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,	)	
	)	
Intervenor,	)	
	)	
vs.	)	**PCB No. 10-61 & 11-2**
	)	**(Water - Enforcement)**
FREEMAN UNITED COAL MINING COMPANY, LLC, a Delaware limited liability company, and SPRINGFIELD COAL COMPANY, LLC, a Delaware limited liability company,	)	
	)	
Respondents.	)	

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on July 11, 2012, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, PEOPLE'S RESPONSE TO MOTION FOR LEAVE TO FILE REPLY BY FREEMAN UNITED COAL MINING COMPANY, LLC, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: _____
THOMAS DAVIS, Chief
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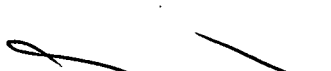
CERTIFICATE OF SERVICE

I hereby certify that I did on July 11, 2012, cause to be served by United States Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instrument entitled NOTICE OF ELECTRONIC FILING and PEOPLE'S RESPONSE TO MOTION FOR LEAVE TO FILE REPLY BY FREEMAN UNITED COAL MINING COMPANY, LLC, upon the Respondents listed on the Service List.



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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
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ENVIRONMENTAL LAW AND POLICY CENTER, on behalf of PRAIRIE RIVERS NETWORK and SIERRA CLUB, ILLINOIS CHAPTER,	)	
	)	
Intervenor,	)	
	)	
v.	)	**PCB No. 2010-061**
	)	**(Water-Enforcement)**
FREEMAN UNITED COAL MINING COMPANY, LLC, a Delaware limited liability company, and SPRINGFIELD COAL COMPANY, LLC, a Delaware limited liability company,	)	
	)	
Respondents.	)	

PEOPLE'S RESPONSE TO MOTION FOR LEAVE TO FILE REPLY BY FREEMAN UNITED COAL MINING COMPANY, LLC

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, hereby objects to the Motion for Leave to File Reply to the People's Response to Freeman United's Motion for Summary Judgment, and states as follows:

1. Section 101.500(e) of the Board's procedural rules provides that the movant will not have the right to reply to a response to its motion "except as permitted by the Board or hearing officer to prevent material prejudice."

2. Freeman United alleges [at ¶ 3] that it "would be materially prejudiced if its motion for leave to reply were denied." The Respondent does not explain how it would be prejudiced and does not elaborate as to how such prejudice might be material. The Board has no

basis to determine whether granting leave would prevent material prejudice. Hence, the request for leave fails to provide sufficient grounds.

3. The Board has considered whether material prejudice might occur in numerous cases without articulating any bright line test. Section 101.500(d) also employs a "material prejudice" standard regarding untimely responses to motions. Where the request for leave is itself untimely, the Board has denied the request. See, e.g., *Kyle Nash v. Luis Jimenez*, PCB 07-97 (August 19, 2010). Where the requests for leave fail to include any allegation of material prejudice, the Board has denied such requests. See, e.g., *People v. Tradition Investments, LLC* , PCB 11-68 (October 6, 2011). In the latter case, the Board denied the People's request to file a reply under Section 101.500(e): "The People's motion does not assert that material prejudice will occur if the People are not allowed to file a reply, but rather argues that a reply will help to narrow issues and allow for a response to Tradition Investments' interpretation of the law. The Board finds that these are *insufficient grounds* to allow a reply when an objection has been raised." PCB 11-68 (October 6, 2011), slip op. at 2; emphasis added. Unfortunately, the Board has not yet explained what sufficient grounds might entail.

4. In addition to the lateness of a request for leave or the omission of any claim of material prejudice, the Board has occasionally looked to the nature of the issues for which leave is sought. In *Kyle Nash v. Luis Jimenez*, for instance, the Board noted that the response to which a reply was intended contained "novel allegations" that were "irrelevant" to the underlying claims and denied leave to reply after somehow finding that "the likelihood of material prejudice resulting from a denial of leave to be low." PCB 07-97 (August 19, 2010), slip op. at 3.

5. An exhaustive review of the orders in which the Board granted or denied leave to reply under Section 101.500(e) is unnecessary to make the simple point that *allegations* of material prejudice must be pleaded in any such request. The showing of any such prejudice that may be required and the standard of review to consider whether the allegations are sufficiently supported are not readily apparent from the Board's rulings. Does a *reasonable* likelihood of material prejudice suffice or must a party requesting leave show a *substantial* likelihood? Moreover, once the likelihood of any prejudice may be established, how does the Board consider the *materiality* of potential prejudice? In other words, the impact on the party being denied the opportunity to reply (in support of the party's own motion) would have to be *tangible* and *direct* somehow. The Board's previous rulings have considered the effects upon the requesting party of not permitting a reply; the potential effects upon the adjudication of the subject motion are relegated to these concerns.

6. Freeman United's justification in seeking leave to reply is its claim that "the State has introduced new issues and facts . . . raising the issue of the State's knowledge regarding the Industry Mine's NPDES [permit] compliance history and the circumstances surrounding the initiation of the present action, and Freeman United has not had the opportunity to address them." Motion at ¶ 2. This is, however, not true. It was Freeman United that raised these issues in its motion for summary judgment. Similarly, the claim that the State has introduced critical factual information that needs to be accurately characterized is a claim that warrants scrutiny. The State's introduction of information was properly made through a count-affidavit to rebut the allegations of fact made by the mining company. The State responded to Freeman United's

contentions in its motion for summary judgment with relevant documentation. By making these contentions, it was Freeman United that introduced new issues and facts.

7. As the movant for summary judgment based upon its affirmative defenses, Freeman United made an allegation of fact that no violation notice was issued after the March 2005 notice, but that allegation is rebutted by the documents submitted by the State. This rebuttal (on a collateral matter) is now considered by the movant to somehow constitute new information simply because it was not submitted with Freeman United's motion. As we anticipated [see State's Response at page 15, footnote 3], Freeman United (having raised a factual issue in its motion and affidavit, and such issue having been responded to with a counter-affidavit) is now seeking leave to reply by merely claiming that a material prejudice will result. The Respondent, however, does not identify any of the purportedly new issues or facts introduced by the State and does not provide any basis to evaluate how critical or relevant such matters might be in relation to the claims of violation.

8. The fundamental notion that any prejudice might result is suspect. The parties are litigating an enforcement case in accordance with the Board's procedural rules. These rules clearly provide that there is no right of reply. These rules also govern the summary judgment procedure and allow for affidavits and counter-affidavits to provide a more complete record of decision on the pleadings. Any party filing a motion for summary judgment must anticipate likely responsive arguments based upon applicable case law and the evidentiary record consisting of admissions, depositions, and supplemental information verified by affidavit. Certainly, the State did so in its motion for summary judgment. Section 101.504 also requires that both motions and responses must clearly state the grounds for the motions and a concise statement of the relief

sought or the party's position in response. Where the rules preclude any reply absent material prejudice, then any movant is thereby on notice and must play by the rules. Where the rules limit the adjudication of summary judgment to the record provided by the pleadings, admissions on file, any depositions, and other evidence admissible at hearing, then any response must be constrained to such record. In this context, the appropriate inclusion of *new* issues and facts in a response is not likely to occur. Here, Freeman United did not admit the effluent allegations in the Complaint, the subject of our motion for summary judgment, even though the allegations are based solely on the Discharge Monitoring Reports previously submitted for the Industry Mine. As movant, the Complainant provided the affidavit from Mr Crislip to prove the hundreds of violations. Here, Freeman United raised affirmative defenses in its Answer to the Complaint, including contentions to avoid liability based upon a previously approved Compliance Commitment Agreement; these defenses are the subject of their motion for summary judgment. As movant, the Complainant addressed the CCA issues in our motion for summary judgment. As respondent to Freeman United's summary judgment request, the Complainant not only addressed the CCA issues but also other "new" matters raised by the mining company. Freeman United filed an affidavit to support its motion and the State has filed a counter-affidavit in response. Where is the "new" matter? More importantly, how might any prejudice even result where both parties are following the rules?

9. Section 101.500(e) should be revised to allow a right of reply to the movant. This change would make Board practice more consistent with that of the circuit courts. The movant has the burden of proof or persuasion, depending upon the motion. The Board's record for decision for summary judgment will be what the Board determines to be relevant and admissible,

whether admissions or deposition testimony, or evidence supported by affidavit. The reason for the right of reply is simple fairness.

10. In conclusion, the Respondent does not justify its request for leave. Section 101.500(e) requires a showing of the likelihood of material prejudice resulting from denial of the ability to reply, not merely an unsupported allegation.

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, hereby objects to the request for leave by the Respondent.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN,
Attorney General
of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: _____
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Dated: 7/10/12