ILLINOIS POLLUTION CONTROL BOARD
November 15, 2012

PEOPLE OF THE STATE OF ILLINOIS, Complainant, ENVIRONMENTAL LAW AND POLICY CENTER, on behalf of PRAIRE RIVERS NETWORK and SIERRA CLUB, ILLINOIS CHAPTER, Intervenor, v. FREEMAN UNITED COAL MINING COMPANY, LLC, a Delaware limited liability company, and SPRINGFIELD COAL COMPANY, LLC, a Delaware limited liability company, Respondents.	)	PCB 10-61 & 11-02 (Consolidated – Water - Enforcement)
ENVIRONMENTAL LAW AND POLICY CENTER, on behalf of PRAIRIE RIVERS NETWORK and SIERRA CLUB, ILLINOIS CHAPTER, Complainant, v. FREEMAN UNITED COAL MINING CO., and SPRINGFIELD COAL CO., LLC, Respondents.	)	

OPINION AND ORDER OF THE BOARD (by D. Glosser):

On February 10, 2010, the People of the State of Illinois (People) filed a four-count complaint against Freeman United Coal Mining Company, LLC (Freeman United) and Springfield Coal Company, LLC (Springfield Coal). The complaint alleged water pollution and National Pollutant Discharge Elimination System (NPDES) permit violations, which occurred at

the strip mine (Industry Mine) located in McDonough and Schuyler Counties, approximately 5 miles southwest of Industry, Illinois, between January 2005 and December 2009.

On April 15, 2010, the Board granted the Environmental Law and Policy Center's (ELPC) motion to intervene on behalf of Prairie Rivers Network (PRN) and Sierra Club, Illinois Chapter (Sierra Club) (collectively ELPC) and accepted for filing ELPC's four-count complaint against Freeman United and Springfield Coal. The Board accepted ELPC's complaint for hearing on July 15, 2010, after denying all motions to strike, dismiss and challenge the sufficiency of ELPC's complaint.

On March 6, 2012, the People filed a motion for partial summary judgment and on April 27, 2012 ELPC filed a motion for partial summary judgment. Today, the Board decides both motions. For the reasons discussed below, the Board grants the People's motion for partial summary judgment and denies Freeman United's cross-motion for partial summary judgment. The Board also grants ELPC's motion for partial summary judgment on Count II, and denies Freeman United's request to reconsider its motion to strike or dismiss ELPC's complaint. With both motions, the Board declines to issue a civil penalty at this time and orders the parties to hearing to address factual issues that may impact the penalty finding.

This order begins by reviewing the procedural history, facts, and complaints of these consolidated cases before providing the applicable statutes and standard of review. Next, this order identifies the three issues raised in the People's motion for partial summary judgment and summarizes the parties' arguments on each of those issues separately. The opinion then provides the Board's analysis of and findings on each issue. Afterward, this order lists the three issues raised in ELPC's motion for partial summary judgment. It then summarizes the parties' arguments on each issue, before concluding each section with the Board's analysis of and findings on each issue.

PROCEDURAL HISTORY

The People filed a four-count complaint (People Compl.) against Freeman United and Springfield Coal on February 10, 2010, and the Board accepted the complaint for hearing on February 18, 2010. On February 25, 2010, ELPC, on behalf of PRN and Sierra Club, filed a motion to intervene in this proceeding and requested that the Board accept ELPC's four-count complaint (ELPC Compl.) against Freeman United and Springfield Coal. On April 15, 2010, the Board granted ELPC's motion to intervene finding ELPC may be materially prejudiced absent intervention and that the motion was timely. Freeman United and Springfield Coal separately filed motions to strike, dismiss or challenge the sufficiency of ELPC's complaint on May 14, 2010. On July 15, 2010, the Board denied both of Freeman United and Springfield Coal's motions and accepted ELPC's complaint, while also consolidating it with the People's case for hearing.

On July 23, 2010, Freeman United and Springfield Coal separately answered the People's complaint and presented affirmative defenses (FAns.; SAns.), to which the People replied to on July 29, 2010. Additionally, Freeman United and Springfield Coal each separately filed answers and affirmative defenses to ELPC's complaint on August 13, 2010. From then until November

29, 2011, the People, Freeman United, and Springfield Coal worked together towards a settlement that would include an acceptable Supplemental Environmental Plan and possible penalty demand. During this period, ELPC maintained their involvement by monitoring the settlement process and even considering activating their own case. Hearing Officer Order 10/18/2010.

On March 6, 2012, the People filed a motion for partial summary judgment (PMot.) against Freeman United and Springfield Coal in regards to the alleged NPDES permit violations in Counts I and II of the People's complaint. On April 27, 2012, Freeman United and Springfield Coal each filed responses to the People's motion (FResp. to People; SResp. to People). In both responses, Freeman United and Springfield Coal requested that the Board deny the People's motion. In addition, Freeman United's response also included a cross-motion for summary judgment on Counts I and III.

Also on April 27, 2012, ELPC filed a motion for partial summary judgment (ELPC Mot.) regarding the NPDES permit violations alleged in Count II of ELPC's complaint. On June 6, 2012, Freeman United and Springfield Coal separately responded to ELPC's motion (FResp. to ELPC; SResp. to ELPC). In each response, Freeman United and Springfield Coal requested that the Board deny ELPC's motion. However, Freeman United's response also requested that the Board reconsider its previous denial of Freeman United's motion to strike or dismiss ELPC's complaint.

On June 18, 2012, the People filed a response to Freeman United's cross-motion for partial summary judgment (PReply to FResp.). On July 5, 2012, Freeman United filed a motion for leave to reply to the People's most recent response. Freeman United filed this reply on July 10, 2012 (FSurreply to People). On July 11, 2012, the People objected to Freeman United's motion to leave for reply on the grounds that Freeman United failed to provide sufficient support to show how Freeman United would be prejudiced by denying its motion for leave to reply as required by Section 101.500(e) of the Board's procedural rules (35 Ill. Adm. Code 101.500(e)). After reviewing both Freeman United's request to reply and the People's objection, the Board grants Freeman United's motion for leave to reply to the People's response to Freeman United's summary judgment motion.

On June 22, 2012, ELPC filed motions for leave to reply to Springfield Coal and Freeman United's responses to their summary judgment motion. Attached to this motion was ELPC's reply to both Freeman United and Springfield Coal's responses (ELPC Reply). Both Springfield Coal and Freeman United filed their own separate motions for leave to surreply to ELPC's reply on July 10, 2012. (FSurreply to ELPC; SSurreply to ELPC). The Board has reviewed ELPC, Springfield Coal and Freeman United's motions to leave to reply, and the Board grants all three motions.

PEOPLE'S COMPLAINT

On February 10, 2010, the Attorney General brought a four-count complaint against Freeman United and Springfield Coal on her own motion and at the request of the Illinois Environmental Protection Agency (IEPA) pursuant to the terms and provision of Section 31 of

the Act, 415 ILCS 4/31 (2010). People Compl. at 1. The first two Counts concern NPDES permit violations at the Industry Mine, while the remaining two counts allege water pollution violations at the Industry Mine. *Id*. at 13, 18, 19, 21.

Specifically, Count I of the People's complaint (one of the Counts the People are seeking summary judgment on) alleges that Freeman United violated the terms or conditions of NPDES Permit No. IL0061247 and Section 12(f) of the Act, 415 ILCS 5/12(f) (2010), by repeatedly causing or allowing the discharge of iron, manganese, sulfates, pH, and total suspended solids (TSS) from the Industry Mine into waters of the State, in excess of the effluent limitations imposed by the Industry Mine NPDES permit. *Id*. at 13. As such, the People seek relief by requesting that the Board enter an order against Freeman United that accomplishes the following: (A) authorizes a hearing in this matter; (B) finds that Freeman United violated Section 12(f) of the Act, 415 ILCS 5/12(f) (2010), and the regulations as alleged in Count I; (C) imposes a monetary penalty of not more than the statutory maximum on Freeman United pursuant to Section 42(b)(1) of the Act, 415 ILCS 5/42(b)(1) (2010); (D) awards the People reasonable costs in this matter pursuant to Section 42(f) of the Act, 415 ILCS 5/42(f) (2010), and; (E) grants such other relief as the Board deems appropriate. *Id*. at 13-14.

Count II of the People's complaint (one of the Counts the People are seeking summary judgment on) alleges that Springfield Coal violated the terms or conditions of NPDES Permit No. IL0061247 and Section 12(f) of the Act, 415 ILCS 5/12(f) (2010), by repeatedly causing or allowing the discharge of manganese, sulfates, pH, and TSS from the Industry Mine into waters of the State, in excess of the effluent limitations imposed by the Industry Mine NPDES permit. *Id*. at 18. Accordingly, the People request that the Board enter an order against Springfield Coal that includes the following relief: (A) authorizes a hearing in this matter; (B) finds that Springfield Coal violated Section 12(f) of the Act, 415 ILCS 5/12(f) (2010), and the regulations as alleged in Count II; (C) imposes a monetary penalty of not more than the statutory maximum on Springfield Coal pursuant to Section 42(b)(1) of the Act, 415 ILCS 5/42(b)(1) (2010); (D) awards the People reasonable costs in this matter pursuant to Section 42(f) of the Act, 415 ILCS 5/42(f) (2010), and; (E) grants such other relief as the Board deems appropriate. *Id*. at 19.

Count III of the People's complaint alleges that from at least January 2004 until September 2007, Freeman United violated Section 12(a) of the Act, 415 ILCS 5/12(a) (2010), by causing or allowing the discharge of iron, manganese, sulfates, pH, and TSS into waters of the State so as to cause or tend to cause water pollution in Illinois in combination with matter from other sources, and which have likely created a nuisance or rendered such waters harmful or detrimental or injurious to agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or aquatic life. *Id*. at 19. As such, the People request that the Board enter an order against Freeman United, which includes the following relief: (A) authorizes a hearing in this matter; (B) finds that Freeman United violated Section 12(a) of the Act, 415 ILCS 5/12(a) (2010), and the regulations as alleged in Count III; (C) imposes a monetary penalty of not more than the statutory maximum on Freeman United pursuant to Section 42(a) of the Act, 415 ILCS 5/42(a) (2010), and; (D) grants such other relief as the Board deems appropriate. *Id*. at 20.

Count IV of the People's complaint alleges that since September 2007, Springfield Coal has violated Section 12(a) of the Act, 415 ILCS 5/12(a) (2010), by causing or allowing the

discharge of manganese, sulfates, pH, and TSS into waters of the State so as to cause or tend to cause water pollution in Illinois in combination with matter from other sources, and which have likely created a nuisance or rendered such waters harmful or detrimental or injurious to agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or aquatic life. *Id*. at 21. Accordingly, the People seek relief by requesting that the Board enter an order against Springfield Coal that accomplishes the following: (A) authorizes a hearing in this matter; (B) finds that Springfield Coal violated Section 12(a) of the Act, 415 ILCS 5/12(a) (2010), and the regulations as alleged in Count IV; (C) imposes a monetary penalty of not more than the statutory maximum on Springfield Coal pursuant to Section 42(a) of the Act, 415 ILCS 5/42(a) (2010), and; (D) grants such other relief as the Board deems appropriate. *Id*. at 21.

ELPC'S COMPLAINT

On February 25, 2010, ELPC, counsel for the PRN, and its individual members, and Sierra Club, and its individual members, brought a four-count complaint against Freeman United and Springfield Coal pursuant to Section 31(d)(1) of the Act, 415 ILCS 5/31(d)(1) (2010). ELPC Compl. at 1. The first count in ELPC's complaint alleges that because Freeman United did not properly follow the statutory requirements set out in 40 C.F.R. Sections 122.61(b), 122.61(b)(2), and 122.53, which govern the process of transferring a NPDES permit, Freeman Unite remains the permittee liable for any and all violations of Industry Mine's NPDES permit, including those after selling the facility to Springfield Coal. *Id*. at 9. Furthermore, ELPC alleges that Springfield Coal violated 33 U.S.C. Section 1311(a) and Section 12(f) of the Act, 415 ILCS 5/12(f) (2010) because Springfield Coal has been operating the Industry Mine without a permit since it took control of the facility due to the permit being ineffectively transferred. *Id*. However, ELPC's complaint also alleges that, in the alternative, if the transfer was effective, Freeman Coal remains liable for any and all violations of NPDES Permit No. IL0061247 that occurred prior to transferring the permit, and Springfield Coal is liable for any and all violations of NPDES Permit No. IL0061247 that occurred after the transfer was made. *Id*. at 10.

Based on the allegations in Count I, ELPC seeks relief by requesting that the Board enter an order against Freeman United, Springfield Coal, or both, which accomplishes the following: (A) authorizes a hearing in this matter; (B) finds that these respondents violated Section 12(f) of the Act, 415 ILCS 5/12(f) (2010), and its implementing regulations as alleged in Count I; (C) imposes a monetary penalty of not more than the statutory maximum on these respondents pursuant to Section 42(b)(1) of the Act, 415 ILCS 5/42(b)(1) (2010); (D) orders these respondents to cease and desist from violations of the Act and its implementing regulations pursuant to Section 33(b) of the Act, 415 ILCS 5/33(b) (2010), and; (E) grants such other relief as the Board deems appropriate. *Id*. at 10.

Count II of ELPC's complaint (the count ELPC seeks summary judgment for) alleges that Freeman United, Springfield Coal, or both violated the terms or conditions of NPDES Permit No. IL0061247, Section 12(f) of the Act, 415 ILCS 5/12(f) (2010), and Section 301 of the Clean Water Act, 33 U.S.C. Section 1311 (2006). *Id*. at 21. ELPC alleges that these violations occurred because the respondents repeatedly caused or allowed a discharge from the Industry Mine of iron, manganese, sulfates, pH, and TSS, in excess of the effluent limitations imposed by the Industry Mine NPDES permit. *Id*. As such, the ELPC requests that the Board enter an order

against Freeman United, Springfield Coal, or both, which includes the following relief: (A) authorizes a hearing in this matter; (B) finds that these respondents violated Section 12(f) of the Act, 415 ILCS 5/12(f) (2010), and its implementing regulations as alleged herein; (C) imposes a monetary penalty of not more than the statutory maximum on these respondents pursuant to Section 42(b)(1) of the Act, 415 ILCS 5/42(b)(1) (2010); (D) orders these respondents to cease and desist from violations of NPDES Permit No. IL0061247 pursuant to Section 33(b) of the Act, 415 ILCS 5/33(b) (2010), and; (E) grants such other relief as the Board deems appropriate. *Id*. at 22.

In Count III, ELPC alleges that from at least January 2004 until September 2009, the respondents caused or tended to cause water pollution in violation of Section 12(a) of the Act, 415 ILCS 5/12(a) (2010), by causing or allowing the discharge of iron, manganese, sulfates, pH, and TSS into waters of the State so as to cause or tend to cause water pollution in Illinois in combination with matter from other sources, and which have likely created a nuisance or rendered such waters harmful or detrimental or injurious to agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or aquatic life. *Id*. at 23. Based on this allegation, ELPC requests that the Board enter an order against Freeman United, Springfield Coal, or both that includes the following relief: (A) authorizes a hearing in this matter; (B) finds that these respondents violated Section 12(f) of the Act, 415 ILCS 5/12(f) (2010), and its implementing regulations as alleged herein; (C) imposes a monetary penalty of not more than the statutory maximum on these respondents pursuant to Section 42(b)(1) of the Act, 415 ILCS 5/42(b)(1) (2010); (D) orders these respondents to cease and desist from violations of the Act pursuant to Section 33(b) of the Act, 415 ILCS 5/33(b) (2010), and; (E) grants such other relief as the Board deems appropriate. *Id*. at 24.

In Count IV of ELPC's complaint, ELPC alleges that the respondents caused or allowed the discharge of sulfates into Grindstone Creek and its tributaries in violation of Section 302.208(h) of the Board's Water Quality Standards, 35 Ill. Adm. Code 302.208(h), which in turn, is a violation of Section 12(a) of the Act, 415 ILCS 5/12(a) (2010). *Id*. at 26-27. In addition, ELPC alleges that by causing or allowing the discharge of sulfates into Grindstone Creek and its tributaries, the respondents also violated Special Condition 1 of NPDES Permit No. IL61247, Section 12(f) of the Act, 415 ILCS 5/12(f) (2010), and Section 301 of the Clean Water Act, 33 U.S.C. Section 1311 (2006). *Id*. Based on these allegations, ELPC seeks relief by requesting that the Board enter an order against Freeman United, Springfield Coal, or both, which accomplishes the following: (A) authorizes a hearing in this matter; (B) finds that these respondents violated Section 12(f) of the Act, 415 ILCS 5/12(f) (2010), and its implementing regulations as alleged in Count IV; (C) imposes a monetary penalty of not more than the statutory maximum on these respondents pursuant to Section 42(b)(1) of the Act, 415 ILCS 5/42(b)(1) (2010); (D) orders these respondents to cease and desist from violations of the Act and Illinois water quality standards pursuant to Section 33(b) of the Act, 415 ILCS 5/33(b) (2010), and; (E) grants such other relief as the Board deems appropriate. *Id*. at 27.

FACTUAL BACKGROUND

The following facts are undisputed, unless otherwise noted. Freeman United is a Delaware Limited Liability Company authorized to do business in Illinois at the Industry Mine

until September 1, 2007. FAns. at 2. Springfield Coal is a Delaware Limited Liability Company authorized to do business in Illinois and has owned and operated the Industry Mine since September 1, 2007. SAns. at 5.

ELPC is an Illinois-based not-for-profit organization and is counsel for PRN and the Sierra Club. ELPC Compl. at. 2. PRN is an Illinois-based not-for-profit organization concerned with river conservation and water quality throughout Illinois. *Id*. Sierra Club is a California-based not-for-profit corporation, which has among its purposes to protect and restore the quality of the natural and human environment. Both organizations have members who live in the water sheds of Camp Creek, Willow Creek, Grindstone Creek and their tributaries and are who are adversely affected be the degradation of those waters. *Id*. at 2-3.

On April 2, 1999 IEPA issued Permit No. IL0061247 to Freeman United under the NPDES program of the Federal Clean Water Act (CWA). *Id*. NPDES Permit No. IL0061247 authorizes discharges from the Industry Mine into waters of the state, including Grindstone Creek, Willow Creek, Camp Creek, and their unnamed tributaries and also imposes monitoring and reporting requirements on the site's operator. *Id*. On August 15, 2003, Freeman United submitted to IEPA a timely application regarding the renewal of the NPDES permit. People Comp. at 2; FAns. at 3. On August 14, 2007, Springfield Coal submitted to the IEPA a written request to transfer NPDES Permit No. IL0061247 from Freeman United to Springfield Coal. *Id*. It is undisputed that IEPA never acted in response to this request; however, whether this transfer became legally effective remains a disputed fact. *See* SResp. to People at 2; ELPC Compl. at 4.

On March 11, 2005, IEPA issued a Notice of Violation (NOV) to Freeman United regarding manganese discharges from Outfall 019. FResp. to People at 9, *citing* Austin Aff. at ¶5. Freeman United responded to IEPA within 45 days with a proposed Compliance Commitment Agreement (CCA). *Id*, *citing* Austin Aff. at ¶6. IEPA accepted the proposed CCA on June 16, 2005 and the CCA became effective for a period of two years. *Id*, *citing* Austin Aff. at ¶7. Freeman United fully complied with the terms of the CCA. PMot. at 6; PReply to FResp. at 21.

On March 30, 2007, Freeman United submitted a letter to IEPA that sought to extend the CCA, but the IEPA denied the request. FResp. to People at 10; People Resp. to FAns. at 4. Although the People admitted to this fact in their response to Freeman United's answer and affirmative defenses, the People later allege that the March 2007 letter from Freeman United to the IEPA was simply a compliance status report showing the results of a manganese study done at the Industry Mine as required by the CCA. PReply to FResp. at 22. The People further claim that, "[t]here is nothing in the letter itself to suggest that slightly different terms or compliance activities were being proposed. There is nothing to suggest that Freeman United was apparently asking that the June 2005 CCA be 'extended' or that a new improved CCA was being proposed." *Id*. To the contrary, Freeman United alleges that its March 2007 letter to the IEPA was a proposed CCA extension to which IEPA provided a written response to on July 13, 2007. FAns. at 5. Freeman United claims IEPA's response advised Freeman United of the insufficiencies of its original request, and invited Freeman United "to submit additional proposals and directed Freeman United as to what would need to be added in an 'acceptable CCA extension.'" *Id*. Whereas the People argue that Freeman United admitted "that the July 13, 2007 letter from

[IEPA] explicitly stated that any subsequent proposal relating to Outfall 19 'will not be considered to be a CCA as referenced in Section 31(a).'" PReply to FResp. at 23. Therefore, the facts regarding the correspondences between Freeman United and the IEPA between March and July 2007 are disputed.

It is undisputed that on August 30, 2007, Freeman United submitted a revised proposal to IEPA regarding a new/extended CCA for the operations at the Industry Mine, and that IEPA never responded in writing. FAns. at 5; People Resp. to FAns. at 4. Freeman United and Springfield Coal present the affidavit of Thomas Austin, the current Vice President of Human Resources and Government Relations for Springfield Coal, to show that in September 2007, IEPA told Springfield Coal to continue operating pursuant to the terms of the August 30, 2007 CCA proposal during a phone call between Mr. Austin and an unnamed IEPA employee. FAns. at 5, *see also* SResp. to People at 7. However, the truth of this fact is disputed because the People claim that Mr. Austin's phone conversation lacks the proper foundation to be admissible evidence. PReply to FResp. at 23. Thus, whether the 2007 CCA proposal was accepted and became effective remains a disputed fact.

Whether IEPA properly served Freeman United with a NOV in October 2009 is another disputed fact. The People present the affidavit of Larry Crislip, manager of the Permit Section for the Mine Pollution Control Program of IEPA, to support that in October 2009, IEPA issued an NOV regarding violations at the Industry Mine. PReply to FResp. at 15. However, Freeman United denies that the October 2009 NOV was properly served on Freeman United. FSurreply to People at 10.

There is no dispute that on December 8, 2009, ELPC gave Freeman United a notice of intent to sue for alleged violations of NPDES Permit No. IL0061247 and Special Condition No. 1. ELPC Compl. at 3-4. Pursuant to the Code of Federal Regulations, this notice was also mailed to the Illinois Attorney General (Attorney General), the Director of IEPA, and the regional and national administrators of the United States Environmental Protection Agency. *Id*. at 4, *citing* 40 C.F.R. § 135.3. There is also no dispute that after learning that Industry Mine had been sold to Springfield Coal, ELPC sent a second letter, which also complied with the notice requirements of 40 C.F.R. Section 135.3, giving notice of intent to sue under the CWA to Springfield Coal for the violations listed in the letter to Freeman United, but also for discharging without a NPDES permit. *Id*.

How the Attorney General learned about the violations alleged in the People's complaint is also a disputed fact. The People allege that sometime in January, following the October 2009 NOV, IEPA referred the violations alleged in the NOV to the Illinois Attorney General. PReply to FResp. at 29. Freeman United does not affirm or deny that IEPA referred the violations alleged in this case to the Attorney General; however, Freeman United questions whether the Attorney General became aware of violations alleged in the People's complaint from IEPA's referral or the ELPC's notification letter. FResp. to People at 10; 11, *citing* PMot. at 6.

It is undisputed that on February 10, 2010, the Attorney General filed a complaint on behalf of the People against Freeman United and Springfield Coal. *Id*. On February 25, 2010, the ELPC filed a motion to intervene and complaint against Freeman United and Springfield Coal. ELPC Compl. at 1.

It is also undisputed that in October 2006, the Board proposed to ease the sulfate water quality standard, which was set at 500 mg/l (daily maximum). FResp. to ELPC Mot. at 10. The NPDES permit for the Industry Mine included a daily maximum sulfate limitation of 500 mg/l. *Id*. As part of the regulatory rulemaking proceedings, IEPA submitted the expert testimony in support of a less stringent sulfate standard by Robert Mosher, who testified that:

> General Use water quality standards for sulfate (500 mg/l) and TDS [total dissolved solids] (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 opinions 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 standard 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 constituents of TDS are not treatable by any practical means. FResp. to ELPC Mot. at 11, *citing* February 2, 2007 Testimony of Robert Mosher in 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) R07-09, slip op 2 (Sept. 4, 2008).

In September 2008, the state officially rejected the sulfate water quality standard set at 500 mg/l (daily maximum), and revised this standard to a less stringent level. SResp. to People at 12. Additionally, whether background concentrations of constituents in the waters at the Industry Mine affect the applicability of the terms and conditions in the Industry Mine NPDES permit is a disputed fact. The respondents claim, based on Mr. Austin's affidavit, that historical sampling of the streams at the Industry Mine prove that there are and have historically been elevated levels of a number of constituents in the surface water on the property, including sulfate, manganese , iron, TSS and pH. FResp. to ELPC at 12; SResp. to ELPC at 20; ELPC Reply to Freeman and Springfield at 17. The respondents claim these elevated levels should excuse them from liability for exceeding the effluent limits set out in their NPDES permit. FResp. to ELPC at 12; SResp. to ELPC at 20. The People and ELPC claim that these alleged background concentrations of constituents have no bearing on the fact that the NPDES permit limits were exceeded, and as such the respondents remain liable. PMot. at 3; ELPC Reply to Freeman and Springfield at 17.

Lastly, the parties also dispute whether the exception provided in 35 Ill. Adm. Code 406.106(b)(2) applies in this case. The respondents claim that this provision, which excuses mine operators from meeting the manganese limit set in their NPDES permit unless it is necessary for the facility to add chemicals to the discharge in order to meet the iron or pH effluent limitations and also eases the facilities pH limit from 9 to 10 when compliance with the manganese limitation is unobtainable, applies to their operations at the Industry Mine. SResp. to People at 17; Freeman Resp to People at 20. To the contrary, the People and ELPC argue that 35 Ill. Adm. Code 406.106(b)(2) does not apply to the respondents so as to relieve them from liability for exceeding the manganese and pH limits in the Industry Mine NPDES permit because such an exception is not expressly written into the Industry Mine NPDES permit. ELPC Reply to Freeman and Springfield at 16; PMot. at 3.

The NPDES Permit (No. IL0061247) for Industry Mine imposes effluent limitations for iron, manganese, sulfates, pH, and total suspended solids (TSS), applicable to discharges. People Compl. at 3. The pH of the effluent discharged from all outfalls must be within a range of 6.0 to 9.0. *Id*. The following limitations (as expressed in milligrams per liter (mg/L)) are also applicable to all outfalls:

Pollutant	30 Day Average	Daily Maximum
Iron	3.5 mg/L	7.0 mg/L
Manganese	2.0 mg/L	4.0 mg/L
TSS	35.0 mg/L	70.0 mg/L

Id.

The concentration levels of sulfates in the effluent are regulated on a daily maximum basis according to the particular outfalls designated by the NPDES permit:

Outfalls	Daily Maximum
002,003,006,009,029,030,031,032,033,035	1100 mg/L
005,007,010,011,018,019	1800 mg/L
004, 008, 020, 021,022, 024W, 026, 027	500 mg/L

Id.

Industry Mine has the following outfalls

Outfalls	Descriptions	Receiving Waters
002	Acid Mine Drainage from Preparation Plant	Tributary to Grindstone Creek
003	Surface Acid Mine Drainage	Grindstone Creek
018, 019, 020, 021	Surface Acid Mine Drainage	Tributary to Grindstone Creek

009, 024W, 026	Surface Acid Mine Drainage	Willow Creek
022	Surface Acid Mine Drainage	Tributary to Camp Creek
029, 030	Alkaline Mine Drainage	Tributary to Willow Creek
031,032,033,035	Alkaline Mine Drainage	Grindstone Creek
004,005,006,007, 008, 010, 011	Reclamation Area Drainage	Grindstone Creek
027	Reclamation Area Drainage	Willow Creek
017	Storm water Discharge	Grindstone Creek

People Compl. at 3-4.

Section 406.106(b) sets forth the following effluent discharge limits:

Constituent	Storet Number	Concentration
Acidity	00435	(total acidity shall not exceed total alkalinity)
Iron (total)	01045	3.5mg/l
Lead (total)	01051	1 mg/l
Ammonia Nitrogen (as N)	00610	5 mg/l
pH		00400 (range 6 to 9)
Zinc (total)	01092	5 mg/l
Fluoride (total)	00951	15 mg/l
Total suspended solids	00530	35 mg/l
Manganese	01055	2.0 mg/l

35 Ill. Adm. Code 406.106(b).

In its daily monitoring reports (DMR), Freeman United reported iron discharged in excess of its permitted monthly average in June 2004, January 2005, and February 2005 from three outfalls. Crislip Aff. at 3. The actual discharge ranged from 26.0 mg/L to 3.08 mg/L, exceeding the permit limits of 3.0 and 3.5 mg/L. *Id*. Freeman United also reported daily maximum effluent exceedences for iron on various dates in 2004, 2006 and 2006 from various outfalls. *Id*.

Freeman United also reported monthly average and daily maximum violations for manganese and TSS during several months in 2005, 2006 and 2007. Crislip Aff. at 4-9. Daily maximums for sulfates were exceeded during that same time frame as were pH limitations. *Id*.

Springfield Coal reported exceedences for manganese, sulfates, TSS, iron and pH during 2008, 2009, 2010, and 2011. Crislip Aff. at 10-17.

STATUTORY AND REGULATORY BACKGROUND

Section 12(f) of the Act states in part:

No Person shall:

> Cause or threaten or allow the discharge of any contaminants into the waters of the State, as defined herein, including but not limited to, waters to any sewage works, or into any well or from any point source within the State without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act, or in violation of any term or condition imposed by such permit, or in violation of any NPDES permit filing requirement established under Section 39(b), or in violation of any regulations adopted by the Board with respect to the NPDES program. 415 ILCS 5/12(f) (2010).

Section 406.106(b) of the Board's Mine Related Water Pollution Regulations state:

Except as provided in Sections 406.109 and 406.110, a mine discharge effluent shall not exceed the following levels of contaminants:

Constituent	Store Number	Concentration
Acidity	00435	(total acidity shall not exceed total alkalinity)
Iron (total)	01045	3.5mg/l
Lead (total)	01051	1 mg/l
Ammonia Nitrogen (as N)	00610	5 mg/l
pH		00400 (range 6 to 9)
Zinc (total)	01092	5 mg/l
Fluoride (total)	00951	15 mg/l
Total suspended solids	00530	35 mg/l
Manganese	01055	2.0 mg/l

35 Ill. Adm. Code 406.106(b).

Section 406.106(b)(2) of the Board's Mine Related Water Pollution Regulations state:

The manganese effluent limitation is applicable only to discharges from facilities where chemical addition is required to meet the iron or pH effluent limitations. The upper limit of pH shall be 10 for any such facility that is unable to comply with the manganese limit at pH 9. The manganese standard is not applicable to mine discharges which are associated with areas where no active mining, processing or refuse disposal has taken place since May 13, 1976.. 35 Ill. Adm. Code 406.106(b)(2).

Section 101.516(b) of the Board's Procedural Rules states:

If the record, including pleadings, depositions and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, and that

the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment. 35 Ill. Adm. Code 101.516(b).

Section 2-1005(c) of the Code of Civil Procedure states:

> Procedure. The opposite party may prior to or at the time of hearing on the motion file counter affidavits. The judgment sought shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. 735 ILCS 5/2-1005(c).

STANDARD OF DECISION

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id*. Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." *Id*., *citing* Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

PEOPLE'S SUMMARY JUDGMENT MOTION

The Board will begin by setting forth the issues raised in the People's motion and responses to that motion. On an issue-by-issue basis, the Board will summarize the arguments made by each party. The Board will then conclude each section with an analysis and findings on that issue before reaching its final conclusion on the People's motion for partial summary judgment and issuing its order.

Issues Raised in the People's Motion

In order to fully evaluate all the issues raised in the People's motion and the parties' corresponding responses and replies, the Board breaks its discussion into the following three issues: 1) whether genuine issues of material fact exists with respect to the alleged NPDES permit violations at Industry Mine to justify denying summary judgment in favor of the People; 2) whether Freeman United satisfies its affirmative defenses with undisputed facts to justify summary judgment in favor of Freeman United; and, 3) whether the Board should grant the People's penalty request.

NPDES Permit Violations

People's Motion

The People argue that "there is no genuine issue of material fact regarding the effluent allegations in the complaint," such that they are entitled to summary judgment as a matter of law on Counts I and II. PMot. at 3. The People rely on the monthly DMRs, submitted to IEPA by Freeman United and Springfield Coal from January 2004 to present, as proof that the respondents repeatedly discharged contaminants in excess of the NPDES permit limits. *Id*. The People further support their argument with the affidavit by Larry Crislip, manager of the Permit Section for the Mine Pollution Control Program of IEPA. *Id*. at 4. In the affidavit, Mr. Crislip reviewed each respondent's DMR submissions to ascertain the effluent concentrations of iron, manganese, sulfates, pH, and TSS discharged from the Industry Mine during the reported dates. *Id*. at 4-5. Mr. Crislip compared the analytical data from the DMRs to the applicable effluent limitations. *Id*. The People claim that Mr. Crislip's affidavit confirms "the accuracy of the effluent data reported in the DMRs and thereby establishes that these numerous [363 reported] effluent exceedences have repeatedly violated the NPDES permit." *Id*. Therefore, the People assert the entire record for decision consists of the People's complaint, the answers thereto by the respondents, and the affidavit by Larry Crislip. *Id*. at 5.

The People offer arguments in attempt to dispose of any potential arguments the respondents may present to contest the People's motion. *Id*. at 6-9. The People opine that Freeman United may claim there are disputed issues of material fact based on Freeman United's affirmative defense alleging that the People were precluded from bringing this complaint due to Freeman United's successful completion of the 2005 CCA. *Id*. at 6. The People admit that a CCA, which pertained to manganese discharges from Pond 19, was entered into between Freeman United and IEPA in June 2005. *Id*. at 6, *citing* People Resp. to FAns. at 4. Moreover, the People do not dispute that Freeman United's actions fully met the terms of the 2005 CCA, but the People claim that "those actions did not achieve compliance with the NPDES Permit's manganese effluent limitations applicable to Pond 19 (i.e., permitted outfall 019)." *Id*. at 7. Thus, the People argue that no issue of material fact exists regarding the 2005 CCA, but rather a legal issue of "whether any civil penalties may, or should be imposed for the particular discharges during the two year term of the June 2005 CCA." *Id*. at 6.

Similarly, the People anticipate that Springfield Coal will argue summary judgment is not appropriate based on Springfield Coal's allegation that a 2007 CCA put a material fact in dispute. *Id*. at 7. Although the People deny Springfield Coal's claim that an August 2007 CCA ever existed, the People argue that a contention of this nature "would find little support in the statutes." *Id*. The People claim that Section 31(a)(7.6) of the Act (415 ILCS 5/31(a)(7.6)), which was recently enacted[1], "clearly shows that . . . the statute does not limit the Attorney General's authority to take enforcement and seek penalties." *Id*. at 8. The provision only requires that the successful completion of a CCA is a factor (weighed in favor of the person completing the CCA) in the Attorney General's decision of whether to file a complaint for the violations addressed in that CCA. *Id*. at 7-8, *citing* 415 ILCS 5/31(a)(7.6). Furthermore, the

[1] Section 31(a)(7.6) of the Act was added by P.A. 97-519, effective August 23, 2011.

People argue that "the mere assertion of affirmative defense does not create a disputed material fact, especially where the complainant's response challenges the factual sufficiency and legal validity of such purported defenses." *Id.* at 9-10.

In total, the People argue that no genuine issue of material fact exists as to any of the 363 NPDES permit limit violations because the Board may only consider factual allegations admitted by the complainant, and not any facts alleged by Freeman United or Springfield Coal, which the People denied. *Id* at 10. Thus, the People conclude that they are entitled to partial summary judgment as a matter of law. *Id*.

Springfield Coal's Response

Springfield Coal argues that the People's motion should be denied because considering all the evidence on file, there are genuine issues of material fact in this case. SResp. to People at 4. Springfield Coal supports this contention by pointing out the high standard for summary judgment, which requires the Board to "construe the evidence liberally in favor of Springfield Coal." *Id* at 5; *see* In re Estate of Hoover, 155 Ill. 2d 402, 410-11 (Ill. 1993); *see also* Schmahl v. A.V.C. Enter., Inc., 148 Ill. App. 3d 324, 327 (1st. Dist. 1986). In light of this standard, Springfield Coal presents the following seven arguments to demonstrate that genuine issues of material fact exist to preclude partial summary judgment. *Id* at 4.

Existence of CCA. Springfield Coal argues that summary judgment is not appropriate because whether the 2007 CCA existed between Springfield Coal and IEPA is a disputed material fact. *Id*. at 6. Springfield Coal argues that the 2007 CCA was created by statute because neither Freeman United nor Springfield Coal received a written response to Freeman United's August 30, 2007 revised CCA extension request. *Id* at 9, *citing* 415 ILCS 5/31(a)(9) (2012). Springfield Coal alleges that in September 2007 IEPA told Springfield Coal in an oral conversation "to continue to operate pursuant to the terms of the Springfield Coal CCA." *Id*. at 7. Relating this controversy to case law, Springfield Coal claims that "Board precedent dictates that summary judgment is not appropriate when the parties dispute the existence of a compliance commitment agreement." *Id* at 3, *citing* People of the State of Illinois v. Midwest Grain Prod. of Illinois, Inc., PCB 97-179slip op at 4 (Aug. 21, 1997).

Springfield Coal goes on to criticize the People's use of Section 31(a)(7.6) of the Act to deny that a CCA would preclude the Attorney General from pursuing penalties against Springfield Coal for violations addressed therein. *Id*. at 9-10, *citing* 415 ILCS 5/31(a)(7.6) . Springfield Coal argues that Section 31(a)(7.6) does not have retroactive effect, so it cannot be applied to the CCA that existed from 2007 to 2009 since the provision was not enacted until August 2011. *Id*. at 10, *see* 415 ILCS 5/31(a)(7.6) (2012); Caveney v. Bower, 207 Ill.2d 82, 91-92 (2003); Commonwealth Edison Co. v. Will Cnty. Collector, 196 Ill.2d 27, 38-39 (2001); Foster Wheeler Energy Corp. v. LSP Equip., LLC, 346 Ill. App. 3d 753, 758-59 (2nd Dist. 2004); *see also* P.A. 97-519 (S.B. 1357). Therefore, Springfield Coal argues that summary judgment should be denied because the existence of the 2007 CCA is a disputed material fact. *Id*.

Sulfate Limit. Springfield Coal questions the materially relevant sulfate effluent limitation in Industry Mine's NPDES permit, claiming that regulatory changes made by the Board make the permit limitation moot. *Id*. at 12. Under this theory, Springfield Coal argues that the People should not be allowed to pursue sulfate effluent limitation violations that occurred after October 2006 against Springfield Coal. *Id*. at 12. Springfield Coal supports this contention with the fact that the sulfate effluent limitation in its NPDES permit "is based upon a sulfate water quality standard which was officially rejected by the Board in September 2008, and which the State knew for years before then was not based in science and was inappropriate for mining operations." *Id*. Springfield Coal points out that it would have only exceeded the new relaxed sulfate standard 19 times, rather than the 77 times the People allege occurred from September 2008 through 2011. *Id*.

Springfield Coal further supports its contention with the fact that it has been over three and a half years since the new sulfate standard was adopted, but IEPA has yet to renew or modify Industry Mine's NPDES permit. *Id* at 14. Therefore, Springfield Coal argues that "[t]he State's Motion should be denied for all alleged excursions since October 2006 of the sulfate effluent limitations in the NPDES Permit unless the State can prove that the discharge from the Industry Mine would have exceeded the current sulfate water quality standard." *Id*.

Background Concentrations. Springfield Coal argues that whether background concentrations of constituents in the receiving streams at the Industry Mine have caused exceedences of the NPDES permit effluent limitations is an issue of material fact that precludes summary judgment. *Id* at 14. Springfield Coal claims that records of samples taken from the Industry Mine in 1979 show concentrations of manganese, sulfates, and iron "would be considered exceedences of the Industry Mine's current NPDES permit." *Id*. Furthermore, samples taken from the streams traversing the Industry Mine property since 2003 have regularly "shown that the concentrations of iron, chlorides, and TSS are at higher concentrations upstream of Industry Mine rather than downstream." *Id*. at 15-16. Thus, Springfield Coal argues that 35 Ill. Adm. Code 406.103 applies as a defense to the exceedences of the effluent limitations in its NPDES permit because the exceedences "result from contaminants in the influent water before it enters the affected land." *Id*. at 17. Section 406.103 provides:

> Because the effluent standards in this part are based upon concentrations achievable with conventional treatment technology that is largely unaffected by ordinary levels of contaminants in intake water, they are absolute standards that must not be met without subtracting background concentrations. However, it is not the intent of these regulations to require users to clean up contamination caused essentially by upstream sources or to require treatment when only traces of contaminants are added to the background. Compliance with the numerical effluent standards is therefore not required when effluent concentrations in excess of the standards result entirely from the contamination of influent before it enters the affected land. Background concentrations or discharges upstream from affected land are rebuttably presumed not to have caused a violation of this part. 35 Ill. Adm. Code 406.103.

Springfield Coal recognizes that the regulation places the burden on itself to prove the effluent concentrations in excess of the NPDES permit limitations are caused by background concentrations or discharges upstream. *Id*. But, to give Springfield Coal such an opportunity, Springfield Coal argues that summary judgment should be denied since factual issues regarding the cause of the excess contaminants are material. *Id*.

Manganese and pH Effluent Limitations. Springfield Coal argues that there are material issues with respect to whether the People can enforce the manganese and pH effluent limitations in the NPDES permit. *Id*. Springfield Coal points to 35 Ill. Adm. Code 406.106(b)(2), which states:

> The manganese effluent limitation is applicable only to discharges from facilities where chemical addition is required to meet the iron or pH effluent limitations. The upper limit of pH shall be 10 for any such facility that is unable to comply with the manganese limit at pH 9. 35 Ill. Adm. Code 406.106(b)(2).

Springfield Coal claims that the only chemical addition conducted at the Industry Mine has been in Ponds 18 and 19 for the purpose of lowering manganese concentrations. *Id* at 18. Springfield Coal argues that since these chemical additions were not done "to meet the pH or iron effluent standards, all of the manganese excursions alleged by the State against Springfield Coal related to Ponds 18 and 19 should also be dismissed." *Id*. Additionally, Springfield Coal argues that all exceedences of the manganese effluent limitation at other ponds should be dismissed "unless that State can show that chemical addition was being conducted at the time of the alleged exceedence." *Id*.

Furthermore, Springfield Coal argues that a pH limit of 10 is applicable to Industry Mine according to Section 406.106(b)(2), rather than the upper limit of 9 designated in Springfield Coal's NPDES permit, since the facility is unable to comply with the manganese effluent limitation. *Id*. Springfield Coal claims that changing its pH limit in this manner would, as a matter of law, eliminate "a number of the pH excursions alleged in the State's Motion". *Id*. Therefore, Springfield Coal argues that summary judgment should be denied because issues surrounding the manganese and pH effluent limits are material. *Id*.

Failure to Issue NPDES Permit. Springfield Coal claims that "[t]he State has attempted to financially benefit from its unreasonable and excessive delays in reissuing Springfield Coal's NPDES permit while pursuing violations occasioned by the delay". *Id* at 4. In doing so, Springfield Coal argues that the doctrine of "unclean hands" bars the People's motion for summary judgment. *Id*. Springfield Coal notes that "[t]he doctrine applies when the party seeking relief is guilty of misconduct or bad faith toward the party against whom relief is sought and the misconduct is connected with the transaction at issue." *Id* at 20, *see* Long v. Kemper Life Ins. Co., 196 Ill.App.3d 216, 219 (1990).

Springfield Coal claims a NPDES permit renewal application was submitted to IEPA in 2003, and that at a meeting on July 20, 2010 IEPA told Springfield Coal that its renewal application was still not even in the queue for consideration. *Id*. Springfield Coal argues that the

nine-year delay in reissuing the NPDES permit for the Industry Mine was an act of bad faith toward Springfield Coal. *Id*. Springfield Coal asserts that "the State should not be allowed to capitalize on its delay and seek penalties against Springfield Coal for circumstances caused solely by the State's delay." *Id*.

Springfield Coal also opines that the effluent sulfate violations would be significantly reduced if IEPA would have renewed the Industry Mine's NPDES permit to apply the newly adopted sulfate effluent limitation in September 2008. *Id*. at 21. Therefore, Springfield Coal asks the Board to bar the People from pursuing penalties for all of the alleged excursions, not just sulfate excursions, to deter the State from engaging in similar behavior in the future. *Id*. Also, based on the facts supporting the doctrine of unclean hands, Springfield Coal requests that the Board deny the People's motion because discovery would be beneficial in order to shed light on these factual issues. *Id*.

Laches. Springfield Coal argues that the doctrine of laches bars the People's right to relief because IEPA's unreasonable delay in reissuing the Industry Mine NPDES permit prejudiced Springfield Coal. *Id.* at 22. Springfield Coal states that "[l]aches is a doctrine which bars relief where, because of delay in asserting a right, the defendant has been misled of prejudiced." *Id, citing* City of Rochelle v. Suski, 206 Ill.App.3d 497, 501 (2nd Dist. 1990); Van Milligan v. Bd. Of Fire and Police Com'rs of Vill. Of Glenview, 158 Ill.2d 85, 93-94 (1994). Springfield Coal asserts that although laches applies when a person has delayed in exercising a right, the doctrine should still be applied here because IEPA delayed asserting its nondiscretionary duty of reviewing and acting upon the Industry Mine's NPDES permit renewal application for nine years. *Id.* at 23. Springfield Coal alleges that IEPA's egregious act prejudices Springfield Coal because that nine year delay caused Springfield Coal to "rack up dozens of sulfate excursions that would not otherwise be excursions under the new sulfate water quality standard that was changed four years ago." *Id*. Therefore, Springfield Coal argues that material facts exist regarding whether IEPA's delay in issuing the NPDES permit has prejudiced Springfield Coal such that summary judgment in favor of the People should be denied. *Id*.

Issues of Fact. Springfield Coal argues that numerous discrepancies between the People's motion and Larry Crislip's affidavit support that material facts are in dispute so as to preclude summary judgment. *Id*. Springfield Coal points out that the People do not include copies of the DMRs with its motion, but rather enter Larry Crislip's affidavit that reviews those DMRs, into the record to support their motion. *Id*. Springfield Coal claims that Mr. Crislip's affidavit is insufficient proof that Springfield Coal violated daily maximum effluent limitations because the affidavit fails to list the specific dates when Springfield Coal violated these effluent limitations. *Id.* at 24.

Moreover, Springfield Coal argues that twenty of the monthly effluent limitation exceedences alleged in Mr. Crislip's affidavit should not be considered violations because "the DMRs indicate that less than three samples were taken in those particular months" as required by 35 Ill. Adm. Code 304.104. *Id*. Overall, Springfield Coal argues that "the record supporting the State's Motion is insufficient and there are discrepancies between the DMRs and Mr. Crislip's affidavit that raise material issues of fact." *Id.*

Freeman United's Combined Response And Cross-Motion

Freeman United's main argument is that undisputed facts satisfy the elements of the affirmative defenses it raised, such that the Board should deny the People's motion and instead grant summary favor in its favor. FResp. to People at 7. Freeman United raised three affirmative defenses as follows:

1) IEPA's failure to meet pre-enforcement requirements should bar the People's right to assert their claim;

2) the doctrines of laches and waiver should bar the People from bringing their claim;

3 the equitable doctrine of estoppel should prevent the People from initiating an enforcement proceeding regarding matters covered in the CCAs. *Id*.

The Board will summarize each of those arguments below before summarizing Freeman United's alternative request for relief, which is that material facts remain in dispute such that the People's motion for summary judgment should be denied. *Id*. at 8.

Pre-enforcement Requirements Defense. Freeman United argues that the elements of the first affirmative defense it raised pertaining to the mandatory pre-enforcement requirements set out in Section 31 of the Act are met by undisputed facts. *Id*. at 7. Freeman United acknowledges that IEPA properly issued the March 11, 2005 NOV and accurately accepted Freeman United's CCA proposal on June 16, 2005 pursuant to Sections 31(a)(1) and 31(a)(7) of the Act. *Id*. at 9. Additionally, Freeman United notes that the People conceded to the following facts: Freeman United fully met the terms of the 2005 CCA; and Freeman United submitted a 2007 CCA on August 30, 2007, but IEPA never replied. *Id*. at 10. According to these undisputed facts, Freeman United argues that the 2007 CCA was deemed effectively accepted on September 30, 2007, pursuant to Section 31(a)(9) of the Act, because IEPA failed to respond to Freeman United's proposal within 30 days. *Id*. And due to the effective CCA, Freeman United claims that IEPA was prevented by Section 31(a)(10) of the Act from pursuing further enforcement proceedings regarding the March 2005 NOV. *Id*.

Section 31(a)(10) of the Act states in part:

> If the person complained against complies with the terms of a Compliance Commitment Agreement accepted pursuant to [415 ILCS 5/31(a)], the IEPA shall not refer the alleged violations which are the subject of the Compliance Commitment Agreement to the Office of the Illinois Attorney General or the State's Attorney of the county in which the alleged violation occurred. 415 ILCS 5/31(a)(10) (2010).

Therefore, Freeman United argues that IEPA's "failure to follow these procedural requirements divests the Board of jurisdiction over the respondent." *Id*. at 9, *citing* People v. Chicago Heights Refuse Depot, Inc., PCB 90-112, slip op at 4 (Oct. 10, 1991).

Furthermore, Freeman United acknowledges that the 2005 NOV only addressed manganese discharges from Outfall 019, but it nonetheless argues that the State is also barred from pursuing all the other permit limit violations alleged in the complaint because IEPA did not satisfy the Act's pre-enforcement process. *Id*. at 10. Freeman United supports this contention by stating IEPA never issued Freeman United another NOV, nor gave Freeman United notice before referring the violations to the Attorney General as required by Section 31 of the Act. *Id*. Thus, Freeman United claims IEPA was barred from referring the issues in this case to the Attorney General because IEPA failed to follow the mandatory pre-enforcement requirements set out in Section 31 of the Act. *Id*. at 8-9, *citing* People v. John Crane, Inc., PCB 01-76, slip op at 5 (May 17, 2001).

Lastly, Freeman United recognizes that the Attorney General has the authority to bring a civil action for violations of the Act on her own motion. *Id*., *citing* 415 ILCS 5/24(e); 5/43(a). But Freeman United argues, "[t]here is no evidence in the record that this matter came to the attention of the Attorney General by any means other than by referral from [the IEPA]." *Id*., *see* PMot. at 6. Thus, Freeman United requests that the Board grant Freeman United partial summary judgment based on the fact that a CCA existed and IEPA failed to meet the pre-enforcement requirements of the Act before referring the matter to the Attorney General. *Id*. at 11-12, *citing* People v. Chiquita Processed Foods, LLC, PCB 02-56 (Nov. 21, 2002).

Doctrine of Laches and Waiver Defense. Similarly, Freeman United argues that the elements of Freeman United's second affirmative defense, which regards the doctrines of laches and waiver, are satisfied by undisputed facts. *Id*. at 13. Freeman United first points out that it is undisputed that Freeman United submitted monthly DMRs to IEPA on a quarterly basis as required by the NPDES permit. *Id*. Freeman United asserts that the DMRs contained detailed and specified information about the discharges from all of the outfalls at the Industry Mine. *Id*. Also, Freeman United highlights the fact that all of the violations alleged in the People's complaint against Freeman United occurred between January 2004 and August 2007, yet the claim was not filed until February 2010. *Id*. at 14.

From these undisputed facts, Freeman United first claims that the two necessary elements of its laches defense are satisfied. *Id*. at 13-14. To address the first element, a lack of diligence by the State, Freeman United argues that the "State cannot reasonably dispute that [the IEPA] was aware (or should have been aware) of the alleged discharge violations each time that Freeman United submitted its DMRs to [the IEPA]." *Id*. at 14. Freeman United supports this argument by pointing out that the DMR's fundamental purpose is to inform IEPA of facilities' self-monitoring results. *Id*. Additionally, Freeman United asserts that "[w]e know that [the IEPA] reviewed Freeman United's DMRs because [the IEPA's] 2005 NOV was predicated on manganese discharges that were identified in these DMRs." *Id*. Thus, Freeman United claims that IEPA's lack of action between the March 2005 NOV and the February 2010 complaint was an unreasonable delay. *Id*. Therefore, Freeman United argues that "[s]uch an unreasonable delay clearly evidences a lack of diligence." *Id*.

In addressing the second element a laches defense, the resulting prejudice, Freeman United argues that it has been prejudiced by the People's complainant being unreasonably

delayed. *Id*. Freeman United asserts that it relied on the 2005 CCA, which Freeman United believed in good faith pertained to all outstanding discharge violations at the time IEPA accepted the CCA. *Id*. Freeman United argues that "[h]ad the State diligently identified the violations now included in the State's complaint and complied with the procedural requirements set forth in Section 31 of the Act, Freeman United would have had the opportunity to work cooperatively with [the IEPA] to address these alleged violations." *Id*. Therefore, Freeman United claims that IEPA's choice, to remain silent for five years while potential penalties accrued, prejudiced Freeman United because during that time Freeman United "continued to act in good faith reliance on the CCAs." *Id*. Thus, Freeman United concludes that the People's claim should be barred and that Freeman United is entitled to summary judgment as a matter of law because undisputed facts satisfy both the diligence and prejudice elements of its laches defense. *Id*.

Additionally, Freeman United also claims that these same undisputed facts satisfy the waiver defense by demonstrating that the State intentionally relinquished its right to enforce the violations the People allege against Freeman United. *Id*. at 15. Freeman United restates the pertinent facts as follows: IEPA possessed the timely submitted DMRs from Freeman United; IEPA consciously chose not to issue additional NOVs nor initiate the Act's other permissible pre-enforcement processes based on the information provided in the DMRs. *Id*. Thus, Freeman United argues these facts show that the State intentionally relinquished its right to bring this enforcement action or, at minimum, supports an inference that the State relinquished this right. *Id*. Therefore, Freeman United concludes that the Board should find the People waived its right to initiate this proceeding and enter summary judgment in favor of Freeman United because undisputed facts satisfy Freeman United's waiver defense. *Id*.

Doctrine of Estoppel Defense. Freeman United argues that the undisputed facts establish that the estoppel defense should apply and as such that the People should be barred from pursuing their claims against Freeman United. *Id*. at 16, *see* In re Pielet Bros. Trading, Inc., AC 88-51 (July 13, 1989); *see also* Pavlakos v. Dep't of Labor, 111 Ill. 2d 257, 265 (1985). Freeman United lists the six elements necessary for it to satisfy the estoppel defense:

1) words or conduct by the State constituting either a misrepresentation or concealment of material facts;
2) knowledge on the part of the State that the representations made were untrue;
3) that Freeman United did not know the representations to be false either at the time they were made or at the time they were acted upon;
4) that the State either intended or expected that the conduct or representation would be acted upon by Freeman United;
5) that Freeman United relied upon or acted upon the representations; and
6) that Freeman United has been prejudiced." *Id*. *see* City of Mendota v. Pollution Control Bd., 161 Ill. App. 3d 203 (3d Dist. 1987).

Freeman United claims that the first element of estoppel is met by the fact that IEPA decided to issue only one NOV in 2005, which solely pertained to manganese effluent limits. *Id*. at 16. As such, Freeman United argues that IEPA "misrepresented and/or concealed the fact that [the IEPA] would later seek to enforce other alleged discharges that [the IEPA] apparently

believed did not warrant enforcement in 2005." *Id*. at 16-17. Next, Freeman United alleges IEPA knew its representations were untrue, so as to satisfy the second estoppel element, because the same DMRs used to form the People's current complaint were in IEPA possession when IEPA accepted the 2005 CCA and also when IEPA failed to formally respond to the 2007 CCA. *Id*. at 17.

Freeman United claims the third element is met because Freeman United "had no reason to believe that after accepting the CCA, the State would later change course and initiate enforcement proceedings more than five years later, especially when [the IEPA] never issued a new NOV or notified Freeman United of its intent to pursue further legal action." *Id*. Freeman United argues the fourth element is satisfied by that fact that IEPA was aware or should have been aware that the compliance actions undertaken by Freeman United were based on the violations in the 2005 NOV. *Id*.

In support of its argument on the fifth element, Freeman United asserts it would have attempted to address any additional violations or compliance measures if IEPA would have identified them in its NOV and/or CCA. *Id*. Lastly, Freeman United claims the sixth element is met because "the State's request that the Board impose substantial civil penalties for violations that were never previously identified by the State clearly demonstrates that Freeman United has been prejudiced." *Id*. Therefore, Freeman United concludes that because undisputed facts establish all the elements of its estoppel defense, the Board should find that the State is estopped from initiating its claim and should enter summary judgment in favor of Freeman United.

Freeman United's argument regarding affirmative defenses concludes by requesting that the Board deny the People's motion with respect to Count I, and instead grant summary judgment favor of Freeman United on Counts I and III because undisputed facts satisfy each element of the affirmative defenses Freeman United raised. *Id*. at 7, *citing* 35 Ill. Adm. Code 101.516(b); *see also* In re Apex Auto. Warehouse, L.P., Nos. 96B04594, 96B04596, 2000 WL 640780 (Bankr. N.D. Ill. 2000). However, in the chance that the Board denies Freeman United's cross-motion, Freeman United also presents an alternative argument seeking a denial of the People's motion because material facts are disputed. *Id*. at 8.

Disputed Material Facts. Freeman United contends that material facts used to support the People's motion are in dispute so that a grant of summary judgment in favor of the People would be inappropriate. *Id*. Freeman United claims there are five disputed factual issues as to "whether the NPDES violations alleged in the State's complaint are in fact violations of the Act." *Id*. at 18. Freeman United argues that because the Board purposed to make the sulfate water quality standard less stringent in 2006, and actually amended the standard in 2008, the People should "be barred from pursuing violations based upon a standard that had been rejected." *Id*. at 19.

Next, Freeman United asserts that there is a disputed material issue regarding whether background concentrations of constituents in the receiving streams at the Industry Mine have caused the NPDES permit limit violations. *Id*. Thirdly, Freeman United argues that material issues exist with respect to "whether the State can enforce the manganese and pH limitations in the NPDES permit, as 35 Ill. Adm. Code 406.106(b)(2) states that the manganese effluent

limitation is 'applicable only to discharges from facilities where chemical addition is required to meet the iron or pH effluent limitations.'" *Id*. at 20.

Additionally, Freeman United claims that Industry Mine's NPDES pH effluent limitation should have been revised to ten under 35 Ill. Adm. Code 406.106(b)(2) because it was unable to comply with the manganese effluent limitation at pH 9. Therefore, Freeman United argues that certain violations alleged in the People's complaint should not be considered violations. *Id*.

Lastly, Freeman United argues that a material issue exists regarding the applicability of the manganese effluent limitation on Outfall 19. *Id*. Freeman United claims that Outfall 19 should not have been subject to any manganese effluent limitations according to 35 Ill. Adm. Code 406.109, because Freeman United's 2005 CCA designated the waters collected in Pond 19 as "Reclamation Area" drainage. *Id*. To conclude, Freeman United requests that the Board deny the People's motion, regardless of its own affirmative defenses, because "there are material issues of fact as to whether the violations alleged in the State's complaint do in fact constitute violations of the Act." *Id*. at 21.

People's Response To Freeman's Combined Response and Cross-Motion

The People responded to Freeman United's combined response and motion for partial summary judgment by pointing out that Freeman United's motion is based solely upon affirmative defenses, which the People claim were pled without sufficient facts, lacked a legal basis, or both. PReply to FResp. at 8. The following is the Board's summary of the arguments the People make opposing the affirmative defenses that Freeman United claims justify its motion for summary judgment.

No Applicable Statue of Limitations. The People oppose Freeman United's first affirmative defense by arguing that no applicable statute of limitations exists to prevent the People from asserting their claim. *Id*. at 9. Although Freeman United never actually argues that Section 31 of the Act establishes a time restraint by which IEPA can file an enforcement action, the People claim that Freeman United's combined motion and response incorrectly relies upon this provision. *Id*. The People argue that "the procedures set forth in Section 31(a) do not bear resemblance to the procedures typically scrutinized by courts in regard to statutes of limitation or jurisdictional concerns." *Id*. at 9-10. Furthermore, if Section 31 was an applicable statute of limitations, the People claim it would contradict the longstanding case law that recognizes a governmental immunity to statutes of limitations when public rights are being asserted, as is the case here. *Id*. at 10, *see* County of Cook v. Chicago Magnet Wire Corporation, 152 Ill. App. 3d 726 (1st Dist. 1987); Pielet Bros. Trading, Inc. v. Pollution Control Board, 110 Ill. App. 3d 752 (5th Dist. 1982).

The People also argue that Freeman United's affirmative defense regarding a statutory restriction barring the People's claim is unsupported because Freeman United ignores the fact that the violations at the Industry Mine have been continuous since January of 2004 until well after the filing of the complaint. *Id*. As such, the People argue that Freeman United's defense is unsupported because "Illinois courts have consistently held that the statute of limitations for

actions as to continuous acts or injuries only begins to run upon the date of the last wrongful act." *Id*. at 11.

The People highlight the fact that "the Board has already held that Section 31 is not a statute of limitations, but an administrative tool . . . [invoked] prior to [the] initiation of formal enforcement proceedings." *Id*. at 11, *citing* People v. Eagle-Picher-Boge, L.L.C. (July 22, 1999), PCB 99-152, slip op at 6. Therefore, the People oppose Freeman United's motion for summary judgment since Freeman United's first affirmative defense is unsupported due to Freeman United's failure to identify an applicable statute of limitations.

Laches. The People counter Freeman United's attempt to apply the doctrine of laches by arguing that neither element of the defense is sufficiently supported by the record. *Id*. at 12. The People acknowledge that, although disfavored, case law has determined that laches can be applied to public bodies that are operating in their government capacity, but only under compelling circumstances. *Id*, *citing* Hickey v. Illinois Central Railroad Co., 35 Ill. 2d 427, 447-48 (1966). Thus, the People argue that Freeman United fails to carry the burden of establishing a compelling circumstance as required for laches to apply "[s]ince IEPA and the Attorney General's Office are operating in a governmental capacity in prosecuting this case in order to protect the public's interest." *Id*. Additionally, the People argue that the first element of laches, lack of due diligence *by the party asserting the claim*, is not supported in Freeman United's motion. The People claim that Freeman United incorrectly relies on IEPA's actions to support the due diligence element, rather than the Attorney General's action, who is *the party asserting the claim*. *Id*.

Furthermore, the People argue that Freeman United fails to sufficiently support the second element of laches, prejudice to the opposing party, because Freeman United mainly relies on Mr. Austin's affidavit, which contains no statements that demonstrate prejudice. *Id*. at 13-14. Freeman United attempted to further support the prejudice element by arguing that the IEPA failed in its duty to issue NOVs for violations after the 2005 CCA. *Id*. at 15. But, the People counter this argument by pointing out that Freeman United ignores the undisputed October 2009 NOV issued by IEPA (admissible through Mr. Davis' affidavit). *Id*. The People contend that "[t]he Board has considered *laches* in several other cases but has never held that a State enforcement action was thereby barred." *Id*. Thus, the People argue that even if the Board somehow finds that either, or both, of the laches elements are met, "the record is [still] devoid of any compelling circumstances against any public body operating in its governmental capacity." *Id*. at 15-16, *see* Van Milligan v. Board of Fire and Police Commissioners, 158 Ill. 2d 85, 90-91 (1994; Hickey v. Illinois Central Railroad Co., 35 Ill. 2d 427, 447-48 (1966).

Pre-enforcement Statutory Requirements. The People respond to Freeman United's claim that IEPA failed to comply with the mandatory procedural requirements in Section 31 of the Act, which thereby divests the Board of personal jurisdiction over Freeman United. *Id*. at 16, *citing* . People v. John Crane, Inc., (May 17, 2001), PCB 01-76, slip op at ; People v. Chicago Heights Refuse Depot, Inc., (October 10, 1991(, PCB 90-112, slip op at 4. The People assert that this argument from Freeman United lacks a legal basis because Freeman United misinterprets the Crane opinions' distinction between mandatory and directory requirements. *Id*., *citing* People v. John Crane, Inc., (May 17, 2001), PCB 01-76, slip op at 5). The People argue that "Crane stands

for the proposition that the timely issuance of a notice of violation is a directory requirement and the lack of compliance by the [IEPA] does not bar referral to the Attorney General, thereby further limiting the application of the Chicago Heights Refuse Depot, Inc. decision (that involved Section 31 prior to the 1996 amendments)." *Id*. at 18.

Furthermore, the People claim that Freeman United provides insufficient support for its third affirmative defense that alleges the People and IEPA failed to meet statutory requirements so as to prevent Freeman United from having the opportunity to respond to IEPA about the alleged violations. *Id*. at 19. The People argue Freeman United's support is insufficient because Freeman United's motion "provides little legal argument and no additional factual record." *Id*.

The People also criticize Freeman United's use of Chiquita Processed Foods to support that Freeman United's motion is justified based on "a finding that the entire action is somehow precluded because of the 2005 CCA." *Id*. at 19-20, *citing* Chiquita Processed Foods, PCB 02-56. The People argue that the 2005 CCA does not bar this complaint because there is no genuine issue of material fact regarding whether the Attorney General became aware of the Industry Mine NPDES permit violations through sources other than IEPA. *Id*. at 19. The People's claim is supported in the record by Davis' affidavit which demonstrates that IEPA issued Freeman United a NOV on October 8, 2009, but the Attorney General did not get wind of the Industry Mine violations until ELPC's December 9, 2009 notice of intent to take action letter, which was sent to both Freeman United and the Attorney General. *Id*. at 19-20.

Additionally, the People claim that Freeman United incorrectly applied the Chiquita Processed Foods ruling in this case because that "holding is limited to those cases where the lack of any violation notice is undisputed, and not to the present matter where the claim is that the CCA precludes any referral." *Id*. at 21. Therefore, the People maintain that Freeman United's third affirmative defense lacks sufficient support by virtue of its misuse of case law. *Id*.

The People also take issue with Freeman United's second affirmative defense concerning the CCAs and how they affect the requirements of Section 31 of the Act. *Id*. at 21. The People attack Freeman United's use of the statements by Mr. Austin to support that the March 30, 2007 letter to IEPA either renewed or extended the CCA. *Id*. at 22. The People highlight the actual language of the letter and assert that "[t]here is nothing in the letter itself to suggest that slightly different terms or compliance activities were being proposed. There is nothing to suggest that Freeman United was apparently asking that the June 2005 CCA be 'extended' or that a new improved CCA was being proposed". *Id*. Thus, apart from Mr. Austin's words labeling the March 2007 letter as a "'proposed two-year CCA extension,'" the People argue that Freeman United lacks support in the record to prove a CCA has been renewed or extended. *Id*.

In addition, the People argue that Freeman United's support for its position that the CCA was also extended on August 30, 2007 is inadmissible evidence that cannot be considered. *Id*. at 23. The People claim that the information concerning Mr. Austin's conversation with an unnamed IEPA employee lacks the proper foundation to be anything more than hearsay. *Id*.

The People also argue that Freeman United contradicts itself because first Freeman United admits "that the July 13, 2007 letter from the Illinois EPA explicitly stated that any subsequent proposal relating to Outfall 19 'will not be considered to be a CCA as referenced in

Section 31(a).'" *Id*. at 23-24. Yet despite this admission, Freeman United still argues that the August 30, 2007 CCA extension proposal was deemed accepted under Section 31(a)(9) of the Act. *Id*. at 24.

The People go on to criticize Freeman United's argument by claiming that Section 31(a)(9) cannot possibly subject the August 30th proposal to an approval by operation of law because that provision "does not apply to the extension or renewal of a previously approved compliance commitment agreement." *Id*. As to Freeman United's arguments concerning the 2005 CCA in relation to the People's penalty demand, the People claim that Section 31 does not prevent the Board from imposing penalties for violations that were addressed in the CCA. *Id*. at 25. "Therefore, any dispute (legal or factual) as to the alleged extension of the June 2005 CCA does not affect summary judgment." *Id*.

Waiver. The People counter Freeman United's affirmative defense regarding the doctrine of waiver by claiming that Freeman United's defense does not hold any merit because it lacks sufficient factual support. *Id*. at 28. The People argue that Freeman United drew upon case law that is inapplicable because those decisions ruled on a motion to strike an affirmative defense, rather than ruled on the merits of the defense. *Id*. Furthermore, the People criticize that the only factual allegation Freeman United presents to support its entire waiver argument is disproved by the proof provided in Davis' affidavit showing that IEPA issued a NOV in 2009. *Id*. at 29. The People provide additional support demonstrating that IEPA did not relinquish a right by highlighting IEPA's January 2010 referral to the Attorney General, the Attorney General's timely response to ELPC's December 2009 notice of intent to initiate a claim, and the complaint filed in February 2010. *Id*. Thus, the People maintain that Freeman United's seventh affirmative defense was baseless since the record proves that no waiver occurred. *Id*.

Estoppel. The People oppose Freeman United's estoppel defense because the People claim Freeman United failed to present any factual support to satisfy each of the six elements necessary to establish the estoppel defense. *Id*. at 30. The People note that, like laches, the ability to estop the government is limited to compelling circumstances when the State is acting in its governmental capacity. *Id*. at 31, *citing* Hickey v. Illinois Central Railroad Co., 35 Ill. 2d 427, 447-48 (1966). The People claim that Freeman United fails to establish any compelling circumstance because Freeman United only justifies its estoppel defense on IEPA's "lack of attention to the Industry Mine between August 2007 . . . and October 2009". *Id*. at 32.

Additionally, the People claim that there is a genuine issue of material facts pertaining to Freeman United's defense especially since more than one reasonable inference can be drawn from the factual allegations Freeman United does present. *Id*. But, the People argue that these factual issues do not affect "the facts underlying the 219 effluent violations alleged in Count I and verified by affidavit." *Id*. Therefore, the People conclude that Freeman United's eighth affirmative defense fails because Freeman United did not satisfy the six elements of the estoppel defense nor establish any compelling circumstances. *Id*.

Freeman's Surreply

The Board will summarize the four arguments Freeman United presents in its July 10, 2012 surreply to the People.

Pre-enforcement Statutory Requirements. Freeman United maintains its original position that the referral by IEPA breached the procedural requirements of Section 31(a)(10) of the Act, since Freeman United complied with the terms of the CCA. *Id*. at 2, 7. Therefore, Freeman United asserts that summary judgment should be entered in its favor. *Id*. Freeman United disagrees with the People's assertion that the whether IEPA complied with the Section 31(a) procedures is irrelevant because the complaint was brought by the Attorney General. *Id*. at 3. Instead, Freeman United argues that the State should not be able to avoid Section 31(a)'s mandatory requirements "merely by including language that the complaint is brought both on behalf of the Illinois Attorney General and the State." *Id*. at 5. Moreover, Freeman United claims that the Board's decision in Chiquita Processed Foods reflects the position that the State does not have the ability to evade Section 31 obligations simply by claiming that the Attorney General found out about the underlying violations through a source other than IEPA. *Id, citing* Chiquita Processed Foods, PCB 02-56.

Freeman United also criticizes the People's reliance on Davis' affidavit as the sole source of support with respect to how the Attorney General learned of the alleged violations. *Id*. Freeman United argues that Davis' carefully worded affidavit is insufficient because it does not provide adequate information regarding "when the State made the decision to add [the IEPA] to the complaint and the nature of its discussions with [the IEPA] with respect to its ongoing enforcement proceeding." *Id*.

Freeman United points out that the People's response fails to address the counter-argument Freeman United made in its summary judgment motion concerning the inability to retroactively apply Section 31(a)(7.6) to a CCA that was approved in 2005. *Id*. at 7. Freeman United also highlights that the People ignored "Freeman United's discussion of the legislative history of the 2011 amendments that evidences an intent by the State legislature to maintain and enhance protection for entities who cooperate with [the IEPA] through CCAs and to punish those who break those agreements." *Id*. Thus, Freeman United argues that the People's response inadequately supports its position such that after reviewing all the evidence the Board should grant summary judgment in Freeman United's favor based on IEPA's actions with respect to Section 31(a) of the Act. *Id*. at 5, 7.

Laches. Freeman United maintains its position that the State's claim is barred by laches, despite the People's opposition. *Id*. at 8. Freeman United disagrees with the People's contention that the diligence element for a laches defense cannot be imputed onto the Attorney General from IEPA's action. *Id*. Freeman United argues that since the People chose to bring "this action on behalf of both the State and [the IEPA], the State should not now be free to argue that the Board can ignore the actions of the [IEPA] when evaluating whether laches bars the State's claims against Freeman United." *Id*. Further, Freeman United claims that the People's argument here has no legal basis since the People failed to cite to any authority to support their contention that the diligence element cannot be imputed. *Id*. On the other hand, Freeman United cites to

multiple cases in which the courts treated the United States, the entire federal government, and distinct government departments, respectively, as a single entity responsible for the acts of its agents. *Id*. at 8-9, *citing* Colton v. Am. Promotional Events, Inc., No. ED CV 09-1864, 2010 U.S. Dist. LEXIS 109354, *19-20 (C.D. Cal. 2010); In re Shortt, 277 B.R. 683, 690 (Bankr. N.D.Tex. 2002); Amoco Corp. v. C.I.R., 138 F.3d 1139, 1149 (7th Cir. 1998); U.S. v. Maxwell, 157 F.3d 1099, 1102 (7th Cir. 1998); Paradyne Corp. U.S. Dept. of Justice, 647 F. Supp. 1228, 1235-36 (D.D.C. 1986).

Freeman United claims that the People simply misunderstood Freeman United's argument concerning the prejudice element of laches. *Id*. at 9. Freeman United asserts Mr. Austin's affidavit supports that Freeman United believed, in good faith, that all of the discharge violations at the Industry Mine were dealt with when IEPA accepted the 2005 CCA. *Id*. Therefore, Freeman United claims that it has clearly been prejudiced by IEPA's unreasonable delay between issuing the 2005 NOV and now seeking civil penalties for violations that occurred during the life of the CCA. *Id*. As such, Freeman United argues that, unlike the People who fail to provide any legal basis for their position, Freeman United has presented sufficient evidence to support its laches defense. *Id*. at 10.

Waiver. Freeman United questions the People's opposition to Freeman United's contention that the State waived its right to enforce the violations alleged in the complaint against Freeman United. *Id*. Freeman United argues that the People's use of the October 2009 NOV as evidence that the State did not knowingly relinquish its right to pursue an enforcement action against Freeman United is inadequate because Freeman United sold the Industry Mine in August of 2007. *Id*. Freeman United claims that "[a]ccepting the State's argument would lead to the absurd result that the State could never be found to have waived its enforcement rights so long as at some point in the future (no matter how distant) the State files a complaint or issues an NOV. *Id*. Freeman United rejects such a line of reasoning, and instead asserts that the State's five year delay in taking any enforcement action with respect to Freeman United between May 2005 and February 2010 warrants an inference by the Board that the State knowingly relinquished its rights. *Id*. Therefore, Freeman United argues that its waiver defense has sufficient support, whereas the People's argument in opposition lacks sound factual support. *Id*.

Estoppel. Freeman United asserts that the support used for each element of its estoppel defense is satisfied with admissible evidence that has not been rebutted by the State. *Id*. at 11. As such, Freeman United disagrees with the People's argument that three of the six elements required to establish an estoppel defense have not been proven by Freeman United. *Id*. To prove the second element, Freeman United points out that IEPA knowingly made a false misrepresentation when it limited the 2005 NOV to only manganese violations, despite IEPA's admitted knowledge of other alleged violations at the Industry Mine. *Id*. Freeman United also claims IEPA furthered this misrepresentation when it accepted the 2005 CCA and failed to mention their intention to pursue enforcement proceedings against Freeman United for other effluent discharges while the CCA was still pending. *Id*. at 12. To prove the fifth estoppel element, Freeman United highlights the fact that Austin's affidavit "demonstrates that Freeman United relied on the fact that the 2005 NOV was limited to manganese discharges from a single outfall in crafting its 2005 CCA." And to prove the final element, that Freeman United was prejudiced, Freeman United reiterates the fact that the State is seeking penalties now for

violations that occurred numerous years ago when Freeman United still owned the Industry Mine. *Id*. Therefore, Freeman United argues that the People should be estopped from bringing this claim because Freeman United did satisfy all six elements to establish the estoppel defense. *Id*.

Board Analysis and Findings

Genuine Issue of Material Fact

The Board will first look to whether genuine issues of material fact exist in regards to the NPDES permit violations. Only if there are no issues of fact will the Board turn to whether the People have proven they are entitled to partial summary judgment as a matter of law. While the People argue that there is no issue of material fact with regard to the NPDES permit violations at the Industry Mine and that they are entitled to judgment as a matter of law, both Springfield Coal and Freeman United disagree and claim that there are genuine issues of fact remaining to be decided.

The People rely solely on the undisputed data in the DMRs to support the violations in their complaint, while both Springfield Coal and Freeman United rely on supplementary documents, regulations, and doctrines to allege that genuine issues of material fact exist in order to defeat the People's motion. For instance, Springfield Coal and Freeman United rely on the 2009 amendment to the sulfate water quality standard to question whether the sulfate effluent limitation in the Industry Mine NPDES permit is valid. Both respondents also rely on Section 406.103 (35 Ill. Adm. Code 406.103) to argue that whether background concentrations of constituents in the receiving streams at the Industry Mine caused the NPDES permit violation is another disputed material fact.

Springfield Coal and Freeman United also depend on Section 406.106(b)(2) (35 Ill. Adm. Code 406.106(b)(2)) to raise as a disputed fact whether the manganese and pH effluent limits set in the Industry Mine NPDES permit are enforceable. In addition, Freeman United relies on Section 406.109 (35 Ill. Adm. Code 406.109) to claim that the status of Outfall 019 was legally changed into Reclamation Area Drainage so as to prevent NPDES liability.

Similarly, Springfield Coal depends on Section 31(a)(9) of the Act (415 ILCS 5/31(a)(9) (2010)) to argue that the 2007 CCA existed and the existence of the CCA is a disputed material fact. Springfield Coal also relies on the doctrine of unclean hands and the doctrine of laches to assert that the facts it presents in support of these doctrines are material and disputed so as to affect Springfield Coal's liability. And lastly, Springfield Coal relies on the interveners' complaint to allege that the discrepancy between the number of violations alleged by the interveners as compared to the number alleged by the People makes the actual number of violations at the Industry Mine a disputed material fact.

Considering the pleadings as it must, strictly against the People, the Board concludes that there is no genuine issue of material fact with regard to the issue of NPDES permit violations. Although Freeman United and Springfield Coal raise questions concerning the enforceability of the Industry Mine NPDES permit, the Board finds that these are questions of law because they

do not attempt to dispute any data in the DMRs. As established by the affidavit of Mr. Crislip, the DMRs provide the factual basis for the alleged violations. Respondents have raised legal issue, but have not fundamentally challenged the affidavit of Mr. Crislip. Furthermore, the Board is unconvinced by Springfield Coal's arguments regarding the different number of alleged violations between the People's complaint and ELPC's complaint. Simply because ELPC chose to allege more violations, does not alter the fact that the DMRs, signed by the respondents, report violations of the NPDES permit limits. Accordingly, the Board finds no genuine issue of material facts as to all the violations alleged by the People in Counts I and II. Therefore summary judgment is appropriate.

The Board also notes that Freeman United filed a cross-motion for summary judgment on Counts I and III of the People's complaint. As to Count III, the Board finds that there are genuine issues of fact and denies Freeman United's motion for summary judgment at this time.

Affirmative Defenses

The Board then turns to whether the People have proven they are entitled to summary judgment as a matter of law. In doing so, the Board will analyze Freeman United's affirmative defenses to determine if any are pled with sufficiency so as to defeat the alleged violation. If so, the People's claims against Freeman United will be barred. In addition, though not raised as an affirmative defense, the Board will examine Springfield Coal's arguments alleging the doctrines of "unclean hands" and laches.

Pursuant to the Board's procedural rules, "[a]ny facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing." 35 Ill. Adm. Code 103.204(d). In an affirmative defense, a respondent alleges "new facts or arguments that, if true, will defeat . . . [a complaint's] claim even if all allegations in the complaint are true." People v. Community Landfill Co., PCB 97-193, slip op at 3 (Aug. 6, 1998). "[T]o set forth a good and sufficient claim or defense, a pleading must allege ultimate facts sufficient to satisfy each element of the cause of action or affirmative defense pled." Richco Plastic Co. v. IMS Co., 288 Ill. App. 3d 782, 784, 681 N.E.2d 56, 58 (1st Dist. 1997). The facts of an affirmative defense must be pled with the same degree of specificity necessary for establishing a cause of action. International Ins. Co. v. Sargent & Lundy, 242 Ill. App. 3d 614, 630, 609 N.E. 2d 842, 853 (1st Dist. 1993).

Here, Freeman United has pled facts in attempt to satisfy three separate affirmative defenses that would each bar the People's right to bring this action, even if the all the allegations in their complaint are true. In addition, Freeman United argues that the Board should grant it partial summary judgment on Counts I and III as a matter of law because these affirmative defenses are satisfied by undisputed facts.

Pre-enforcement Statutory Requirements. In regards to the first of Freeman United's defenses that Section 31's mandatory pre-enforcement requirements were not followed, the Board finds that Freeman United has not established a sufficient legal basis for this defense through the introduction of new and specific facts. The Board finds that Freeman United misconstrues the holding in Crane, such that Freeman United has no valid authority to support

that IEPA violated the pre-enforcement requirements set out in Section 31's by failing to issue another NOV before referring the matter to the Attorney General. Crane, PCB 01-76, slip op at 5 (May 17, 2001). This is because the Board's decision in Crane distinguished Section 31's mandatory pre-referral provisions from those which are directory. *Id*. Specifically, Crane determined that Section 31's provision providing all respondents in state enforcement actions notice and opportunity to meet with the IEPA before the matter is referred to the Attorney General is mandatory; however, the provision in Section 31(a)(1) setting out the specific 180 day timeframe for IEPA to issue an NOV is discretionary. *Id*. Therefore, Freeman United has not proved that IEPA violated Section 31's pre-enforcement requirement so as to prevent the State from pursuing the permit violations alleged in the People's complaint.

Furthermore, the Board finds that Freeman United's argument that the Attorney General learned about the NPDES permit violations at the Industry Mine from IEPA, rather than an outside source bars the People's claim is without merit. The Board has:

> repeatedly found that [the requirements of Section 31 of the Act] were not intended to bar the Attorney General from prosecuting an environmental violation. *See* People v. Eagle-Picher-Boge, PCB 99-152 (July 22, 1999); People v. Geon, PCB 97-62 (Oct. 2, 1997); and People v. Heuermann, PCB 97-92 (Sept. 18, 1997).
>
> Rather, the written notice required by Section 31(a)(1) is a precondition to the Agency's referral of the alleged violations to the Attorney General. People v. Chemetco, PCB 96-76 (July 8, 1998). The legislative history of Section 31 indicates that the legislature did not intend to prevent the Attorney General from bringing enforcement actions that are not based on an Agency referral. People v. Sheridan Sand & Gravel, PCB 06-177, slip op 14-15, citing People v. Chiquita Processed Foods, L.L.C., PCB 02-56, slip op 4-5 (Nov. 21, 2002).

In Sheridan Sand & Gravel, the respondents asserted as an affirmative defense the IEPA's failure to follow the Section 31 requirements. *Id*. The Board went on to hold that "because the Attorney General brought the complaint on her own motion, whether or not IEPA complied with Section 31 of the Act has no bearing on the allegations in the complaint." Sheridan Sand & Gravel, PCB 06-177, slip op at 15. Freeman United has offered no argument which convinces the Board to alter this longstanding interpretation of Section 31 of the Act.

The Board also finds that the existence of a CCA, while prohibiting IEPA from referring a case, does not bar the People from bringing an enforcement action on its own motion. Section 31(a)(10) of the Act states in part:

> If the person complained against complies with the terms of a Compliance Commitment Agreement . . ., the [IEPA] shall not refer the alleged violations which are the subject of the Compliance Commitment Agreement to the Office of the Illinois Attorney General or the State's Attorney of the county in which the alleged violation occurred. 415 ILCS 5/31(a)(10) (2010).

Nothing in that Section prohibits the People from bringing an action.

In sum, the Board finds that the facts surrounding the alleged affirmative defense are undisputed and Freeman United's affirmative defense is without merit.

Likewise, Springfield Coal's argument that Section 31(a)(9) of the Act (415 ILCS 5/31(a)(9) (2010)) resulted in a CCA being in place in 2007, is without merit. Because the Board has found that the Attorney General's ability to bring a cause of action is not limited by Section 31(a)(10) of the Act (415 ILCS 5/31(a)(10) (2010)), the existence of a CCA does not impact the Board's decision on whether or not Springfield Coal violated the provisions of its permit.

Laches and Waiver. Freeman United also raises the equitable doctrines of laches and waiver as affirmative defenses to the People's claim. Freeman United claims the elements of each of these defenses are satisfied by the undisputed facts that the DMRs were timely submitted on a quarterly basis, but this action was not filed until February 2010. In terms of the laches defense, while Freeman United argues that these undisputed facts support the State's lack of diligence and its own resulting prejudice, the People contend that Freeman United wrongfully imputed IEPA's behavior for that of the Attorney General, who is the actual party asserting the claim. In addition to the first two traditional elements of a laches defense, the People argue that Freeman United failed to satisfy that a compelling circumstance existed, which becomes a third laches element when a party is asserting this defense against a public body who is operating in its governmental capacity. Hickey v. Illinois Central Railroad Co., 35 Ill. 2d 427, 447-48 (1966). Considering the pleadings, the Board concludes that the facts surrounding the alleged affirmative defense are undisputed. However, Freeman United has not met the burden of establishing the compelling circumstance element of its laches defense as is required because the Attorney General and IEPA are public bodies whom were operating in their governmental capacity in this case. Therefore, the Board finds that Freeman United's laches defense is insufficient to defeat the People claim.

Likewise, Springfield Coal's arguments that the doctrines of "unclean hands" and laches should be applied to Springfield Coal are without merit. IEPA's failure to act on the new NPDES permit may factor into appropriate penalties, but the lack of a new permit does not excuse the failure to comply with the existing permit. And as with Freeman United, Springfield Coal has not met its burden of establishing the compelling circumstance element of its laches defense.

In terms of Freeman United's waiver, the parties disagree over the facts used to support Freeman United's contention that the State intentionally relinquished its right to enforce the violations the People allege against Freeman United. From Freeman United's perspective, the fact that IEPA failed to issue additional NOVs or initiate other permissible pre-enforcement processes, despite IEPA's timely possession of the relevant DMRs, demonstrates that the IEPA intentionally relinquished its enforcement right (or at least supports this inference). The People disagree with Freeman United's factual support, claiming that IEPA did take additional action between its original 2005 NOV and this current action in the form of a 2009 NOV, and a 2010 referral to the Attorney General. However, Freeman United rebuts the People's claim by arguing

that the 2009 NOV was not applicable to prove the State did not relinquish its right to enforce this action against Freeman United because Freeman United sold the Industry Mine in 2007.

With the affirmative defense of waiver, the parties dispute the facts related to this defense; however as a matter of law waiver does not apply. As indicated above, the Board has consistently found that IEPA's actions under Section 31 of the Act do not bar prosecution by the Attorney General. Therefore, the issuance or nonissuance of NOVs do not bar prosecution or excuse the alleged violations.

Estoppel, Freeman United contends that each of the six required elements of estoppel are clearly established through undisputed facts. The People claim again that Freeman United failed to satisfy the additional requirement of proving the existence of a compelling circumstance, since it is attempting to assert the defense against a public body acting in its governmental capacity. Upon consideration of all the pleadings, the Board finds that Freeman United has not sufficiently presented facts with the requisite specificity required to establish the elements of an estoppel defense. Most notably, the Board finds that the facts surrounding the alleged affirmative defense are undisputed and Freeman United failed to satisfy the limited circumstances in which the doctrine of estoppel can lawfully be applied against the government. Therefore, the Board concludes that Freeman United has not established its estoppel defense so as to bar the People's claim against Freeman United.

Conclusion on Affirmative Defenses. The Board holds that the facts surrounding the alleged affirmative defense are undisputed and Freeman United has not satisfied any of the affirmative defenses it has presented in its pleadings. Therefore, the People's claims against Freeman United are not barred by any affirmative defense. Furthermore, based on the above analysis, the Board denies Freeman United's motion for summary judgment on Counts I and III because Freeman United has not sufficiently established each element of any affirmative defense with undisputed facts. Therefore, as a matter of law, the Board concludes that Freeman United is not entitled to partial summary judgment.

Summary Judgment as a Matter of Law

Next, the Board finds that the evidence provided by the People in the DMRs is sufficient to conclude that the violations by the respondents at the Industry Mine did in fact occur. *See* Natural Res. Def. Council, Inc. v. Outboard Marine Corp., 692 F. Supp. 801, 819 (N.D. Ill. 1988) (where the court recognized DMRs as "conclusive and irrebuttable evidence that violations have occurred"). The People have alleged in Counts I and II that respondents violated Section 12(f) of the Act, which prohibits "cause[ing] or allow[ing] the discharge of any contaminants into waters of the State. . . in violation of any term or condition imposed by [an NPDES] permit." 415 ILCS 5/12(f) (2010). Mr. Crislip's affidavit summarized the evidence in the DMRs which establish exceedences in the effluent discharged. Respondents challenge the fact that the actual DMRs are not in the record, and that there are differences between the People's alleged violations and ELPCs. However, respondents do not assert that the DMRs incorrectly reported the effluent limits.

The respondents offer arguments that the NPDES permit limits are inappropriate (in the case of the sulfate limit) or the result of background concentrations in the stream. These arguments are not persuasive in determining whether or not the effluent discharge exceeds the permit limits and thus violates Section 12(f) of the Act (415 ILCS 5/12(f) (2010)).

As to the arguments concerning Outfall 19 and manganese and pH limits made by respondents, the Board has reviewed the Industry Mine NPDES permit. The permit includes specific numerical limits for pH ("not less than 6.0 nor greater than 9.0") and manganese (30-day average 2.0, daily maximum 4.0). *See* NPDES permit (attached to People's Motion) 2-5. The NPDES permit does not include language from Section 406.106(b)(2). Furthermore, a review of the permit establishes that there is no reference to Outfall 019 becoming a reclamation area. Therefore based on the Board's review of the NPDES permit, the Board finds that respondents' arguments that Sections 406.106(b)(2) and 406.109 excuse the exceedences of the effluent limits set forth in the NPDES permit are without merit.

For similar reasons, Springfield Coal's argument that background concentrations result in the effluent violations and Section 406.103 (35 Ill. Adm. Code 406.103) allows Springfield Coal the opportunity to prove that fact is not persuasive. Section 406.103 does state: "Compliance with the numerical effluent standards is therefore not required when effluent concentrations in excess of the standards result entirely from the contamination of influent before it enters the affected land." 35 Ill. Adm. Code 406.103. However, the violations alleged in the complaint that are the subject of the motion for summary judgment are allegations that the effluent violated permit limits. While those permit limits mirror the standards in Part 406, nonetheless, the limits are set forth in the permit. Therefore, the effluent is exceeding permit limits.

Many of these issues are factors that might have been raised when the permit was issued and that may impact the Board's determination on what penalty might be appropriate. However, Mr. Crislip's affidavit summarizing the reporting on the DMRs sufficiently establishes that the Industry Mine Discharge exceeded permit limits. Therefore, the Board finds that Freeman United violated Section 12(f) of the Act (415 ILCS 5/12(f) (2010)) and that Springfield Coal violated Section 12(f) of the Act (415 ILCS 5/12(f) (2010)) as alleged in Counts I and II of the complaint. Thus, the Board grants the People's motion for partial summary judgment. The Board finds that respondents violated Section 12(f) of the Act (415 ILCS 5/12(f) (2010)) by discharging effluent that contained contaminants in excess of the limits set forth in the NPDES permit. Following this liability determination, the Board will move forward and analyze whether the People's corresponding penalty request is appropriate and should be granted.

Penalty Request

People's Motion

The People request that the Board impose a total penalty of $837,000.00 against Freeman United and Springfield Coal. PMot. at 19. The People contend that the Board has the authority to impose a penalty through consideration of the factors set forth in Section 33(c) and 42(h) of the Act. *Id* at 14, *see*, e.g., People v. Gilmer, PCB 99-27 (August 24, 2000).

The People argue that "[t[he Board has consistently reiterated its position that the statutory maximum penalty 'is natural or logical benchmark from which to begin considering factors in aggravation and mitigation of the penalty amounts.'" *Id* at 15, *citing* People v. Byrom Ward and Timothy James, PCB 10-72 (Nov. 17, 2011), slip op at 9; Gilmer, PCB 99-27 slip op at 8, both quoting IEPA v, Allen Barry, PCB 88-71 (May 10, 1990), slip op at 72. Following this approach, the People argue that the Board should impose the maximum civil penalty set out in Section 42(b)(1) of the Act, which is $10,000.00 per day for a violation of an NPDES term or provision. *Id* at 15. Based on the number of violations verified in Mr. Crislip's affidavit, and continuous nature of these violations (noting that 65 violations have occurred after the complaint was filed), the People suggest that the Board impose the total maximum penalty amount (no greater than $4,460,000.00) for the violations derived from Counts I and II. *Id* at 16.

More specifically, the People suggest applying the simplistic approach of imposing a "somewhat nominal penalty of $1,000.00" when calculating the penalties for violations of a daily maximum limit. *Id.* And, the People suggest imposing a higher penalty of at least $5,000 for each monthly limit violation to deter future noncompliance by the respondents. *Id*. As for the pH violations evidenced in the DMRs, the People suggest that a $5,000.00 penalty be imposed due to "the nature of the pollution source, *i.e.* acid mine drainage." *Id*. Thus, the People request that the Board impose a penalty of $341,000.00 against Freeman United for its 225 effluent violations alleged in Count I, and $496,000 against Springfield Coal for the 220 effluent violations alleged in Count II or occurring after the complaint was filed. *Id*. at 17.

The People argue that these suggested penalty amounts are consistent with the Section 33(c) factors and Section 41(h) criteria as demonstrated by the information found in Mr. Crislip's affidavit and the DMRs. *Id*. at 10-14. Thus, the People argue that a total civil penalty of $837,000.00 against Freeman United and Springfield Coal is reasonable. *Id*. at 19.

Springfield Coal's Response

Springfield Coal argues that the penalty demand requested by the People is improper at this stage in the hearing, unprecedented, and unjustified based on the numerous disputed facts that are relevant to a penalty evaluation. SResp. to People at 25. First, Springfield Coal claims the People's demand that the Board impose a specific amount of damages at the summary judgment phase is improper based on Illinois case law. *Id* at 26, *see* Illinois v. Chemetco, Inc., PCB 96-76 (Feb. 19, 1998); *see also* People v. Community. Landfill Co., Inc., PCB 97-193 (Oct. 3, 2002). Springfield Coal asserts that the amount of damages to impose is a factual question that can only occur during an evidentiary hearing, after liability has already been determined. *Id*, *see* Doe v. Montessori Sch. Of Lake Forest, 287 Ill.App.3d 289, 301 (2nd Dist. 1997).

Springfield Coal also disputes the People's view that a penalty demand of $496,000.00 is a "reasonable" sanction and deterrent because that amount is "significantly greater than any penalty that has been agreed to as part of any settlement of a CWA enforcement case before the Board or imposed by the Board which alleged solely CWA violations." *Id* at 27. Springfield Coal supports that the People's penalty demand is meritless by pointing out that only fifteen Board CWA enforcement cases have resulted in a final penalty greater than $25,000 in the past eight years, the highest being only $135,000. *Id*, *see* , People of the State of Illinois v. Petco

Petroleum Corporation, PCB 05-66 (Feb. 2, 2006). Springfield Coal notes that " the State even admits that the requested penalties are excessive". *Id* at 28, *see* PMot. at 18. Springfield Coal argues that because the People have not provided sufficient support to prove their penalty demand is reasonable in the face Board precedent and the facts of the case, the Board should deny the People's motion. *Id*.

Springfield Coal stresses that the Board should not assess the damages against Springfield Coal at the summary judgment phase because numerous factual discrepancies, which could be resolved during an evidentiary hearing, will impact the penalty amount determination. *Id*. In Springfield Coal's view, the People's attempt to show that Springfield Coal cannot dispute the People's interpretation of the factors set out in Section 33(c) and criteria listed in Section 42(h) is "cursory and baseless . . . largely because of the significant factual disputes in this matter." *Id* at 28-29.

As support for its argument, Springfield Coal highlights the two examples of how the factual discrepancies in this case affect these statutory factors and criteria. *Id*. First, the People ignore the fact that IEPA proposed to de-list Grindstone Creek from Illinois Section 303(d)'s Impaired Water list for sulfates when the People address the Section 33(c)(i) factor regarding the "character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people." *Id*. at 29. Second, the People do not mention IEPA's expert testimony from Mr. Mosher who stated "regardless of the source, sulfate and many of the other constituent of TDS are not treatable by any practical means" when the People discuss the Section 33(c)(iv) factor pertaining to the "technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source." *Id*.

Springfield Coal claims it "can cite numerous other examples of factual discrepancies that would influence the Board's evaluation of the Section 33(c) factors and the Section 42(h) criteria." *Id* at 29. But instead, Springfield Coal goes on to cite the Board's decision in Illinois v. Chemetco, Inc., which held "that since there were factual disputes regarding the Section 33(c) factors and the Section 42(h) criteria, these disputes 'preclude the Board from assessing a penalty without a hearing.'" *Id* at 30, *see* Illinois v. Chemetco, Inc., PCB 96-76 (Feb. 19, 1998). Springfield Coal therefore argues that the Board should follow its own precedent and deny the People's demand to impose penalties at the summary judgment stage of the proceeding. *Id*.

Freeman United's Response

Freeman United argues that the People's penalty request is improper and premature based on the Board's procedural precedent, the existence of factual disputes, and Illinois case law. *Id*. Freeman United begins by asserting the Board has previously rejected a request to evaluate the amount of damages at the summary judgment stage in Community Landfill, PCB 97-193, slip op at 10 (Apr. 5, 2001). *Id*, *see also* Chemetco, PCB 96-76 (Feb. 19, 1998). In Community Landfill, the Board granted partial summary judgment, but ordered that the matter proceed to hearing on the remaining counts before determining the penalty amount for the counts resolved via summary judgment. *Id*. Freeman United argues that this is the proper procedural process because "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." *Id* at 22.

Freeman United's also opposes the People's penalty demand asserting that the existence of significant factual disputes will affect the Board's penalty evaluation under the Section 33(c) factors and the Section 42(h) criteria. *Id*. Contrary to the People's position that the number and frequency of reported effluent exceedences indisputably demonstrates the Section 33(c)(i) factor pertaining to the "'character and degree of injury,'" Freeman United argues that the People ignored the fact only a single NOV was issued to Freeman United and it only concerned manganese discharges from one outfall. *Id.* Freeman United argues that if IEPA believed other contaminants discharged from Industry Mine were a threat to the general welfare or physical property, the NOV would have addressed those discharges as well. *Id.*

Additionally, Freeman United argues that the People disregarded the factual discrepancies concerning the pendency of the Industry Mine NPDES permit and the State's revised sulfate water quality regulation, which Freeman United believes would also impact the application of Section 33(c)(i). *Id* at 23. Freeman United goes on to insist that the Section 33(c)(iv) factor concerning the technical practicability and economic reasonableness of reducing and/or eliminating the complained discharges would be affected by the People's disregard of the fact that by "accepting a CCA that addressed only manganese discharges, [the IEPA] implicitly conceded that compliance with the permit's other effluent limitations wasn't practical or reasonable." *Id.* at 24.

Furthermore, Freeman United argues that the numerous factual inaccuracies in Mr. Crislip's affidavit impact the Section 42(h)(1) criterion concerning the duration and gravity of any alleged violations. *Id* at 25. Freeman United also opposes the People's argument that Mr. Crislip's affidavit evidences a lack of due diligence on behalf of Freeman United by arguing that Freeman United's timely NOV response, original CCA proposal, the CCA extension and final CCA proposal all demonstrate otherwise. *Id*. Freeman United claims that this disputed fact also impacts the application of the Section 42(h)(2) criterion. *Id.* Based on these various disputed factual issues, Freeman United claims the Board should be precluded from imposing the requested penalties on Freeman United at this stage because the Section 33(c) factors and Section 42(h) criteria would be misapplied. *Id*.

Freeman United continues arguing that the People are unjustified in asking the Board to impose a penalty significantly greater than that imposed by the Board for similar CWA violations. *Id*. Freeman United notes that "[d]uring the last eight years, there were only fifteen CWA enforcement cases where the Board's final penalty was over $25,000. Of these fifteen cases, the average penalty amount was approximately $56,918, and the highest was $135,000." *Id*. Thus, Freeman United argues that the Board should deny the People request because it argues that the Board should not ignore its own precedent. *Id* at 27.

Freeman United's asserts that the only reason Freeman United presents this last argument is "due to the unusual and inappropriate nature of the State's request for relief". *Id* at 21. Freeman United maintains its earlier discussed position that the Board should deny the People's motion and instead grant Freeman United summary judgment. *Id*. In accordance with this

position, Freeman United states that the Board need not consider the People's request to impose civil penalties against Freeman United. *Id*. Thus, Freeman United concludes its final argument opposing the People's penalty request by asking the Board not to impose the relief requested by the People, "even if the State were entitled to the relief it seeks (which it is not)", because it would be inappropriate in this case "to allow the State to reset the penalty levels for effluent violations from coal mines". *Id* at 27. Therefore, Freeman United requests that the Board deny the People's penalty request and the People's attempt to make an example out of Freeman United by ignoring prior precedent, if this matter ever reached the penalty phase. *Id.*

Board Analysis and Findings Regarding the People's Penalty Request

Contrary to the People's assertion that the Board has the authority to impose the statutory maximum penalty after finding the respondents liable at summary judgment, both Freeman United and Springfield Coal argue that a penalty determination is not appropriate at the summary judgment phase in the proceeding. The respondents contend that a penalty determination at this stage would be inappropriate because it is a factual question that can only be determined after an evidentiary hearing.

While the People claim that the imposition of the maximum civil penalty is reasonable in this case, the respondents argue that such a high penalty is unprecedented. Both respondents contend that the People's total requested penalty is unreasonable because it is more than six times greater than the highest penalty imposed by the Board in the past fifteen years for a CWA enforcement case.

Lastly, the People argue that the Board has the authority to impose the statutory maximum penalty based on an evaluation of the factors set forth in Section 33(c) and 42(h) of the Act. However, both respondents argue that an evidentiary hearing is required before the Board can justly impose a penalty because matters still in dispute will impact the Board's assessment of the statutory factors.

The Board found that the People are entitled to partial summary judgment as a matter of law because no disputed material facts exist as to Freeman United and Springfield Coal's liability. The question of whether the People's penalty request shall be granted is still left for the Board to determine. After considering all the penalty issues presented in the pleadings, the Board first finds that neither the Act nor case law restrict the Board's authority to consider penalties in summary judgment motions. 415 ILCS 5/42(d) (2010); 35 Ill. Adm. Code 101.516(a). In fact the Board does grant motions for summary judgment and rules on civil penalties without sending the case to hearing. *See e.g.* People v. Zachary Isaac *et al.*, PCB 11-58 (Sept. 20, 2012); *see also* People v. Byrom Ward *et al.*, PCB 10-72 (July 7, 2011 and Nov. 17, 2011) (no hearing was held, but parties were asked to brief the issue of civil penalties).

The Board also grants partial summary judgment for liability, while retaining its right to determine the penalty after a hearing when the Board deems appropriate. *See* Community Landfill, PCB 97-193(Apr. 5, 2001); People v. Drawer Drape Cleaners, Inc., PCB 03-51 (August 19, 2004); People v. Whiteway Sanitation, Inc., PCB 95-64 (Feb. 9, 1988). In this case, the Board finds that a majority of the issues that the respondents raised as disputed material facts in

regards to their liability for violating the Act are actually disputed material issues affecting the penalty determination. As such, the Board directs the parties to a hearing on the penalty imposition. At hearing the parties will be allowed to to present evidence on the Section 33(c) factors and Section 42(h) criteria which may include evidence concerning the amended sulfate standard, the background concentrations of constituents at the Industry Mine, the applicable manganese and pH limits, the existence and effectiveness of the CCAs, and IEPA's delayed response to the information in the DMRs. The parties should also address the economic benefit respondents accrued by noncompliance (*see* 415 ILCS 5/42(h) (2010)).

CONCLUSION ON PEOPLE'S MOTION

The Board grants the People's motion for summary judgment and denies Freeman United's cross-motion for summary judgment. The Board finds that the record establishes respondents violated Section 12(f) of the Act (415 ILCS 5/12(f) (2010)) by discharging effluent from the Industry Mine that exceeded the permitted daily and/or monthly limits for iron, manganese, sulfates, TSS, and pH. Having found violations of the Act, the Board sends the penalty question to hearing because further evidence may impact the Board's evaluation of the factors and criteria provided in Section 33(c) and 42(h) of the Act.

ELPC's MOTION FOR SUMMARY JUDGMENT

Issues Raised in ELPC's Motion for Summary Judgment

The Board divides its discussion on ELPC's motion into the following three separate issues in order to thoroughly address each matter raised by the motion and the parties' subsequent responses and replies: 1) whether the Board should grant Freeman United's request to reconsider its motion to dismiss ELPC's claim; 2) whether genuine issues of material fact exist with respect to the alleged NPDES permit violations at the Industry Mine to justify denying ELPC's motion for partial summary judgment, and; 3) whether the Board should grant ELPC's cease and desist request and penalty request.

On an issue-by-issue basis, the Board will summarize the arguments made by each party in the order in which they were filed with the Board which may include ELPC's motion for partial summary judgment, Springfield Coal and Freeman United's responses, as well as the parties' corresponding replies. The Board will then conclude each section with an analysis and findings on that issue before reaching its final conclusion on ELPC's motion for partial summary judgment and issuing its order.

The Board notes that many of the arguments made are similar to those raised by the People, Freeman United and Springfield Coal with regards to the People's motion. However, those arguments are repeated here to ensure a full hearing on the merits of the arguments.

Freeman United's Request to Reconsider Motion to Dismiss

Freeman Response To ELPC's Motion

Freeman United requests that the Board reconsider its July 15, 2010 motion denying its motion to dismiss ELPC's complaint on the grounds that the complaint is duplicative of the People's enforcement claims. FResp. to ELPC. at 2. Freeman United points out that the Board originally concluded that ELPC's complaint was not duplicative because, unlike the People's complaint, ELPC sought to find Freeman United liable for alleged violations occurring after the Industry Mine was sold to Springfield Coal. *Id*. at 6. However, Freeman United argues that ELPC's summary judgment motion "[makes] no effort to argue that Freeman United is responsible for effluent discharges that occurred after Freeman United sold Industry Mine to Springfield Coal." *Id*.

Freeman United claims that the violations alleged in Counts II and III in ELPC's complaint and Counts I and III in the People's complaints are substantially duplicative and should be dismissed because they both, respectively, seek to impose liability for alleged NPDES effluent limitations and alleged violations of Section 12(a). *Id*, *see* Rulon v. Double D Gun Club, PCB 03-07, slip op at 2 (Aug. 22, 2002); 35 Ill. Adm. Code 103.212(a). Furthermore, Freeman United argues that since the claims by ELPC against Freeman United do not relate to ongoing violations of the Act, but rather wholly past violations, the Board should follow Gwaltney and dismiss ELPC's claims against Freeman United. FResp. to PRN Mot. at7, *citing* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found, Inc., 484 U.S. 49 (1987). In Gwaltney, the Supreme Court held that citizen suits alleging CWA violations can only seek injunctive relief and penalties for ongoing CWA violations. *Id*. Freeman United analogizes the present tense language used in the CWA to the present tense language used in the Act to argue that the Board should narrow application of citizen suits under the Act, similar to how the decision in Gwaltney narrowed the application of citizen suits under the CWA. *Id.* Therefore, Freeman United argues that the Board should follow the Gwaltney holding and dismiss ELPC's complaints against Freeman United since those complaints are for wholly past violations. *Id*.

Freeman United acknowledges that Counts I and IV of ELPC's complaint do not apply to Freeman United since the violations alleged there are only applicable on or after September 8, 2008, which is after Freeman United sold the Industry Mine. *Id*. at 7. Accordingly, Freeman United requests that the Board reconsider its motion to dismiss ELPC's complaint against Freeman United in its entirety. *Id*.

ELPC's Reply

ELPC opposes Freeman United's request to the Board to reconsider Freeman United's motion to strike and/or dismiss ELPC's complaint. ELPC Reply to Freeman and Springfield at 7. ELPC asserts that it would be improper for the Board to follow Freeman United's request and strike or dismiss their complaint merely because ELPC moved for summary judgment on only one count of the claim, rather than on the complaint in its entirety. *Id*. ELPC argues that nothing in the Board's orders has limited their participation in the case. *Id*.

Furthermore, ELPC argues that they are actually fulfilling the role the Board recognized for them when the Board granted their motion to intervene, which was to "'ensure that complainant's enforcement action is diligently prosecuted and to raise additional complaints that complainant has failed to raise.'" *Id*., *citing* People v. Freeman United Coal Mining and Springfield Coal Company, LLC., PCB 10-61, slip op at 3 (Apr. 15, 2010). ELPC explains that their choice to move for summary judgment on only one of the claims was based on their evaluation that the nature of the other two claims were more fact-intensive, and thereby a better fit for a hearing. *Id*. Therefore ELPC argues that the Board should deny Freeman United's request to reconsider their motion to strike or dismiss ELPC's complaint. *Id*.

Furthermore, ELPC address Freeman United's suggestion that the precedent in Gwaltney should be followed so as to dismiss ELPC's claim against Freeman United. *Id*., *citing* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc 484 U.S. 49 (1987). The holding in Gwaltney bars citizen suits enforcing "wholly past" CWA violations. *Id*. However, ELPC argues that it would be wrong to follow that holding because "Gwaltney is a federal case interpreting citizen suits under the federal Clean Water Act, and Illinois has not adopted this limitation on enforcement actions under the Illinois Environmental Protection Act." *Id*. Specifically, ELPC cites Section 33(a) (415 ILCS 5/33(a) (2010)) to show that the Board has the ability to evaluate penalties for violations of the Act regardless of when the violations occurred. *Id*. at 24.

Furthermore, ELPC argues that the correct precedent to follow is that set by the Board in E.R. 1, LLC v. Seiber, where the Board specifically permitted a citizen enforcement claim pursuing past violations of the Act. *Id*., *citing* E.R. 1, LLC v. Seiber, PCB 08-30 (Apr. 21, 2011). As such, ELPC argues that the Board should not dismiss their claim based on the fact the violations were wholly past because Freeman United's argument relied on inapplicable legal authority. *Id.*

Freeman United's Surreply

Freeman United argues that ELPC failed to show why their complaint is not duplicative of the State's complaint because ELPC never argued Freeman United should be held accountable for the violations occurring after the sale of the Industry Mine. FSurreply to ELPC at 2. Although Freeman United acknowledges ELPC's decision not to pursue summary judgment on the post-sale alleged violations against Freeman United "out of respect for the Board's limited and time and resources," Freeman United argues such reasoning weak. *Id*., *citing* ELPC Reply to Freeman and SResp. at 3). Freeman United claims that if preserving the Board's time was the true rationale behind ELPC's action, then ELPC should just voluntarily dismiss their claim because the relief they seek is exactly the same as that sought by the State. *Id*. at 2. Freeman United reiterates that ELPC was "allowed to intervene because [they] represented to the Board that [they] sought unique relief: a determination from this Board that Freeman United was liable for alleged violations that occurred after [Freeman] sold the Industry Mine to Springfield Coal." *Id*. Therefore, Freeman United argues that the Board should reconsider Freeman United's motion to dismiss ELPC's complaint against Freeman United because ELPC has not alleged facts to show the relief they seek is unique from that sought by the State. *Id*.

Board Analysis and Findings

In ruling on a motion for reconsideration, the Board will consider factors including new evidence or a change in the law, to conclude that the Board's decision was in error. 35 Ill. Adm. Code 101.902. In Citizens Against Regional Landfill v. County Board of Whiteside, PCB 93-156 (Mar. 11, 1993), we observed that "the intended purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court's previous application of the existing law." Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E. 2d 1154, 1158 (1st Dist. 1992).

Freeman United argues that the Board should reconsider the denial of its motion to dismiss ELPC's claims against Freeman United. Freeman United contends that the Board's denial rested on the fact that the allegations differed because only ELPC sought to enforce violations against Freeman United that occurred after the sale of the Industry Mine. But since ELPC's motion for summary judgment on Count II of their complaint does not seek post-sale enforcement against Freeman United, Freeman United argues that ELPC and the State's complaints are duplicative.

ELPC disagrees with Freeman United's assertion by arguing that their motion for partial summary judgment does not affect the Board's decisions to grant intervention to ELPC and accept their claim into the action. Since nothing in the Board's order limited their participation in this case, ELPC argues the Board should deny Freeman United's request to dismiss their complaint. Furthermore, ELPC criticizes Freeman United's assertion that their claim should be dismissed because ELPC's action is a citizen suit enforcing 'wholly past' CWA violations. ELPC argues that Freeman United's use of Gwaltney to support this assertion is meritless because that was a federal case interpreting citizen suits under the federal CWA, which is different from the rules adopted into the Act that control the citizen suit in this case.

After reviewing all the pleadings, the Board denies Freeman United's request to reconsider the motion to dismiss ELPC's complaint. The Board agrees with ELPC that the holding in Gwaltney does not apply here to prevent the intervenors from enforcing wholly past CWA violations. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987). Furthermore, the Board's procedural rules state that a complaint is duplicative when it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. The Board originally found that ELPC's complaint was not duplicative because the allegations in ELPC's entire complaint involved a longer time frame and additional violations as compared to the State's complaint. Even though ELPC only seeks summary judgment on Count II of their complaint, which does not involve this longer time frame, it does not diminish the fact that the Board found that their entire complaint was not duplicative of the State's complaint. People v. Freeman United Coal *et. al.*, PCB 10-61, 11-2 (consol.) slip op at 15 (July15, 2010). The Board's procedural rules give an intervenor "all the rights of an original party to the adjudicatory proceeding except that the Board may limit the rights of the intervenor as justice may require." 35 Ill. Adm. Code 101.402(e). The Board's order granting ELPC intervention in no way limited their right to seek partial summary judgment. People v. Freeman United Coal *et. al.*, PCB 10-61, 11-2 (consol.) slip op at 11 (Apr. 15, 2010). The Board finds

that Freeman United has provided no new evidence or a change in the law that would indicate that the Board's July 15, 2010 order dismissing the request was in error. Therefore, the Board denies Freeman United's request to reconsider the motion to dismiss ELPC's complaint because the intervenors' summary judgment motion does not change the Board's original finding that intervenors' complaint is not duplicative of the complaint filed by the People.

NPDES Permit Violations

ELPC's Motion

ELPC seeks summary judgment on Count II of their complaint that alleges Freeman United and Springfield Coal have violated the terms of the Industry Mine NPDES permit on numerous occasions. PRN Mot. at 1. ELPC argues that because Freeman United and Springfield Coal have admitted to the discharges of water pollution from the Industry Mine through signed DMRs, the Board should find "that as a matter of law Springfield Coal and Freeman [United] are liable, respectively, for 342 and 283 violations of the [Act]." *Id*. at 6. ELPC supports their motion by referencing each time a DMR showed that an outfall at Industry Mine exceeded the monthly average and/or daily maximum effluent limitations for discharges of iron, manganese, sulfates, TSS, pH, and settlable solids into the receiving streams. *Id* at 7-10. Based on this evidence, ELPC argues that "[t]here is no genuine issue of material fact as to whether Springfield Coal and Freeman [United] repeatedly discharged iron, manganese, sulfates, pH, total suspended solids and settleable solids from the Industry Mine in excess of the effluent limitation imposed by NPDES Permit No. IL0061247, as modified July 21, 2003." *Id* at 10. Therefore, ELPC argues that the Board should find both Springfield Coal and Freeman United liable for the 625 violations of Section 12(f) of the Act.

Springfield Coal's Response

Springfield Coal alleges several different issues of material fact to argue that ELPC's motion should be denied. SResp. to ELPC at 5-6. Springfield Coal notes the high standard of review that requires the Board to deny the motion for summary judgment if it "finds that the record contains 'any material issues of genuine fact'". *Id*. at 7, *see* Hoover, 155 Ill. 2d at 411. As such, Springfield Coal argues that ELPC's motion should be denied because considering all the evidence on file, the Board should find that multiple disputed factual issues exist. *Id*.

One area that Springfield Coal argues establishes factual issues is that there are substantial discrepancies with respect to the violations alleged against Springfield Coal by ELPC as compared to those alleged the People. *Id* at 8. Springfield Coal asserts that the number of violation alleged by ELPC and the People differ drastically even though both parties have based their allegations on the same information provided in Industry Mine's DMRs and NPDES permit. *Id*. Therefore, Springfield Coal contends that this discrepancy demonstrates the existence of factual dispute that should preclude the entry of summary judgment. *Id*.

Springfield Coal also argues that 66 of the violations alleged against Springfield Coal by ELPC do not constitute actual violations. *Id*. at 10. Specifically, Springfield claims that, after reviewing ELPC's motion with the DMRs and data supporting the DMRs, at least 61 of the

alleged monthly average effluent limit exceedences are not supported by the requisite number of samples to calculate a monthly average. *Id*. at 10, *citing* 35 Ill. Adm. Code 406.101.

Furthermore, Springfield Coal disputes ELPC's allegation that Springfield Coal exceeded its permit limit for discharges at Outfall 017 in April 2008, June 2008, and February 2011 by claiming that "Outfall 017 was not discharging during these three months." *Id*. at 11. Additionally, Springfield Coal argues that two other claims made by ELPC, which regard the September 2010 sulfate discharge from Outfall 009 and the pH of the January 2010 discharge from Outfall 019, are not in fact violations because neither can be supported by the DMR or NPDES permit. *Id*. Thus, Springfield Coal claims that material issues exist regarding 66 of the violations alleged by ELPC, such that the Board should not grant ELPC's motion for summary judgment. *Id*.

Springfield Coal claims that whether the 2007 CCA exists is a material disputed fact that precludes summary judgment. *Id*. Springfield Coal asserts, as it did in its response to the People's motion, that the existence of the CCA prevents ELPC from pursuing alleged violations that occurred during the time the CCA was effective. *Id*. "Instead of repeating these arguments, Springfield Coal expressly incorporates all of the arguments and corresponding exhibits from its response to the State's Motion for Partial Summary Judgment into this response." *Id*. at 11-12. Springfield Coal highlights the fact that ELPC did not mention the 2007 CCA anywhere in their motion, nor did ELPC attempt to explain away the precedent set by People v. Midwest Grain Prod. Of Illinois, Inc..*Id*. at 12, *citing* People v. Midwest Grain Prod. Of Illinois, Inc., PCB 97-179 (Aug. 21, 1997). Thus, Springfield Coal argues that the violations alleged by ELPC that occurred during the existence of the 2007 CCA are baseless, and prove that a material issue exists with regards to these violations. *Id*. at 12.

Springfield Coal argues that a disputed material fact also exists regarding whether Springfield Coal has made significant effort to be in compliance. *Id*. Contrary to ELPC's allegation that Springfield Coal failed to submit a compliance plan, Springfield Coal claims that it "has submitted six compliance plans to [the IEPA] detailing work Springfield Coal is undertaking at the Industry Mine in order to achieve compliance with the NPDES Permit." *Id*. at 13.

Springfield Coal further disputes ELPC's allegation that Springfield Coal has "'attempted to rationalize its ongoing level of noncompliance as unimportant'" by presenting numerous examples of how Springfield Coal has actually invested time, resources and effort into complying with its NPDES permit. *Id*. at 14. For instance, Springfield Coal claims that it has spent more than $600,000.00 to satisfy compliance plans and work outside compliance plans that help the Industry Mine comply with its NPDES permit. *Id*. Based on these contradicting facts, Springfield Coal argues that there are factual discrepancies regarding Springfield Coal's level of commitment to compliance, which should preclude the Board from granting summary judgment in ELPC's favor. *Id*. at 15.

Springfield Coal contends that ELPC should not be able to pursue violations in connection with the sulfate effluent limit in the Industry Mine NPDES permit because the permit does not reflect the amended standard, which is less stringent. *Id*. Springfield Coal argues that

the NPDES permit limitation is the problem, and not Springfield Coal's behavior. *Id*. Thereby, Springfield Coal claims it would be unfair to allege violations against Springfield Coal "based upon a standard everyone knows is flawed and for which treatment to achieve compliance is not practical." *Id*. at 16.

Moreover, Springfield Coal points out that a permit renewal application for Industry Mine was submitted almost nine years ago, and IEPA has yet to take action and respond, despite Springfield Coal's attempt at a July 20, 2010 meeting with IEPA to understand where in the queue Industry Mine's permit renewal stands. *Id*. Springfield Coal supports that the alleged sulfate effluent limitation violations are improper by highlighting IEPA's expert testimony made at the October 2006 regulatory rulemaking proceeding concerning the sulfate standard, which said, in part, that:

> 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 constituents of TDS are not treatable by any practical means. *Id*. at 18, *see* Exhibit 9.

Springfield Coal claims that if the Industry Mine NPDES permit was modified to the revised sulfate standard when that standard was enacted, the number of alleged violations against Springfield Coal since it began operating the Industry Mine would drop by almost 75%. *Id*. at 15.

Springfield Coal argues that it should not be held to a rejected standard, and that ELPC should not be able to "capitalize on the State's delay [in reissuing the NPDES permit] and seek penalties against Springfield Coal for circumstances cause by the State's delay." *Id*. at 19. Therefore, Springfield Coal maintains that summary judgment would be inappropriate at this stage because discovery could expose additional facts regarding IEPA's delay. *Id*.

Springfield Coal claims there are disputed material facts with respect to whether background concentrations of constituents in the receiving streams at the Industry Mine are to blame for many of the alleged NPDES permit exceedences. *Id*. at 20. Springfield Coal references samples taken from the streams crossing through the Industry Mine property prior to any mining operations, which showed that the levels of sulfate, manganese, and iron would all be considered exceedences of the NPDES permit limits. *Id*. Springfield Coal also points to other samples taken from surface water runoff prior to constructing new ponds on the property that all show that the high concentration of numerous constituents are either naturally occurring or exist prior to coming into contact with the Industry Mine property and the mining activities. *Id*. at 21. Springfield Coal claims that such facts make the defense provided in Section 406.103 (35 Ill. Adm. Code 406.103) applicable, such that Springfield Coal should not be required to meet the effluent standards provided in its NPDES permit. *Id*. at 22. Thus, Springfield Coal argues that these facts, "when construed in favor of Springfield Coal as required when considering a motion for summary judgment, raise significant issues fact as to whether background concentrations are the cause of many of the exceedences that the Interveners allege." *Id*. at 23.

Springfield Coal opines that the manganese and pH effluent limits in the Industry Mine NPDES permit are inapplicable pursuant to Illinois regulations. *Id*. Springfield Coal asserts that Section 406.106 (35 Ill. Adm. Code 406.106) limits the scope of enforceable manganese effluent limitations to facilities that apply chemicals to discharges in order to meet either iron or pH effluent limitations. *Id*. Additionally, this regulation eases the upper pH limit to 10 when it is not feasible for such a facility to comply with the manganese limit at pH 9. *Id*. Since Springfield Coal claims it has only added chemicals to Ponds 18 and 19 in order to lower the manganese concentrations, "and not to meet the pH or iron effluent standards, all the manganese excursions alleged by the Intervenors against Springfield Coal related to Ponds 18 and 19 should be dismissed." *Id*. at 24. Furthermore, Springfield Coal argues that unless ELPC can prove that a chemical addition was done at the time of an alleged exceedence, all other alleged manganese effluent limitation exceedences should also be dismissed. *Id*.

Similarly, Springfield Coal claims that seven of the twelve pH limit exceedences alleged by ELPC should not be considered violations because the applicable pH limit to Industry Mine should be 10 according to 35 Ill. Adm. Code 406.106(b)(2), despite Industry Mine's NPDES permit limit of nine. *Id*. Therefore, Springfield Coal argues that issues of material fact surrounding which manganese and pH effluent limits are applicable to Industry Mine should prevent the Board from granting summary judgment in favor of ELPC. *Id*. at 25.

Freeman United's Response

Freeman United asserts several distinct issues of material fact to support their contention that the Board should deny ELPC's motion for summary judgment. FResp. to ELPC Mot. at 1-2. Freeman United claims that the standard for summary judgment disfavors ELPC such that a grant of summary judgment would not be 'clear beyond question.' *Id*. at 8, *see* Kay v. Mundelein, 36 Ill. App. 3d 433, 437 (2nd Dist. 1975). Freeman United argues that because a summary judgment requires the evidence to be construed against ELPC and liberally in favor of Freeman United, the facts of this case lack the requisite clarity to appropriately resolve the question of liability through a grant of summary judgment. *Id*., *see*, *e.g.*, Colvin v. Hobart Bros., 156 Ill. 2d 166, 170 (1993). Thus, Freeman United first asks that the Board deny ELPC's motion based on the high standard for summary judgment and Illinois precedent.

Freeman United opposes ELPC's motion because of the 2005 CCA created between Freeman United and IEPA. *Id*. at 9. Freeman United notes that "[t]he State concedes that it both accepted Freeman United's 2005 CAA and that Freeman United fully complied with the 2005 CCA". *Id*. As to the 2007 CCA proposal, Freeman United claims it became effective on September 30, 2007, by operation of law, because IEPA never gave Freeman United a written response to Freeman United's 2007 CCA proposal. *Id*. Freeman United further highlights the facts that IEPA never put Freeman United on notice that it was violating the CCAs, and that ELPC never objected to the CCAs, nor attempted to intervene in the enforcement matter resulting from the CCAs. *Id*. Therefore, Freeman United argues that these undisputed facts, in conjunction with the existence of the CCAs, should bar ELPC from enforcing the violations alleged against Freeman United that occurred during the CCA's effective period between May 15, 2005 and August 31, 2007. *Id*. at 10.

Freeman United also opposes ELPC's motion by arguing that there are various disputed factual issues regarding whether the NPDES violations ELPC alleges against Freeman United are in fact violations of the Act. *Id*. Freeman United first claims that it should not be held to the outdated sulfate water quality standard in Industry Mine's NPDES permit because in October 2006 the Board proposed to ease this standard. *Id*. at 10. IEPA's proposal was enacted two years later based on expert testimony recognizing the scientific inability of mines to practically meet the originally enacted sulfate standard. *Id*. at 11. Thus, Freeman United argues that these facts are in dispute such that ELPC "should be barred from pursuing post-October 2006 alleged violation of the Industry Mine's sulfate effluent limits (38 violations) unless [ELPC] can prove that the discharge would have exceeded the current sulfate water quality standard (which is has not done in its Motion)." *Id*.

Additionally, Freeman United contends that disputed material facts concerning "whether background concentrations of constituents in the receiving streams at the Industry Mine have caused the exceedences of the NPDES permit effluent limitations" alleged in ELPC's complaint put Freeman United's liability for these violations into question. *Id*. at 12. Freeman United points out evidence that elevated levels of sulfate, manganese, iron, total suspended solids, and pH existed in the surface water prior to Freeman United's mining activities. *Id*. Thus, Freeman United argues that Section 406.103 (35 Ill. Adm. Code 406.103) should apply as a defense to 283 of the alleged effluent limitation violations against Freeman United because this evidence demonstrates these alleged violations "result[ed] from contaminants in the influent water before it enter[ed] the affected land." *Id*. at 14. Since ELPC's motion presented no evidence to the contrary, Freeman United argues the Board should deny ELPC's motion on the grounds that the material facts surrounding this issue are disputed. *Id*.

Furthermore, Freeman United opposes ELPC's motion arguing that there is a disputed factual issue with respect to whether ELPC can enforce the manganese and pH effluent limits in the NPDES permit. *Id*. Freeman United claims that these manganese limits are unenforceable based on Section 406.106(b)(2) (35 Ill. Adm. Code 406.106(b)(2)), which "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.'" *Id*. Freeman United claims that even though it has added chemicals to Ponds 18 and 19, the addition was not conducted in order to meet the pH or iron effluent standards, but rather to lower the manganese concentrations. *Id*. As such, Freeman United argues it should not be liable for all the Pond 18 and 19 manganese excursions alleged by ELPC, and these alleged violations should be dismissed. *Id*. at 15.

Similarly, Freeman United claims that because Industry Mine is "unable to comply with the manganese effluent limitation at pH 9, the regulations specify that the pH effluent be revised to 10." *Id., citing* 35 Ill. Adm. Code 406.106(b)(2). Thus, Freeman United argues it should not be liable for alleged pH limit exceedences "where the actual discharge was measured as having a pH greater than 9 but less than 10." *Id*. Furthermore, Freeman United argues Pond 19 should not have been subject to any manganese limitations pursuant to 35 Ill. Adm. Code 406.109 because the 2005 CCA designated Pond 19 as a "Reclamation Area." *Id*. at 15-16. Thus,

Freeman United argues all these facts regarding the applicable manganese and pH effluent limitation are in dispute so as to preclude summary judgment. *Id*. at 16.

Next, Freeman United opposes ELPC's motion by arguing that material facts with respect to sixty-nine of the monthly average effluent limitations exceedences alleged by ELPC are disputed. *Id*. Freeman United notes that 35 Ill. Adm. Code 304.104 specifically requires monthly averages to be based on at least three daily composites. *Id*. Freeman United also points out that "35 Ill. Adm. 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". *Id*. at 16-17. Based on these regulations, Freeman United argues that the Board should deny ELPC's motion "for 69 of the 81 alleged violations of the monthly effluent limits where there was not at least three daily composites." *Id*. at 17. As the three proceeding paragraphs demonstrate, Freeman United questions if the violations alleged by ELPC are in fact violations based on these various, disputed, materially factual issues. As such, Freeman United argues that the Board should be precluded from a finding in favor of ELPC's motion for partial summary judgment.

Freeman United's last argument in support of the Board denying ELPC's motion is based on the disputed facts surrounding ELPC's delay in asserting its claims against Freeman United. *Id*. at 17. Freeman United acknowledges that to succeed on a laches defense, it must show ELPC lacked diligence in asserting its claim, and that such behavior resulted in prejudice to Freeman United. *Id*. at 18. Therefore, Freeman United argues that ELPC did not diligently exercise their right to assert these claims against Freeman United because ELPC did not act promptly following Freeman United's DMR submissions, which were all public record. *Id*. Freeman United further claims that it believed, in good ~~faith, that~~faith that at the time IEPA accepted the 2005 and 2007 CCAs all outstanding discharge violations were resolved. *Id*. Therefore, Freeman United argues that it was prejudiced by ELPC's excessive delay because ELPC "remained silent, allowing potential penalties to accrue while Freeman United continued to act in good faith reliance on the State-approved CCAs." *Id*. at 18-19. As such, Freeman United argues that summary judgment should be denied because material facts are disputed regarding whether ELPC failed to diligently assert a claim and whether that lengthy delay prejudiced Freeman United. *Id*. at 19.

ELPC's Reply

ELPC first answers the respondents' claims regarding any factual issues and then addresses the legal arguments put forth by respondents. The Board will summarize each of those in turn.

Factual Issues. ELPC maintains their position that no genuine issues of material facts exist, even with the addition of the respondents' responses that would preclude the Board from granting them summary judgment. ELPC Reply at 6. ELPC asserts that "DMRs are considered by courts to be 'conclusive and irrebuttable evidence that violations have occurred.'" ELPC Reply at 6, *citing* Natural Res. Def. Council, Inc. v. Outboard Marine Corp., 692 F. Supp. 801, 819 (N.D. Ill. 1988); *see also* United States v. Murphy Oil USA, Inc., 143 F. Supp. 3d 1054, 1109 (W.D. Wis. 2001). As such, ELPC argues that there is no disputable material fact at issue since neither respondent has denied the veracity of the data contained in the DMRs. *Id*. at 6.

ELPC addresses Springfield Coal's argument that the difference between the number of violations alleged by the State and by ELPC should preclude the Board from granting the People's or ELPC's motion for summary judgment. *Id*. at 8. ELPC attacks Springfield Coal's argument on the ground that Springfield Coal cites no authority to support its position. *Id*. Further, ELPC points out that both the People and ELPC rely on the undisputed DMRs, which were submitted by the respondents, to support their allegations. *Id*. ELPC explains that the different number of violations alleged is simply a result of using different methods to identify violations. *Id*. But, "[t]he fact that [ELPC] identified more violations than the State does not make the additional violations any less grounded in undisputed fact." *Id*. Thus, ELPC counters Springfield Coal's position by arguing that their more thorough review of the undisputed evidence does not create a genuine issue of material fact. *Id*.

Additionally, ELPC disagrees with Springfield Coal's contention that it should not be held liable for its NPDES permit violations because it has undertaken various measures to comply with its permit. *Id*. ELPC asserts that any efforts made by Springfield Coal to prevent NPDES permit violations do not negate the undisputed fact that the DMRs show that the respondents have violated the terms of their NPDES permit. *Id*. ELPC argues that "[w]hether or not a permittee has tried to comply with the terms of its NPDES permit is not relevant to the question of the permittee's liability for violations that actually occurred under the permit." *Id*. As further support, ELPC points out that the CWA imposes strict liability on violators and that the Act does not consider a polluter's intent when prosecuting offenders. *Id*. at 22. Thus, ELPC argues that, as a matter of law, Springfield Coal's efforts to comply with its NPDES permit do not relieve Springfield Coal from liability for actual permit violations. *Id*.

ELPC's criticizes Freeman United's argument that the doctrine of laches applies. *Id*. ELPC argues that laches cannot be applied here because Freeman United has not alleged sufficient facts to fulfill the two elements of the doctrine, nor any facts to satisfy the laches exception, which narrows the doctrine's applicability against public bodies. *Id*. ELPC supports their position by highlighting the fact that the "Board has declined to apply the doctrine of laches to environmental enforcement cases "unless conduct or special circumstances make it inequitable to grant relief." *Id*., *citing* People v. Envtl. Control and Abatement, Inc., PCB 95-170, slip op at 20-21 (Jan. 4, 1996), *see also* People v. Big O, Inc., PCB 97-130 (Apr. 17, 1997).

ELPC furthers their argument by showing that "federal courts assessing citizen enforcement suits under the Clean Water Act have rejected the doctrine of laches as a bar to enforcement actions." *Id*., *citing* Conn. Fund for Env't, Inc. v. Upjohn Co., 660 F. Supp. 1397, 1413-14 (1987); Student Pub. Interest Research Group of N.J., Inc. v. P.D. Oil & Chem. Storage, Inc., 627 F. Supp. 1074, 1085 (1986); *see also* Hickey v. Illinois Central Railroad Co., 35 Ill. 2d. 427, 447 (1966). Not only did Freeman United's argument fail to allege facts to show that any conduct or special circumstances justify applying laches to this case, but ELPC also argues that Freeman United did not present evidence to support the two laches elements. *Id*. Freeman United attempted to satisfy the first element, petitioners' lack of diligence, by alleging that ELPC waited an unreasonable amount of time before initiating their claim. *Id*. However, ELPC argues that the Act does not provide a statute of limitations for citizen enforcement suits. *Id*. at 23.

Therefore, ELPC asserts that they had the right to bring the claim for violations of the Act, no matter when the violations occurred. *Id*.

In addition to inadequately proving ELPC's lack of diligence, ELPC argues that Freeman United also failed to allege sufficient facts to satisfy the second laches element—the resulting prejudice to Freeman United. *Id*. "Freeman [United]'s only allegation of prejudice is that during this 'unreasonable length of time' Petitioners 'allow[ed] potential penalties to accrue' against Freeman [United]." *Id*., *citing* FResp. to ELPC at 19. ELPC questions the logic of Freeman United's allegation because ELPC has not alleged any additional violations since Freeman United sold the Industry Mine in 2007. *Id*. Furthermore, ELPC asserts that any claims made by Freeman United concerning the CCA in regards to the prejudice they felt have no bearing on ELPC because ELPC was not a party to that agreement. *Id*. Thus, ELPC argues that the Board should not apply the doctrine of laches because Freeman United has not satisfied the required laches elements nor presented sufficient facts to make this claim a disputed material issue. *Id*.

ELPC takes issue with Freeman United and Springfield Coal's arguments that attempt to use this enforcement action to modify the terms of the Industry Mine NPDES permit in a manner that excuses their incompliance. *Id*. ELPC claims that Freeman United and Springfield Coal's arguments are not factual disputes about whether they violated the NPDES permit limits, but rather legal arguments that attempt to relieve themselves of liability. *Id*. As such, ELPC argues that the Board should grant summary judgment in their favor. *Id*. ELPC supports this request with the "well-settled law" "that an NPDES permit is the only means by which the Clean Water Act allows a discharge of pollutants." *Id*., *citing* 33 U.S.C. 1311(a); *see also*, Natural Res. Def. Council, Inc. v. Costle, 568 F. 2d 1374 (D.C. Cir. 1977). ELPC finds additional support in case law that has "rejected attempts to look beyond the NPDES permit for effluent limitations or relief from permit requirements." *Id*. at 8-9, *citing* Wis. Res. Prot. Council v. Flambeau Mining Co., No. 11-cv-45-bbc, slip op at 59-61 (W. D. Wis. Apr. 13, 2012); Waterkeeper Alliance, Inc. v. U.S. EPA, 399 F. 3d 486, 498-503 (2d Cir. 2005); N. Plains Res. Council v. Fidelity Exploration & Dev. Co., 325 F. 3d 1155, 1164 (9th Cir. 2003). And lastly, ELPC supports their position on the grounds that "[t]he law is also clear that an enforcement case is not a forum by which a discharger can modify unsatisfactory terms of an NPDES permit." *Id*. at 9, *citing* NRDC v. Outboard Marine, 692 F. Supp. at 809-815, 818-819, and 823.

ELPC asserts there is no dispute that IEPA did not modify Industry Mine's NPDES according to the only legally proper means prescribed in the permit modification procedures. *Id*. As such, ELPC argues that each legal question Freeman United and Springfield Coal present in attempt to excuse themselves from liability for the alleged permit violations are meritless. *Id*. Furthermore, ELPC claims that by raising these legal questions, Freeman United and Springfield Coal show that they "do not believe they have to comply with the limits contained in the NPDES permit" and "[t]his attitude is but one of the many aggregating factors the Board should consider when assessing the penalties in this case." *Id*.

Legal Arguments. ELPC goes into a detailed explanation of why the legal arguments raised by the respondents have no legal merit to justify excusing them from compliance with the terms and limits of their NPDES permit. ELPC Reply at 8. The Board will briefly summarize each explanation.

Existence of CCA. ELPC disagrees with the respondents' contention that a CCA relieves Freeman United and Springfield Coal of liability for violations of the Industry Mine's NPDES permit. *Id*. at 10. ELPC claims that they are not barred from initiating a citizen enforcement action simply because IEPA has entered into a CCA with the permittee. *Id*. ELPC argues that Section 31 of the Act (415 ILCS 5/31 (2010)) "explicitly encourages citizen suits regardless of what IEPA chooses to do." *Id*. Therefore, ELPC asserts that the plain language of the statute, which does not bar citizen enforcement actions when a CCA exists, makes the respondents' legal argument meritless. *Id*. Further, ELPC argues that a CCA cannot modify the terms of a NPDES permit as the respondents try to argue because the very purpose of a CCA is to "ensure that a violator complies with the terms of its NPDES permit." *Id*. ELPC cites multiple court decisions holding that the terms of a NPDES permit are not replaced by the terms of a CCA. *Id*. at 11, *citing* Riverkeeper, Inc. v. Mirant Lovett, LLC, 675 F. Supp. 2d 337 (S.D.N.Y. 2009); Or. State Pub. Interest Research Group, Inc. v. Pac. Coast Seafoods Co., 361 F. Supp 2d 1232, 1242-43 (D. Or. 2005); Citizens for a Better Env't-Cal v. Union Oil Co. of Cal., 83 F. 3d 1111, 1119 (9th Cir. 1996).

Additionally, ELPC opposes the respondents' claim that a CCA came into effect in 2007 "by operation of law" because neither Freeman United nor Springfield Coal alleged facts to demonstrate that the conditions of Section 31(a)(9) of the Act (415 ILCS 5/31(a)(9) (2010)) were triggered. *Id*. Under the plain language of that provision, ELPC argues that only three instances can initiate an automatic CCA acceptance by IEPA: 1) if a CCA is submitted in written response to a violation notice as prescribed in subsection (a)(2); 2) if a CCA is submitted in written response to a meeting conducted as prescribed in (a)(5); or 3) if a CCA is submitted "within the time period otherwise agreed to in writing by IEPA and the person complained against." *Id*. at 11-12, *citing* 415 ILCS 5/31(a)(9). Because the respondents only alleged that Freeman United sent IEPA a proposed two-year extension, ELPC claims that none of the conditions have been satisfied, so the 2007 proposed CCA cannot be accepted "as a matter of law". *Id*. at 12.

Moreover, ELPC asserts that the respondents do not cite any law to support that the 2007 CCA, which was proposed by Freeman United, would automatically transfer to Springfield Coal upon the transfer of ownership of the Industry Mine. *Id*. Thus, ELPC argues that even if the Board finds that the 2007 CCA existed, it would have no effect on the case because Freeman United sold the property a day after the CCA would have allegedly become effective without first obtaining a formal amendment to include Springfield Coal as a party to the agreement. *Id*.

ELPC also raises an argument regarding the respondents' contentions that a CCA does not extend to violations that were not addressed in the NOV or CCA. *Id*. ELPC cites various sections of Section 31 of the Act (415 ILCS 5/31 (2010)) to support that Freeman United and Springfield Coal "cannot claim universal immunity for violations not addressed by the CCA." *Id*. Thus, ELPC claims that the respondents are only immune from IEPA referring matters concerning three manganese violations from Outfall 019 in 2004, because those were the only violations addressed in the 2005 NOV and CCA. *Id*. And as discussed above, ELPC maintains that the CCA does not affect their ability to file a citizen enforcement action, regardless of any CCA agreement. *Id*. at 13. Therefore, ELPC asserts that all of Freeman United and Springfield

Coal's legal arguments concerning a CCA are meritless, such that the Board shall grant summary judgment in ELPC's favor.

Monthly Averaging Limits. ELPC notes that "Springfield Coal and Freeman [United] argue that they should not be held liable for violations of monthly average effluent limitations when they took only one or two samples of a parameter in a given month." *Id*. ELPC disagrees with this position, claiming that the argument does not raise a genuine issue of material fact with respect to the number of samples actually reported in the DMRs. *Id*. ELPC argues that the plain language of the regulations the respondents use to support their theory clearly requires three samples to be taken, and never "purports to excuse violations of the monthly average when fewer than three samples are taken." *Id*., *citing* 35 Ill. Adm. Code 406.101; 304.106(b)(1). ELPC argues that to read these regulations as a liability loophole would be against good policy because it would enable a permittee to intentionally avoid taking a third sample in order to waive the monthly effluent limitation in their NPDES permit. *Id*. at 13.

ELPC also cites to the averaging rules under the federal CWA, which does not allow an exception for permittees to avoid compliance with monthly effluent limitations. *Id*. at 13, *citing* Natural Res. Def. Council, Inc. v. Outboard Marine Corp., 692 F. Supp. 801, 821 (N.D. Ill. 1988). And lastly, ELPC cites the language of the Industry Mine NPDES permit, which never references an exception to the average monthly discharge limitation based on the number of samples collected. *Id*. at 14. Therefore, ELPC claims that the respondents' theory is not only meritless, but because the respondents have failed to collect at least three samples, the Board may even find that the Freeman United and Springfield Coal are also liable for a monitoring or reporting violation, "in addition to the discharge violations proven by such samples." *Id*.

Sulfate Standard. ELPC rejects the argument that the new sulfate standard overrides the sulfate effluent limit in the Industry Mine NPDES permit, such that respondents should not be held accountable for violations of the sulfate limit set in their NPDES permit. *Id*. ELPC highlights the fact that the Board did not officially modify the sulfate standard until 2008, which was over a year after Freeman United sold the Industry Mine. *Id*. Thus, ELPC argues that Freeman United is clearly liable for the sulfate violations that occurred under its ownership because allowing Freeman United to ignore its permit limit "merely because a revised water quality standard was under consideration is not justified by law or science." *Id*.

In addition, ELPC argues that Springfield Coal is liable for all effluent sulfate violations that occurred before and after the new standard became effective. *Id*. ELPC reiterates that the only way a NPDES permit can be modified is through the explicit permit modification procedures, which, according to Austin's affidavit, have not been done for the Industry Mine permit. *Id* at 14-15. Furthermore, ELPC cites the permit modification provisions in the Industry Mine NPDES permit, the federal regulations, and the Illinois regulations, to demonstrate that a permittee cannot unilaterally decide that it does not need to comply with its NPDES effluent limitations. *Id*. at 15. Accordingly, ELPC asserts that "[n]o provision in the regulations mandates that permit terms be modified, . . . allows for automatic modification of NPDES effluent limits when new regulations are adopted, . . . [or] excuses violations of effluent limitations when a water quality standard is revised." *Id*. at 15-16, *citing* 40 CFR 122.62(a), 35

Ill. Adm. Code 405.103, Standard Condition 6 of the NPDES Permit at 25. Thus, ELPC declares that the respondents' arguments on this issue are not grounded in law. *Id*. at 16.

Moreover, as a policy matter, ELPC claims that the respondents' idea of an automatic permit modification upon the adoption of a new standard would be unworkable due, in part, to the difficulty in notifying all the affected permittees, and the complexity of the effluent limitation calculation and corresponding considerations. *Id*. Therefore, ELPC argues that the respondents' arguments regarding the sulfate violations are meritless.

Manganese and pH Limits. ELPC claims that Freeman United and Springfield Coal wrongfully cite Section 406.106(b)(2) (35 Ill. Adm. Code 406.106(b)(2)) as the legal authority excusing them from complying with the manganese and pH limitations set in their NPDES permit. *Id*. This is because, "[a]s a matter of law, no source outside of the NPDES permit can modify or eliminate the effluent limits contained therein." *Id*. ELPC describes the permit writing process and notes that it is perfectly acceptable that some of the Illinois regulations pertaining to the NPDES program are included in the Industry Mine NPDES permit, others are not. *Id*. at 17. Under this system, ELPC asserts that it is not the state's regulations that control a permittee's behavior, but rather the NPDES permit, which results from the permit writer's evaluation of the site. *Id*. Thus, ELPC argues that the respondents' arguments on this issue is meritless because the Industry Mine NPDES permit does not contain any exception to the manganese or pH limit, nor does it explicitly incorporate the language from Section 406.106(b)(2) 35 Ill. Adm. Code 406.106(b)(2).

Existing Background Levels. ELPC claims that Section 406.103 (35 Ill. Adm. Code 406.103) is merely an effluent limitation standard that permit writers review and consider when drafting NPDES permits, but are not required to incorporate into all permits. *Id*. ELPC asserts that when the Industry Mine NPDES permit was last reissued in 2003, the alleged background concentrations were known. *Id*. at 18. "Nevertheless, the NPDES permit does not contain a special condition exempting the Industry Mine from its effluent limits on account of background concentrations." *Id*. Furthermore, ELPC points out that even if Section 406.103 was applicable to the conditions at the Industry Mine, the regulation would not eliminate effluent limitations altogether, but instead authorize the permit writer to set an alternative limit based on her evaluations. *Id*., *citing*35 Ill. Adm. Code 406.103.

And lastly, ELPC argues that were Section 406.103 to apply to the Industry Mine, the respondents still did not allege enough facts to satisfy the terms of the regulation. *Id*. This is because the regulation places a hefty burden on the respondents to overcome the "rebuttable presumption that background concentrations or discharges upstream are not the cause of violations of the effluent standards in Part 406." *Id*. ELPC asserts that the summary judgment stage of the proceeding is the proper place to consider any legal question, such as this rebuttable presumption. *Id*., *citing* Wausau Ins. Co. v. All Chicagoland Moving & Storage Co., 333 Ill. App. 3d 1116, 1120 (2d. Dist. 2002). But, ELPC argues that the "respondents have not even alleged facts that fit the terms of the regulation, let alone facts sufficient to overcome the rebuttable presumption." *Id*. at 19. Therefore, ELPC argues that the respondents' theory on this issue is meritless because background concentrations of pollutants do not excuse NPDES effluent limitation violations. *Id*.

Outfall 019. Freeman United believes it should not be held liable for manganese violations at Outfall 019 because that Outfall was identified as a "Reclamation Area" in the 2005 CCA. *Id*. Under this label, Freeman United argues that Outfall 019 was only required to meet alternative "Reclamation Area Drainage" effluent limits, rather than the limitations provided in its NPDES permit. *Id*. To the contrary, ELPC claims that Outfall 019 was never properly re-designated as a "Reclamation Area Discharge" because the formal re-designation process set out in Special Condition 8 of the NPDES Permit was never followed. *Id*. ELPC argues that Freeman United's use of the CCA to prove the status of Outfall 019 does not meet the legal requirements detailed in their NPDES permit, which include submitting a re-designation application and obtaining IEPA's approval. *Id*. Therefore, ELPC argues that Freeman United's argument has no legal basis, such that is fully accountable for the manganese permit limit violations at Outfall 019. *Id*.

ELPC claims that three of the discrepancies are merely transcription errors because the violations were written under the Outfall 017 column, but were actually meant for the Outfall 018 column, as proven by the DMRs. *Id*. at 21. As such, ELPC corrected the error and it is reflected in Exhibit 3 of their reply to Freeman United and Springfield Coal's response. *Id*. Next, ELPC addresses Springfield Coal's claim that the pH value from Outfall 019 in January 2010 should be 8.38, rather than the 9.04 that ELPC included in its original table of NPDES violations at Industry Mine. *Id*. However, ELPC argues that Springfield Coal cited no authority to substantiate the 8.38, whereas the DMR clearly shows a value of 9.04. *Id*. Therefore, ELPC claims that there is no factual discrepancy on this issue, and Springfield Coal is clearly liable for the pH violation. *Id*. ELPC acknowledges their mistake with regards to the September 2010 violation alleged for sulfate from Outfall 009. *Id*. ELPC concedes that Springfield correctly pointed out that there is no average limit for sulfate, so that this alleged violation at Outfall 009 was not in fact a violation. *Id*. ELPC corrected this mistake in its attached violation table and reduced the overall number of violations against Springfield from 342 to 341. *Id*. Overall, ELPC argues that all of the legal questions the respondents' presented in attempt to relieve themselves from liability are meritless, such that the Board should grant ELPC summary judgment.

Springfield Coal's Surreply

Springfield Coal's surreply alleges that ELPC's reply "contains many inaccuracies and mischaracterizations that cannot go unaddressed." Springfield Counter-Reply to ELPC Reply at 1. The Board will summarize the arguments Springfield Coal makes in its surreply to the arguments made in ELPC's reply. Each summary will include the relief Springfield Coal seeks from the Board.

Factual Discrepancies. Springfield Coal argues that ELPC did not provided evidence to dispute the substantial discrepancy between the number of violations alleged against Springfield Coal by ELPC as compared to the number alleged by the People. SSurReply to ELPC Reply at 2. Rather, Springfield Coal claims that the Board should not grant ELPC summary judgment because ELPC's reply actually emphasizes that a significant factual dispute exists with regard to this issue. *Id*. For instance, Springfield Coal highlights ELPC's acknowledgment that both they

and the People determined the number of alleged violations based on the same DMRs. *Id*. But also, ELPC suggests that the State "did a less than adequate job in reviewing the documents" as compared to their own "'painstaking review'". *Id*. In contrast, Springfield Coal doubts that the People did not do a painstaking review of the DMRs because this obligation falls under IEPA and the Illinois Attorney General legal duty of enforcing the Act. *Id*.

Furthermore, Springfield Coal points out that even under ELPC's 'painstaking review', ELPC admitted to making errors in their original motion for summary judgment. *Id*. Thus, Springfield Coal asserts that it is not the degree of review that precludes the entry of summary judgment, but the fact that reasonable people cannot agree on the correct number of alleged violations. *Id*. at 4. Springfield Coal drives home its point by citing case law that "supports the Board denying [ELPC's] motion for summary judgment because, at a minimum, the State and [ELPC] are reviewing the same documents but are arriving at strikingly different conclusions as to the number of alleged violations." *Id*. at 4, *see* Robinson v. Builders Supply & Lumber Co., 223 Ill. App. 3d 1007, 1013-14 (Ill. App. Ct. 1991); *see also* Beverly Bank v. Alsip Bank, 106 Ill. App. 3d 1012, 1017 (Ill. App. Ct. 1982). Therefore, Springfield Coal argues that the significant difference between the number of alleged violation by ELPC and the number alleged by the People is the prime example of a genuine issue of material fact, such that summary judgment in favor of ELPC is unwarranted. *Id*. at 4.

CCA Created. Springfield Coal also claims there are significant facts in dispute with respect to whether the 2007 CCA was properly created and amended. *Id*. at 7. Springfield Coal disagrees with ELPC's contention that the August 30, 2007 CCA did not exists because it did not meet the statutory requirements of Section 31(a)(9) of the Act (415 ILCS 5/31(a)(9)). *Id*. at 5. Springfield Coal criticizes ELPC for looking at the current statute that was amended on August 23, 2011, rather than the law in place in 2007 when the CCA proposal was submitted. *Id*. Springfield Coal argues that under the applicable 2007 statute, the 2007 CCA proposal "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 IEPA and the person complained against.'" *Id*. at 6. Although ELPC claims that a mutually agreed upon time period, as required by the statute, never occurred in this circumstance, Springfield Coal rebuts their contention by chronicling the 2007 letters between Freeman United and IEPA. *Id*. at 5. Springfield Coal asserts that on July 13, 2007, IEPA "formally invited Freeman United to submit an 'acceptable CCA extension'" and, in return, Freeman United sent a revised CCA proposal request on August 30, 2007. *Id*. Springfield Coal claims IEPA's July 13, 2007 letter specifically said, "if you wish to submit a further proposal to resolve this matter short of formal enforcement, please do so by September 1, 2007.'" *Id*. Therefore, Springfield Coal not only claims that the IEPA expected to receive the 2007 CCA proposal, but that the CCA submission was timely and agreed upon in writing as the statute requires. *Id*. at 6.

CCA Transferred. Springfield Coal further opposes ELPC's argument that the 2007 CCA was not properly transferred from Freeman United to Springfield Coal because the formal CCA amendment procedures were not followed. *Id*. Springfield Coal supports its opposition by highlighting the undisputed fact that no language in the statute prevents a prior owner from assigning a CAA to the new owner at the time of the sale. *Id*. Moreover, Springfield Coal asserts that ELPC's claim regarding the CCA's transfer only spawns more questions of fact as to

when a CCA becomes effective. *Id*. Therefore, Springfield Coal argues that numerous factual discrepancies surround the 2007 CCA existence and application so that the Board should deny ELPC's motion for summary judgment. *Id*. at 7.

ELPC Prevented from Pursuing Violations. Next, in contrast to ELPC's position, Springfield Coal argues that the law does prevent ELPC from pursuing violations that are the subject of a CCA. *Id*. Springfield Coal claims that ELPC misconstrues the citizen suit provision provided in Section 31(d)(1) of the Act (415 ILCS 5/31(d)(1) (2010)) because ELPC read the statue as a broad grant of enforcement authority, unrestricted by the limitation that affects the State's enforcement authority when a CCA exists. *Id*. Springfield Coal claims that the power granted in Section 31(d)(1) of the Act (415 ILCS 5/31(d)(1) (2010)) is curtailed by the language requiring citizen complaints to meet the requirements of Section 31(c) of the Act (415 ILCS 5/31(c) (2010)). *Id*. And, under Section 31(c), a written notice and formal complaint can only be issued for "alleged violations which remain the subject of disagreement between IEPA and the person complained against." *Id*., *citing* 414 ILCS 5/31(c)(1) (2010). Therefore, Springfield Coal maintains that ELPC cannot enforce the violations that were the subject of the CCA because the successful completion of the CCA eliminates those violations from those that "remain the subject of disagreement." *Id*.

As opposed to ELPC's interpretation of the Act, Springfield Coal adds that its interpretation of the citizen suit provision makes common sense because it properly distributes more enforcement power to the State than to citizens and facilitates the CCA's purpose of allowing violators to work with IEPA to come into compliance. *Id*. at 8. Springfield Coal argues that "allowing a citizen to bring such an action during the time of a CCA would run counter to the requirement in Section 31(d) of the Act (415 ILCS 5/31(d) (2010)) which precludes claims by the individual which are 'duplicative.'" *Id*. at 8. Thus, Springfield Coal argues that ELPC should not be allowed to pursue the violations that were the subject of the CCA. *Id*.

Limited Scope of CCA. Springfield Coal disagrees with ELPC's assertion that even if the CCAs are enforceable, their scope is limited to the three manganese violations at Outfall 019 which were identified in the March 11, 2005 NOV. *Id*. Springfield Coal acknowledges that the statute restricting IEPA from referring all "alleged violations which are the subject of the Compliance Commitment Agreement to the Office of the Illinois Attorney . . ." is vague and not clarified by any judicial or Board decision. *Id*. at 8-9, *citing* 415 ILCS 5/31(a)(10) (2010). But, Springfield Coal interprets this provision as applying to all violations which occurred during either two-year period when there was a CCA in effect. *Id*. at 9. Springfield Coal supports this claim by noting that "a CCA is not a one-time event, but it is a process which lasts over a period of time." *Id*. Furthermore, Springfield Coal alleges that IEPA's own statements to Freeman United and/or Springfield Coal concerning the CCAs prove that the IEPA knew the alleged violations, for which Section 31(a)(1) of the Act (415 ILCS 5/31(a)(1) 2010)) applies, include more than just the manganese violations at Outfall 019. *Id*., *citing* 415 ILCS 5/31(a)(10) (2010). Springfield Coal supports this contention using the IEPA own words from their July 13, 2007 letter, which invited Freeman United to submit a "'CCA Extension request'" that "'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 standard violations.'" *Id*. (emphasis in the original). Therefore, Springfield Coal argues

that the 2005 and 2007 CCAs' reach all related violations at the Industry Mine that occurred during either CCAs' applicable terms, so that ELPC should be precluded from enforcing these violations in their claim. *Id*.

Exception for Monthly Average. Next, Springfield Coal disagrees with ELPC's argument that Section 406.101 (35 Ill. Adm. Code 406.101) does not provide an exception for monthly average effluent limitation violations when less than three samples are taken. *Id*. at 10. In contrast, Springfield Coal argues that Section 406.101 does provide this exception because 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.'" *Id*., *citing* 35 Ill. Adm. Code 406.101. Thus, Springfield Coal claims it cannot be held liable for many of the monthly average limitation violations alleged against it because the necessary three or more samples were not taken to in order to evaluate Springfield Coal's compliance on this matter. *Id*.

Furthermore, Springfield Coal claims that ELPC's argument on this issue actually spurs more issues of material fact. *Id*. For example, Springfield Coal alleges that ELPC's reply raises the factual inquiry of whether Springfield Coal met the NPDES permit's minimum number of collected samples during each quarter; and if not, whether the ponds were actively discharging during such time. *Id*. Lastly, Springfield Coal criticizes ELPC's argument that the effluent standard regulations do not apply to Springfield Coal or Freeman United. *Id*. To the contrary, Springfield Coal asserts that there is "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 operations in Illinois." *Id*. at 10-11. Thus, Springfield Coal argues that Section 406.101(b) specifically provides it with a defense against ELPC's claim that Springfield Coal's compliance with the monthly average effluent limitation can be determined using only one grab sample from the entire month. *Id*. at 11, *citing* 35 Ill. Adm. Code 406.101(b). Therefore, Springfield Coal argues that ELPC should be barred from enforcing the alleged monthly average limit violations when less than the requisite three grab samples were taken in the month. *Id*. at 11. Springfield Coal concludes its argument on this matter by claiming that this same reasoning can be applied to show that Springfield Coal may also legally invoke the defenses provided for in "the alternative effluent limits for pH and manganese (§406.106), and background concentrations (§406.103)." *Id*. at 11, *see* 35 Ill. Adm. Code 406.103; 406.106.

Background Concentrations. Springfield Coal argues, contrary to ELPC's assertion, that Springfield Coal did present sufficient evidence concerning the background concentrations of constituents to overcome the rebuttable presumption set out in 35 Ill. Adm. Code 406.103. *Id*. at 11. Springfield Coal claims that the evidence required to defeat a rebuttable presumption at the summary judgment stage is extremely low. *Id*. Springfield Coal emphasizes that the two cases ELPC relied upon to support their position resulted in a grant of summary judgment due to the non-moving party's failure to introduce any evidence to refute the respective rebuttable presumption in each case. *Id*, *citing* Smith v. Tri-R Vending, 249 Ill. App. 3d 654 (1993); Wausau Ins. Co. v. All Chicagoland Moving & Storage Co., 333 Ill. App. 3d 1116 (2nd Dist. 2002) (original emphasis included). However, Springfield Coal argues that these decisions actually support Springfield Coal's position because by applying the same logic, a court faced with even the smallest amount of evidence disproving a rebuttable presumption should not grant summary judgment. *Id*. at 12.

Furthermore, Springfield Coal state, "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." *Id*., *see* Francisco Sisters Health Care Corp. v. Dean, 95 Ill. 2d 452 (1983). In order to eliminate repetition, but still allow the Board to review the various facts showing that background concentrations of constituents may be responsible for the effluent limitation exceedences at the Industry Mine, Springfield Coal refers the Board back to the facts presented in Springfield Coal's response to the People's motion and its response to ELPC's motion. *Id*. at 12, *citing* SResp. to People at 14-17; SResp. to ELPC at 20-23. In light of these facts, Springfield Coal argues that summary judgment in favor of ELPC is not warranted because Springfield Coal has sufficiently presented facts to overcome the rebuttable presumption; or in the very least, has demonstrated the existence of a genuine issue of material fact. *Id*.

Outfall 19. Springfield Coal argues that it is not liable for any exceedences of the NPDES permit's manganese effluent limitation that occurred after 2005 at Outfall 019. *Id*. at 13. Springfield Coal claims that the procedures set out in Special Condition 8 of the NPDES Permit to designate a change in outfall status were met. *Id*. Thereby, Springfield Coal claims Outfall 019 should not be held accountable for meeting the NPDES permit's manganese effluent limitation because this Outfall was properly designated as 'Reclamation Area Drainage.' *Id*. at 13. Springfield Coal explains that Special Condition 8 requires a permittee to apply for an outfall status change, and mandates that IEPA approve the requested change. *Id*., *citing* Special Condition 8 of the NPDES Permit. Springfield Coal demonstrates that the application step was satisfied by highlighting Freeman United's May 2005 letter to IEPA, in which Freeman United requested that IEPA change Outfall 019's status to 'Reclamation Area Drainage'. *Id*. at 13. Then, Springfield Coal points out that in response to Freeman United's letter IEPA accepted the 2005 CCA "and therefore approved of Outfall 019 being moved into Reclamation Area Drainage status." *Id*., *see* SResp. to People at Exhibit 1C.

Springfield Coal further argues that the approval of Outfall 019's status change is in no way diminished by the fact that IEPA's acceptance of the 2005 CCA added the requirement that the Permittee continue monitoring and reporting the manganese discharges at Outfall 019. *Id*. Therefore, Springfield Coal argues that it should not be held accountable for effluent manganese limit exceedences at Outfall 019 that occurred after 2005 because the procedures for designating that outfall into Reclamation Area Drainage status were properly followed so as to relieve Outfall 019 from the manganese effluent limitation set in Industry Mine's NPDES Permit. *Id*. at 13-14.

Freeman United's Surreply

In its surreply, Freeman United argues that six significant factual disputes remain with regard to the NPDES violations ELPC alleges against Freeman United. Freeman Counter-Reply to ELPC at 2. The Board will summarize each below.

CCA. Freeman United disagrees with ELPC's belief that the CCA only limits Illinois environmental enforcement actions brought by IEPA, and not actions brought by citizens. *Id*. at 3. Freeman United claims that ELPC is essentially arguing that their power as a citizen enforcer

of the Act reaches further than the power invested in IEPA. *Id*. Not only does Freeman United argue to the contrary, but Freeman United also argues that the provision used by ELPC to support their belief, Section 31(d)(1) of the Act (415 ILCS 5/31(d)(1) 2010)), actually "contains a restriction which applies to private citizens when a CCA is in place." *Id*. Specifically, Freeman United cites the language in Section 31(d)(1) of the Act (415 ILCS 5/31(d)(1) (010)) that allows "any person to file with the Board a complaint, meeting the requirements of subsection (c) of this Section." *Id*., *citing* 415 ILCS 5/31(d)(1) (2010). Freeman United argues the violations that were the subject of the CCA, which ELPC alleges against Freeman United do not meet the requirements of subsection (c) as the Act's citizen enforcement provision requires. *Id*., *citing* 415 ILCS 5/31(c)(1), (d)(1) (2010). Freeman United cites the preface of subsection (c) to show that the violations that were the subject of the successfully completed CCA do not "'remain the subject of disagreement between IEPA and the person complained against.'" As such, Freeman United asserts that ELPC should be barred from alleging these violations against Freeman United. *Id*.

Freeman United claims that its interpretation of the Act is logical because it properly distributes more enforcement authority to the State than to citizens. *Id*. at 4. Furthermore, Freeman United asserts as a policy argument that allowing citizens to enforce violations that were addressed in CCAs "would significantly undermine the incentive for regulated entities to enter into CCAs with the [IEPA]." *Id*. Following this reasoning, Freeman United argues that ELPC's authority under the Act with regard to enforcing violations that were the subject of a CCA is a disputed significant factual issue that should preclude summary judgment in favor of ELPC. *Id*.

Monthly Averages. Freeman United maintains its position that ELPC should be barred from asserting average effluent violations for the months when less than three samples were taken. *Id*. Freeman United argues that ELPC never alleges facts to refute that sixty-nine of the monthly effluent violations alleged against Freeman United were based on months where less than three samples were taken; instead, ELPC's support relies solely on the fact that 35 Ill. Adm. Code 406.101 does not have an exception for monthly effluent exceedences when fewer than three samples are taken. *Id*. at 5. Freeman United asserts ELPC is not entitled to summary judgment on the sixty-nine alleged violations without evidence to rebut the fact these alleged violations occurred when less than three samples were taken per month,. *Id*.

In addition, Freeman United denies ELPC's allegation that Freeman United intentionally took less than three samples per month in order to avoid liability for monthly average exceedences under Freeman's interpretation of the law. *Id*. Freeman United argues ELPC's accusation is baseless because it "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." *Id*., *citing* June 6, 2012, Austin Affidavit B, ¶9. Overall, Freeman United argues that ELPC should not be granted summary judgment on the 69 alleged monthly average effluent violations against Freeman United because whether less than three samples were taken during these months remains a disputed significant fact. *Id*.

Sulfate Limits. Freeman United also argues that ELPC is not entitled to summary judgment on 38 alleged sulfate limit violations because ELPC failed to rebut Freeman United's evidence that meeting the sulfate limit in its NPDES permit would not be technically or economically feasible. *Id*. at 6. Freeman United criticizes ELPC's reliance on their assertion that NPDES permit compliance can only be measured by a permittee's adherence to the permit's terms and conditions. *Id*. To contrast this logic and further support the impracticability of meeting its NPDES sulfate limit, Freeman United notes "that a permit renewal application has been sitting on [the IEPA]'s desk for almost a decade." *Id*. Therefore, Freeman United argues the Board should not grant ELPC summary judgment with regards to the 38 alleged sulfate violations because they have made no effort to rebut the evidence that the sulfate limit in the Industry Mine NPDES permit is technically and economically impractical. *Id*.

Manganese and pH Limits. Freeman United claims that there are disputed material facts surrounding the manganese and pH limits in the Industry Mine NPDES permit which should prevent the Board from granting ELPC summary judgment. *Id*. Freeman United uses Austin's affidavit to support that the material facts related to Industry Mine's NPDES manganese and pH effluent limitations are disputed. *Id*. Freeman United highlights that ELPC did not present any factual allegations to challenge Austin's affidavit, but instead "seek to introduce as fact what it believes the intent of [the IEPA]'s permit writer was when the permit was issued." *Id*., *citing* ELPC Reply to Freeman and Springfield at 14. Freeman United argues that this support is inadmissible because it merely reflects ELPC's beliefs, rather than concrete knowledge or facts. *Id*. at 6. Thus, Freeman United maintains its position that there are disputed issues of material fact regarding the alleged manganese and pH effluent limit violations, such that ELPC is not entitled to summary judgment on those claims. *Id*. at 7.

Background Concentrations. Freeman United argues that disputed issues of fact exist with respect to whether the background concentrations of contaminants in the receiving streams played any role in causing the effluent limitation violations at the Industry Mine. *Id*. Freeman United asserts that ELPC presented no factual evidence to support their theory that the NPDES permit writer was aware and considered the background contaminant concentrations when issuing the Industry Mine's original NPDES permit in 2003. *Id*. Moreover, Freeman United claims that the Board should discount ELPC's theory altogether because what ELPC thinks the permit writer knew and considered at that time is inadmissible evidence. *Id*.

Furthermore, Freeman United argues that ELPC "make no effort to rebut the evidence previously provided by Freeman United that certain background concentrations did in fact exceed the effluent limits in the Industry Mine's NPDES permit." *Id*. at 7-8, *citing* Austin Affidavit. A, ¶11, 22-24 and Exhs. 1D, 1J-1M; Austin Affidavit B ¶10, 11. Instead, ELPC simply claims that Freeman United failed to satisfy the regulation's rebuttable presumption by showing which of the alleged violations were caused by background concentrations or discharges upstream as. *Id*. at 8, *citing* ELPC Reply to Freeman and Springfield at 15. However, Freeman United asserts that this "burden does not fall on Freeman United; rather the burden falls on [ELPC]." *Id*. at 8. Thereby, Freeman United claims that ELPC is not entitled to assert their claim because they have not made any efforts to meet this burden with factual evidence. *Id*. at 8. To conclude Freeman United's arguments, Freeman United asks the Board to deny summary

judgment on all counts of ELPC's complaint because significant material facts remain in dispute. *Id*.

Laches. Freeman United asserts that there are disputed material facts regarding its laches claim such that the Board should deny ELPC's partial summary judgment motion. *Id*. Freeman United highlights ELPC's admission that they stand in the shoes of the Illinois Attorney General. *Id*. at 8, *citing* ELPC Reply to Freeman and Springfield at18. Following this acknowledgment, Freeman United argues that ELPC's claims are barred by laches by incorporating the same reasons Freeman United used to support that the State's claim should be barred by laches in its combined motion and response to the People. *Id*. at 8, *citing* FResp. to People at 13-15. Therefore, Freeman United argues that ELPC's motion should be denied because Freeman United's laches claim raises disputed material facts with regard to whether ELPC's action lacked diligence in a manner resulting in prejudice to Freeman United. *Id*. at 8.

Board Analysis and Findings

Below, the Board will first look to whether genuine issues of material fact exist in regards to the NPDES permit violations. Only if there are no issues of material fact will the Board turn to whether ELPC has proven they are entitled to judgment as a matter of law.

Issues of Material Fact

While ELPC argues that there is no issue of material fact with regard to the NPDES permit violations at the Industry Mine and that they are entitled to summary judgment on Count II as a matter of law, both Springfield Coal and Freeman United disagree and claim that there are genuine issues of fact remaining to be decided. ELPC relies solely on the undisputed data in the DMRs to support the violations in their complaint. ELPC argues that no material facts existed in regard to the respondents' liability for NPDES permit violations because both respondents essentially admitted these violations when they signed and submitted the DMRs from the Industry Mine to IEPA.

On the other hand, both Springfield Coal and Freeman United rely on supplementary documents, regulations, and doctrines to allege that material facts are disputed in order to negate their liability for the NPDES permit violations. Both Springfield Coal and Freeman United argue that there is a high standard of review for summary judgment and that standard requires the Board to construe evidence in favor of the respondents when determining if there is an issue of material fact.

Both respondents present similar arguments attempting to show that disputed material facts exist with regard to:

1) whether the 2007 CCA existed and the impact of the CCAs;

2) whether the amended Illinois sulfate effluent limitation had any effect on the sulfate effluent limit in the Industry Mine permit;

3) whether background concentrations of constituents in the streams at the Industry Mine caused many of the violations alleged against the respondents;

4) whether the manganese and pH effluent limitations in the Industry Mine NPDES permit were enforceable in light of the regulatory provisions in Sections 406.106 and 406.109 (35 Ill. Adm. Code 406.106 and 406.109).

ELPC disagrees with Freeman United and Springfield Coal's assertions. ELPC claims that these alleged issues of material fact are nothing more than questions of law used by the respondents as an excuse for failing to comply with the terms of the Industry Mine NPDES permit. Specifically, ELPC argues that whether the 2007 CCA existed has no effect on the fact that the Industry Mine NPDES permit was violated. Similarly, ELPC argues that the amended sulfate limit does not change the fact that the sulfate limit in the Industry Mine NPDES permit was violated. ELPC also asserts that whether background concentrations affect the streams at the Industry Mine does not change the reality that the limits in the Industry Mine NPDES permit were exceeded. And lastly, ELPC argues that regulatory provisions relating to NPDES permits for mining facilities are not required to be included in every mining facility's NPDES permit; since Sections 406.106 and 406.109 (35 Ill. Adm. Code 406.106 and 406.109) were not written into the terms of the Industry Mine NPDES permit, these provisions do not affect the fact that the manganese and pH limits set in the Industry Mine NPDES permit were violated.

In addition to the common arguments both respondents made in their respective responses concerning material issues of fact, each respondent also made their own additional attacks on ELPC's motion. Freeman United also argued that material facts were disputed with regard to whether Outfall 019 was designated a 'Reclamation Area' and whether ELPC's long delay in enforcing these violations prejudiced Freeman United so as to satisfy both elements of a laches defense.

Springfield Coal's response contended that material facts existed with respect to: the degree of effort Springfield Coal made to be in compliance; whether 61 of the alleged monthly average effluent limit violations are in fact violation since less than three samples were taken to calculate the monthly average, and; whether discrepancy between the number of violations alleged by the People and by ELPC is material to the partial summary judgment motion.

ELPC responded to these separate arguments asserting that these additional arguments are nothing more than legal questions that can be properly resolved by the Board granting their motion for partial summary judgment. ELPC asserts that the status of Outfall 019 does not disprove that manganese discharges at Outfall 019 violated the terms of the Industry Mine NPDES permit. Furthermore, ELPC argues that Freeman United's Outfall 019 argument is baseless because a CCA approval does not meet the Industry Mine NPDES permit's explicit requirements to re-designate the status of an Outfall. As for Freeman United's claim that disputed material facts remain concerning ELPC's diligence in asserting this action, ELPC contends that such a question is not material because the Act does not restrict citizen suits with a statute of limitations. Furthermore, Freeman United failed to allege facts to demonstrate that a special circumstance exists to justify applying the doctrine of laches to an environmental

enforcement case. Therefore, ELPC disputes Freeman United's additional arguments regarding the alleged material issues surrounding the Industry Mine NPDES permit violations.

In response to Springfield Coal's remaining arguments, ELPC maintains their assertion that no genuine issues of material fact exist to preclude their motion for summary judgment. Although Springfield Coal argues it has made efforts to be in compliance with its NPDES permit, ELPC contends that such efforts do not affect Springfield Coal's liability for violating the NPDES permit limits. Moreover, ELPC argues that the fact Springfield Coal keeps violating its NPDES permit even after this action was filed, shows Springfield Coal's blatant disregard for the law. In response to Springfield Coal's argument regarding whether a monthly average effluent limit violation must be based on three samples, ELPC argues that this is merely a question of law, rather than a disputed material fact. And, ELPC asserts that the law would be worthless if it allowed permit holders to avoid average monthly effluent liability by simply taking less than the three required monthly samples. And lastly, ELPC opposes Springfield Coal's argument that the discrepancy in the number of violations alleged by the People and by ELPC is a materially disputed fact. ELPC argues that the additional violations they alleged against the respondents are not any less grounded in undisputed fact just because they used different methods than the State to assess the same DMRs. Therefore, ELPC maintain that no disputed material facts exist with respect to the NPDES permit violations at the Industry Mine.

Board Analysis. Considering the pleadings as it must, strictly against ELPC, the Board concludes that there is no genuine issue of material fact with regard to the issue of NPDES permit violations. Although Freeman United and Springfield Coal raise questions concerning the enforceability of the Industry Mine NPDES permit, the Board finds that these are merely questions of law because they do not attempt to dispute any data in the DMRs, which prove that 624 violations have occurred at the Industry Mine. The arguments regarding things such as enforceability of provisions, impact of background concentrations, and the effect of CCAs are issues to be considered in determining appropriate penalty. The arguments do not alter the fact that the DMRs, signed by the companies, establish violations of the permit limits. Accordingly, the Board finds no genuine issue of material facts as to all the violations alleged by ELPC in Counts II.

Summary Judgment

The Board turns to whether ELPC proved they are entitled to summary judgment as a matter of law. The law provides that liability for violating Section 12(f) of the Act is proven if petitioners demonstrate through evidence in the record that the respondents "cause[d] or allow[ed] the discharge of any contaminants into waters of the State . . . in violation of any term or condition imposed by [an NPDES] permit." 415 ILCS 5/12(f) (2010). Here, ELPC relies on its own comparison of the data provided in the DMRs with the terms of the Industry Mine NPDES permit as the sole evidence that the violations have occurred. The Board finds that this DMR evidence provided by ELPC is sufficient to conclude that the violations by the respondents at the Industry Mine did in fact occur. *See* Natural Res. Def. Council, Inc. v. Outboard Marine Corp., 692 F. Supp. 801, 819 (N.D. Ill. 1988) (where the court recognized DMRs as "conclusive and irrebuttable evidence that violations have occurred").

As to the arguments concerning Outfall 19 and manganese and pH limits made by respondents, the Board has reviewed the Industry Mine NPDES permit. The permit includes specific numerical limits for pH ("not less than 6.0 nor greater than 9.0") and manganese (30-day average 2.0, daily maximum 4.0). *See* NPDES permit (attached to People's Motion) 2-5. The NPDES permit does not include language from Section 406.106(b)(2). Furthermore, a review of the permit establishes that there is no reference to Outfall 019 becoming a reclamation area. Therefore based on the Board's review of the NPDES permit the Board finds that respondents arguments that Sections 406.106(b)(2) and 406.109 excuse the exceedences of the effluent limits set forth in the NPDES permit are without merit.

For similar reasons, Springfield Coal's argument that background concentrations result in the effluent violations and Section 406.103 (35 Ill. Adm. Code 406.103) allows Springfield Coal the opportunity to prove that fact is not persuasive. Section 406.103 does state: "Compliance with the numerical effluent standards is therefore not required when effluent concentrations in excess of the standards result entirely from the contamination of influent before it enters the affected land." 35 Ill. Adm. Code 406.103. However, the violations alleged in the complaint that are the subject of the motion for summary judgment are allegations that the effluent violated permit limits. While those permit limits mirror the standards in Part 406, nonetheless, the limits are set forth in the permit. Therefore, the effluent is exceeding permit limits.

The Board is also unpersuaded by the arguments that the existence of a CCA in this case limits ELPC's ability to prosecute the alleged violations. Most notably, the CCA only addressed Outfall 19 and discharges of manganese (*see* Austin Aff. at Exh. 1B). The CCA did not address the remaining alleged violations. Thus, even if the Board accepted that the existence of a CCA somehow limited ELPC's ability to prosecute the alleged violations; such limitation would be only to the items covered in the CCA. Based on this, the Board finds that the existence of a CCA does not excuse the alleged violations.

The Board grants partial summary judgment on the issue of liability in favor of ELPC as a matter of law. The Board finds that respondents violated Section 12(f) of the Act (415 ILCS 5/12(f) (2010)) by discharging effluent that contained contaminants in excess of the limits set forth in the NPDES permit. Following this liability determination, the Board will move forward and analyze whether ELPC's corresponding penalty request is appropriate and should be granted.

Penalty And Cease and Desist Requests

ELPC's Request

Following a finding of liability, ELPC asks that the Board impose penalties against Freeman United and Springfield Coal, including an order to cease and desist from future violations and to assess the maximum civil penalty under the Act. ELPC Mot. at 11. ELPC justifies their cease and desist order request based on Springfield Coal's "continuous permit violations and refusal to come into compliance with the terms of its permit, even two years after petitioners sent the mine a notice of intent to sue for violations of its permit". *Id*. at 12. ELPC argues that such behavior demonstrates that Springfield Coal will continue to violate the terms of its NPDES permit if the Board does not issue a cease and desist order. *Id*. ELPC further claims

that a cease and desist order is also necessary to deter other mines from causing similar permit violations, including the seven other Illinois mines operated by Springfield Coal. *Id*, *citing* Illinois v. Bernice Kershaw, PCB 92-164 (April 20, 1995).

ELPC argues its request that the Board assess maximum civil penalties against Springfield Coal and Freeman United is necessary in light of the Section 33(c) factors. *Id.* at 12. ELPC supports this argument "[g]iven 1) the need to deter future violations, 2) the years of noncompliance, 3) the extent of violations, 4) the refusal to comply with the permit, and 5) the economic benefit gained by not complying with the mine's NPDES permit." *Id*. Thus, ELPC claims a maximum penalty amount of $38,510,000.00 for Springfield Coal for causing 342 violations, and of $26,320,000.00 for Freeman United for causing 283 violations, are warranted based on past Board practice and pursuant to the Section 42(b)(1) (415 ILCS 5/42(b)(1) 2010)) provision imposing a $10,000 per day penalty for each violation of Section 12(f) of the Act. *Id*. at 12-13, *citing* IEPA v. City of Moline, PCB 82-154 (Sept. 6, 1984).

Springfield Coal's Response

While Springfield Coal's primary argument is that the Board should deny ELPC's motion because genuine issues of material fact exist as to Springfield Coal's liability, Springfield Coal responds to ELPC's request for a cease and desist order and penalty demand as a precaution against an alternative outcome. SResp. to PRN &SC at 25. Thus, Springfield Coal raises two reasons to support its contention that the Board should deny ELPC's cease and desist demand, in addition to three reasons to support Springfield's argument that ELPC's excessive penalty demand should be denied. *Id*.

Springfield Coal argues that an order to cease and desist would be procedurally improper at summary judgment due to Board precedent and the statutory requirements related to a cease and desist order. *Id*. Springfield Coal acknowledges that the Board has the authority to enter a cease and desist order at its own discretion so long as the Board considers "all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits,' including the five Section 33(c) Factors." *Id*. at 26, *citing* 415 ILCS 5/33(c). But, Springfield Coal argues that the Board should follow its own precedent, where the Board has determined that entries of cease and desist orders at the summary judgment stage of the proceeding is inappropriate when the respondent has raised an issue of material fact. *Id*, *citing* Env'l Site Devel. v. White & Brewer Trucking, PCB 96-180, (Nov. 20, 1997); *see also* Kildeer v. Village of Lake Zurich, PCB 88-173, slip op at 2 (Feb. 23, 1989).

Furthermore, Springfield Coal reiterates the liability arguments here to support its claim that numerous disputed material facts exist at this stage, which prevent the Board from being able to properly apply the relevant Section 33(c) factors. *Id*. at 27. Specifically, Springfield Coal claims that the Board would misevaluate the "degree of injury" factor, the "suitability or unsuitability of the pollution source to the area which it is located" factor, and the "technical practicability and economic reasonableness" factor if the parties were denied an opportunity to an evidentiary hearing because disputed material facts impact these factors. *Id*. at 28. Therefore, Springfield Coal argues that the Board should deny ELPC's request for a cease and desist order because it would be procedurally premature at the summary judgment phase. *Id*.

Springfield Coal maintains that the Board should deny ELPC's penalty demand because it is procedurally improper, unprecedented, unjustified. *Id*. at 29. Springfield Coal claims that Illinois case law provides that it is improper to determine the amount of damages at the summary judgment phase because it is a factual inquiry that should only be evaluated by the Board after an evidentiary hearing leads to a finding of liability. *Id*. at 28-29, *see* Mobil Oil Corp. v. Maryland Cas.Co., 288 Ill.App.3d 743, 758 (1st Dist. 1997); Illinois v. Chemetco, Inc., PCB 96-76, slip op at 2, 29-30 (Feb. 19, 1998); *see also* Illinois v. Community. Landfill Co, Inc., PCB 97-193, slip op at 2, 24-25 (Oct. 3, 2002).

Furthermore, Springfield Coal argues that ELPC's excessive penalty demand of $38.5 million against Springfield Coal is unprecedented because the greatest penalty for a CWA enforcement case in the past eight years is only $135,000.00. *Id*. at 30-31. Springfield Coal points out that ELPC does not rely on any case law to support ELPC's claim that the maximum penalty is necessary to deter future violations from Springfield Coal or other Illinois mine operators. *Id*. Thus, Springfield Coal "fails to see how this case warrants a penalty that is many multiple times higher than any other CWA enforcement case ever before the Board." *Id*. at 31 (emphasis in original).

Springfield Coal argues that ELPC's penalty demand is unjustified because numerous material facts needed to properly evaluate the Section 33(c) Factors and Section 42(h) Criteria are in dispute. *Id*. at 32. By referencing its own discussion "above regarding why a cease and desist order is inappropriate at this time," Springfield Coal claims that it would be premature for the Board to determine a penalty amount at summary judgment. *Id*. at 33.

Moreover, Springfield Coal highlights the fact that ELPC completely ignored a previous Board decision, which counters ELPC's position on this exact issue. *Id*., *citing* Illinois v. Chemetco, Inc., PCB 96-76 slip op at 2, 29-30 (Feb. 19, 1998). Therefore, Springfield Coal asks the Board to follow its own precedent and deny ELPC's penalty demand at this stage in the proceeding because ELPC's request is improper, unprecedented and unjustified. *Id*. at 34. On a last note, Springfield Coal argues that it is the inappropriate time and venue for ELPC to attempt to penalize Springfield Coal "by having the State of Illinois recover an amount equal to its investment in the Industry Mine from the Illinois Coal Competitive Grants." *Id*.

Freeman United's Response

Freeman United responds to ELPC by arguing that ELPC's penalty request is procedurally improper, inappropriate based on factual disputes, and unjustified based on precedent. *Id*. Freeman United supports that ELPC's penalty demand is procedurally improper based on prior Board orders finding that "an evaluation of costs and penalties at the summary judgment phase was premature." *Id.* at 20, *citing* Community Landfill Co., Inc., PCB 97-193, slip op at 10 (April 5, 2001).

Next, Freeman United claims that the penalty demand is inappropriate because ELPC incorrectly calculated the maximum theoretical penalty that can be awarded under the Act. *Id*. at 21. Freeman United claims that ELPC wrongly assessed the maximum penalty that could be

imposed for each alleged monthly average discharge limit violation because, as discussed above, 69 of the 81 alleged monthly average violations are not actually violations. *Id*. Removing these 69 violations from the calculations drastically changes the maximum potential penalty from $26,320,000.00 to $5,620,000.00. *Id*. Freeman United further argues that "[w]ith respect to the remaining 12 alleged violations of the monthly average limits, [ELPC] also erroneously assumes continuous discharges from these outfalls." *Id*.

Freeman United also claims that many of the outfalls on the property do not discharge daily. *Id.* Thus, Freeman United argues that ELPC did not present any facts to support the 30 monthly average limit violations used to determine its maximum penalty calculation. *Id*. at 22.

Furthermore, Freeman United claims that the penalty demand is also inappropriate because ELPC selectively chose the statutory criteria and factors it used to support ELPC's penalty demand, while ignoring other criteria that would undermine their request. *Id*. at 22. For instance, ELPC argues that imposing the maximum penalty on Freeman United is necessary to deter future violations of the Act, but this ignores the fact that Freeman United no longer owns the Industry Mine. *Id*. Freeman United raises four more specific examples regarding the CCA, the economic benefit realized, the mine's social and economic value, and the technical practicability of eliminating the discharges, before concluding that "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." *Id*. at 24.

Lastly, Freeman United argues that ELPC's request to impose a civil penalty of over $26 million is unjustified based on Board precedent. *Id*. at 25. Freeman United points out that in "the last eight years, there were only fifteen CWA enforcement case where the Board's final penalty was over $25,000 . . .and the highest was [only] $135,000." *Id*. Thus, Freeman United concludes that ELPC is not entitled to the relief they seek, and even if they were, the Board should not use this case to reset the penalty levels for effluent violations from a coal mine because Freeman United has not been given the opportunity to participate in an evidentiary hearing. *Id*.

ELPC's Reply

ELPC disagrees with Freeman United and Springfield Coal's claims that the Board is barred from evaluating penalties at the summary judgment phase of the proceeding. ELPC Reply to Freeman and SResp. at 24. ELPC asserts that the language in Section 41(d) (415 ILCS 5/41(d) (2010)) "does not restrict penalty determinations to any particular stage of a civil action." *Id*. Additionally, ELPC notes that Section 101.516(a) (35 Ill. Adm. Code 101.516(a)) specifically authorizes "parties to seek summary judgment 'for all or any part of the relief sought.'" *Id*.

ELPC cites multiple cases where the Board has made penalty determinations at the summary judgment stage. *Id*. at 25, *see* People v. Roxana Landfill, Inc., PCB 12-123 slip op at 5 (May 3, 2012); People v. Ogoco, Inc., PCB 06-16 (Sept. 21, 2006); People v. Steve's Concrete & Excavating, PCB 08-87 (Mar. 5, 2009); People v. Dayne Rogers & Black Gold International, PCB 00-127 (Aug. 9, 2001). Additionally, ELPC cites two cases where the Board granted partial

summary judgment because it found that some of the violations or penalty issues should only be decided after a hearing. *Id*., *see* People v. Draw Drape Cleaners, Inc., PCB 03-51 (Aug. 19, 2004); People v. Whiteway Sanitation, Inc., PCB 95-64 (Feb. 9, 1988). Thus, ELPC argues that "[i]f the Board finds genuine issues of material fact as to penalties, granting partial summary judgment on liability and sending the penalty question to hearing is appropriate." *Id*. at 25. However, if in the alternative the Board finds no genuine issues of material fact as to penalties, ELPC maintains that the Board should assess their penalty request and grant ELPC's penalty demand at summary judgment. *Id*.

In addition, ELPC responds to the respondents' arguments that attack ELPC's penalty calculation. *Id*. ELPC claims that the maximum penalty they evaluated for Freeman United and Springfield Coal's violations is justified under the law. *Id*. ELPC criticizes Freeman United's contention that ELPC "'erroneously calculated' the maximum penalty by including 69 violations of the monthly average that are based on one or two samples." *Id*. at 26. ELPC argues that Freeman United's argument is actually about counting the number of violations, not about calculating the penalty. *Id*. And in terms of the number of violations, ELPC argues the total number of monthly average effluent violations is correct and proven as a matter of law as discussed earlier when addressing the issue of liability. *Id*.

ELPC points out that Freeman United failed to cite any authority to support that a monthly average limit should not be considered thirty days of violations without proof that the violations occurred continuously during that time. *Id*. To contrast Freeman United's point, ELPC cites various cases that have held that a "monthly average is a limitation that assesses a permittee's compliance by viewing the entire month as a whole. There is no breakdown into days of discharge." *Id*., *citing* IEPA v. City of Moline, PCB 82-154 (Sept 6, 1984); Natural Res. Def. Council v. Texaco Ref. & Mktg., 800 F. Supp. 1, 21 (D. Del. 1992); Pub. Interest Research Group v. Star Enter., 771 F. Supp. 655, 668 (D.N.J. 1991).

ELPC criticizes the respondents' use of other lower penalty decisions from the past to support assessing their own penalties at less than the maximum penalty. *Id*. ELPC argues that past Board determined penalties have no bearing on Freeman United and Springfield Coal's penalty assessment because it is not relevant to the Section 33(c) or Section 42(h) factors. *Id*. "Furthermore, Respondents have accrued many more violations over a longer period of time than the cited cases." *Id*.; *See*, e.g., People v. Onyx Envtl Servs., LLC., PCB 04-98 (Aug. 19, 2004). ELPC reiterates their statement that the respondents do not deserve a minimal assessment penalty because that would not deter polluters from accruing the extensive discharge violations of the kind experienced at the Industry Mine. *Id*. Therefore, ELPC argues their maximum penalty calculation for Freeman United and Springfield Coal's violations is accurate, and the respondent's have failed to allege any disputed facts to alter this calculation. *Id*.

Freeman United's Surreply

Freeman United disagrees with ELPC's penalty request on the grounds that it remains premature and inappropriate because it is grossly inflated and has no basis in fact or law. *Id*. at 8-9. Freeman United "respectfully submit[s] that the circumstances in this case warrant a finding of the Board that [ELPC] should be barred from seeking penalties for wholly past violations."

Id. at 8. Freeman United supports this contention by noting that the Board has never decided a case brought by citizens or the Illinois Attorney General that sought penalties "against a former owner/operator of a facility for violations that allegedly occurred years in the past." *Id*.

Furthermore, Freeman United argues that ELPC's response attempts to distort the record by making a generalized statement alluding to the allegation that Freeman United reincorporated into a new legal entity in order to "'wipe the slate clean and escape liability for years of violations.'" *Id*. at 8-9, *citing* ELPC Reply to Freeman and Springfield at 20. Freeman United simply asserts that the Board should ignore ELPC's misleading statement because it has no basis in fact, as demonstrated by the reality that ELPC is suing both Freeman United and Springfield Coal. *Id*. at 9.

Lastly, Freeman United incorporates by reference its arguments made on pages 25-26 of Freeman's Response to ELPC's motion regarding their maximum penalty calculation. *Id*. Accordingly, Freeman United argues that the penalty sought by ELPC remains premature and inappropriate, such that the Board should deny ELPC's penalty request.

Board Analysis and Findings

While ELPC asserts that the Board has the authority to impose the statutory maximum penalty after finding the respondents liable at the summary judgment, both Freeman United and Springfield Coal argues that it is not procedurally proper to evaluate the penalty at the summary judgment phase in the proceeding. The respondents contend that a penalty determination at this stage would be inappropriate because it is a factual question that can only be determined after an evidentiary hearing. On the other hand, ELPC claims that it would be consistent with the Board's past decisions to determine the penalty at the summary judgment stage.

While ELPC claims that the imposition of the maximum civil penalty is reasonable in this case due to the continuous nature of the violations, the respondents argue that such a high penalty is unprecedented. The respondents argue that ELPC's total penalty request, which exceeds $64 million, is grossly inflated because the highest final penalty the Board granted for a CWA enforcement case in the past eight years was only $135,000. Therefore, Freeman United and Springfield Coal argue Board precedent demonstrates that ELPC's penalty request is unjustified, while ELPC asserts that past Board penalty determinations have no effect on the penalty assessment for this case.

ELPC argues that their statutory maximum penalty request reflects the factors set forth in Section 33(c) and 42(h) of the Act; whereas, both Freeman United and Springfield Coal argue that various disputed issues remain that will impact the Board's assessment of the statutory factors. Thus, the respondents argue that a hearing on the penalty is required before the Board can properly evaluate the penalty in this case. However, ELPC asserts that these remaining issues are meritless, such that their penalty request is justified under the law.

In addition, ELPC justifies its request to grant a cease and desist order on Springfield Coal's operations at the Industry Mine based on the continuous and ongoing nature of the violations at the Industry Mine. In contrast, Springfield Coal argues that the cease and desist

request is inappropriate at summary judgment because it alleges that disputed material facts remain regarding the Section 33(c) factors. Since the Section 33(c) factors must be considered by the Board when determining whether to enter a cease and desist order, Springfield Coal argues that it would go against Board precedent to grant a cease and desist order at summary judgment without providing a hearing to resolve the disputed material facts. In contrast, ELPC maintains that granting their cease and desist request is necessary because it would deter other mines from causing similar, continuous violations in the future.

The Board has concluded that ELPC is entitled to partial summary judgment as a matter of law because no disputed material facts exist as to Freeman United and Springfield Coal's liability, the question of whether the ELPC's penalty and cease desist requests shall be granted are still left for the Board to determine. After considering all the issues presented in the pleadings, the Board first finds that neither the Act nor case law restricts the Board's authority to consider penalties in summary judgment motions. 415 ILCS 5/42(d) (2010); 35 Ill. Adm. Code 101.516(a). In fact, the Board does grant motions for summary judgment and rules on civil penalties without sending the case to hearing. *See e.g.* People v. Zachary Isaac *et al.*, PCB 11-58 (Sept. 20, 2012); *see also* People v. Byrom Ward *et al.*, PCB 10-72 (July 7, 2011 and Nov. 17, 2011) (no hearing was held, but parties were asked to brief the issue of civil penalties).

The Board also grants partial summary judgment for liability while retaining its right to determine the penalty after a hearing when the Board deems it appropriate. *See* People v. Drawer Drape Cleaners, Inc., PCB 03-51 (August 19, 2004); People v. Whiteway Sanitation, Inc., PCB 95-64 (Feb. 9, 1988). In this case, the Board finds that a majority of the issues that the respondents raised as disputed material facts in regards to their liability for violating the Act are actually disputed material issues affecting the penalty determination. As such, the Board directs the parties to a hearing on the penalty imposition and cease and desist request. At hearing the parties will be allowed to present evidence on the Section 33(c) factors and Section 42(h) criteria which may include evidence concerning the amended sulfate standard, the background concentrations of constituents at the Industry Mine, the applicable manganese and pH limits, the existence and effectiveness of the CCAs, and IEPA's delayed response to the information in the DMRs. The parties should also address the economic benefit respondents accrued by noncompliance (*see* 415 ILCS 5/42(h) (2010)).

Conclusion on ELPC'S Motion

The Board grants ELPC's motion for summary judgment on liability. The Board finds that the record establishes respondents violated Section 12(f) of the Act (415 ILCS 5/12(f) (2010)) by discharging effluent from the Industry Mine that exceeded the permitted daily and/or monthly limits for iron, manganese, sulfates, TSS, and pH. Having found violations of the Act, the Board sends the penalty question and the cease and desist question to hearing because further evidence on the remaining issues may impact the Board's evaluation of the factors and criteria provided in Section 33(c) and 42(h) of the Act.

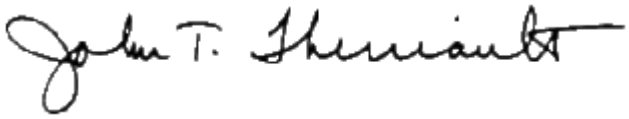
CONCLUSION

For the reasons stated above, the Board grants the People's motion for summary judgment on Counts I and II of their complaint, and denies Freeman United's counter-motion for summary judgment on Counts I and III of the People's complaint. In addition, the Board grants ELPC's motion for summary judgment on Count II of their complaint for the above stated reasons, and denies Freeman United's request that the Board reconsider Freeman United's motion to dismiss ELPC's complaint.

IT IS SO ORDERED.

Board Member J. A. Burke abstains.
Board Member J. O'Leary abstains.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on November 15, 2012, by a vote of 3-0



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John T. Therriault, Assistant Clerk
Illinois Pollution Control Board