifically requested that the Agency acknowledge that the waters being collected at Pond 19 constituted "Reclamation Area Drainage" (*See* Austin Aff. A, Ex. 1B.) The IEPA accepted the CCA, and therefore approved Freeman United's request. IEPA's condition in its acceptance letter that the Industry Mine continue monitoring and reporting of manganese discharges at the outfall (Austin Aff. A, Ex. 1C) does not change the fact that IEPA approved the redesignation of Outfall 019 as Reclamation Area Drainage and that Outfall 019 therefore is not subject to a manganese effluent limitation. Although we recognize that the Sierra Club may have a different interpretation of these facts, it clearly is not entitled to summary judgment with respect to any alleged violations from Outfall 19.

Industry Mine's NPDES permit. (Austin Aff. A, ¶¶11, 22-24 and Exs. 1D, 1J-1M; Austin Aff. B, ¶¶10,11.) Instead, the Sierra Club argues that Freeman United hasn't shown which alleged violations were caused by contaminants other than contaminants associated with the operations of the Industry Mine. (Sierra Club Reply at 15.) That burden does not fall on Freeman United; rather the burden falls on the Sierra Club and the Sierra Club has made no effort to meet its burden. The Sierra Club is therefore not entitled to summary judgment on any of the counts in its complaint.

III. The Sierra Club's Claims Against Freeman United Are Barred by Laches

In response to Freeman United's laches argument, the Sierra Club acknowledges that it stands in the shoes of the Illinois Attorney General. (Sierra Club Reply at 18.) As such, for the same reasons as the State's claims are barred by laches (*see* Freeman United's Motion for Summary Judgment and Response to the People of the State of Illinois' Motion for Partial Summary Judgment at 13-15), so, too, are the Sierra Club's claims barred by laches.[5]

IV. The Sierra Club's Request For Penalties Remains Premature and Inappropriate

The Board has yet to decide a case in which a citizen's group (or the Illinois Attorney General) has brought an action seeking penalties against a former owner/operator of a facility for violations that allegedly occurred years in the past. We respectfully submit that the circumstances in this case warrant a finding of the Board that the Sierra Club should be barred from seeking penalties for wholly past violations. Moreover, we are compelled to respond to a particularly egregious statement by the Sierra Club. The Sierra Club's statement that "polluters should not be allowed to wipe the slate clean and escape liability for years of violations simply

[5] Importantly, the Sierra Club makes no effort to dispute the fact that its members were aware, or should have been aware, of the alleged discharge violations as a result of Freeman United's submittal of its DMRs.

by reincorporating into a new legal entity" has no basis in fact. (Sierra Club Reply at 20.) The Sierra Club is well aware that Freeman United did not reincorporate into a new legal entity; in fact, the Sierra Club sued both Freeman United and Springfield Coal. The Sierra Club's efforts to distort the record should be rejected.

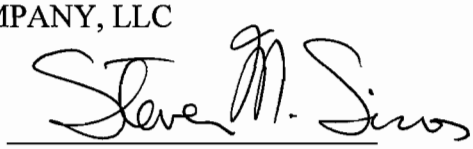
With respect to the Sierra Club's additional arguments concerning the amount of penalties that it believes would be appropriate in this proceeding, Freeman United refers the Board back to its arguments as set forth at pages 25-26 of its Response to Sierra Club's Motion for Summary Judgment. The penalties sought by the Sierra Club are grossly inflated and have no basis in law or fact.

CONCLUSION

For the reasons set forth above, the Sierra Club is not entitled to summary judgment on Count II of its complaint. Further, Freeman United respectfully reiterates its request 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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