BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
ENVIRONMENTAL LAW AND POLICY CENTER, on behalf of PRAIRIE RIVERS NETWORK and SIERRA CLUB, ILLINOIS CHAPTER,	)	
	)	
Intervenor,	)	
	)	
vs.	)	**PCB No. 10-61 & 11-2**
	)	**(Water - Enforcement)**
FREEMAN UNITED COAL MINING COMPANY, LLC, a Delaware limited liability company, and SPRINGFIELD COAL COMPANY, LLC, a Delaware limited liability company,	)	
	)	
Respondents.	)	

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on January 11, 2013, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, PEOPLE'S RESPONSE TO MOTION FOR RECONSIDERATION, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

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

BY: _____
THOMAS DAVIS, Chief
Assistant Attorney General
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CERTIFICATE OF SERVICE

I hereby certify that I did on January 11, 2013, cause to be served by United States Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING and PEOPLE'S RESPONSE TO MOTION FOR RECONSIDERATION, upon the Respondents listed on the Service List.

Thomas Davis, Chief
Assistant Attorney General

This filing is submitted on recycled paper.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
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Complainant,	)	
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ENVIRONMENTAL LAW AND POLICY CENTER, on behalf of PRAIRIE RIVERS NETWORK and SIERRA CLUB, ILLINOIS CHAPTER,	)	
	)	
Intervenor,	)	
	)	
v.	)	**PCB No. 2010-061 & 2011-02 (Water-Enforcement)**
	)	
FREEMAN UNITED COAL MINING COMPANY, LLC, a Delaware limited liability company, and SPRINGFIELD COAL COMPANY, LLC, a Delaware limited liability company,	)	
	)	
Respondents.	)	

PEOPLE'S RESPONSE TO MOTION FOR RECONSIDERATION

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, respectfully responds to the motion for reconsideration, filed jointly by the Respondents pursuant to Section 101.902 of the Board's procedural rules, regarding the grant of the People's motion for partial summary judgment, and states as follows:

On November 15, 2012 the Board issued an opinion and order in this consolidated enforcement proceeding. The Board granted the People's motion for partial summary judgment and the Environmental Law and Policy Center's motion for partial summary judgment on behalf of Prairie Rivers Network and Sierra Club (collectively ELPC), and denied Freeman United's cross-motion for summary judgment. The Respondents filed their motion for reconsideration

regarding the November 15, 2012 opinion and order on December 21, 2012. By agreement of all parties, this response is due January 11, 2013. In requesting reconsideration, Springfield Coal and Freeman United contend that the Board ought to have accepted the affirmative defenses separately asserted by the Respondents in their July 23, 2010 answers to the People's complaint. The People objected and replied to the affirmative defenses on July 29, 2010.

The People's argument regarding the affirmative defenses noted both legal and factual deficiencies. First, whether a defense is an affirmative defense turns on whether the defense "gives color to the opposing party's claim and thus asserts a new matter by which the apparent right is defeated." *Ferris Elevator Co. v. Inc. v. Neffco, Inc.*, 285 Ill. App. 3d 350, 354 (3rd Dist. 1996). Secondly, the facts establishing the defense must be pleaded by the defendant with the same degree of specificity as is required of a plaintiff alleging the essential elements of a cause of action. *Goldman v. Walco Tool & Engineering Co.*, 243 Ill. App. 3d 981, 989 (1st Dist. 1993), appeal denied 152 Ill.2d 558 (1993). An affirmative defense that lacks a factual basis is inadequately pled. *Estate of Wrage v. Tracey*, 194 Ill. App. 3d 117, 122 (1st Dist. 1990). The burden of proof as to any particular affirmative defense is upon the party asserting the defense. *Pascal P. Paddock, Inc. v. Glennon*, 32 Ill.2d 51, 54 (1965). The Attorney General admitted or denied any facts alleged in the several purported defenses (except where the contentions are legal conclusions and merit no response) after indicating that what must be proven must first be pleaded. Neither Respondent amended any of its defense allegations prior to the Board's rulings on the summary judgment requests.

Springfield Coal seeks reconsideration as to its affirmative defenses of *laches* and unclean hands suggesting that evidence in the record was overlooked, yet cites the competing

affidavits that supported the competing motions for summary judgment; these affidavits were reviewed and discussed by the Board at some length. In particular, Springfield Coal argues that the Board's evaluation of issues relating to the imposition of liability was flawed because the Board failed to necessarily afford "a very factual intensive inquiry," but merely contends that "if additional discovery is done, new evidence may be brought forth further supporting these defenses." Motion at page 3. It is this *undiscovered* evidence that Springfield Coal seeks to rely upon and not only overlooked facts in the record. Similarly, Freeman United seeks reconsideration as to its affirmative defenses (waiver and estoppel against the State; *laches* against ELPC) and claims that the Board's rulings on its allegations was inadequate from a factual standpoint. Freeman United also argues certain evidentiary issues relating to the proof of violations.

The Respondents collectively admit that they "have not yet propounded discovery in this case," and suggest that the Board grant reconsideration in order to "allow Respondents the opportunity to engage in discovery to see if additional evidence exists to further support these defenses." Motion at pages 4 & 5. This concession supports the Board's exercise of its discretion to deny the motion. It is well settled that to justify a rehearing on the basis of newly discovered evidence, there must be a showing of due diligence and a demonstration that justice has not been done. *Drehle v. Fleming* (1st Dist. 1970), 129 Ill. App. 2d 166, *aff'd* 49 Ill.2d 293 (1971). In this matter, the People filed its complaint on February 10, 2010 and the summary judgment motion on March 6, 2012. There was no lack of opportunity to pursue discovery; in fact, two years transpired before the People filed the motion for summary judgment. The failure of Respondents to determine whether any evidence might be available to support their purported defenses was

not the only failure. Neither Springfield Coal nor Freeman United sought to revise or replead the affirmative defenses in response to the Attorney General's legal and factual objections.

Springfield Coal's Affirmative Defenses

As part of its answer to the People's complaint, Springfield Coal pleaded the following allegations and legal conclusions regarding affirmative defenses:

> Springfield Coal raises the following affirmative defenses, which shall apply to and be incorporated into all answers by Springfield Coal. Springfield Coal reserves the right to supply further affirmative defenses in a supplemental answer to any or all paragraphs of any count herein.
>
> 1. The State's claim fails to state a cause of action upon which relief can be granted.
> 2. Freeman United submitted a renewal application for National Pollution Discharge Elimination System ("NPDES") Permit No. IL0061247 in August 2003. At present, the Illinois Environmental Protection Agency ("IEPA") has not officially acted upon the renewal application. Had IEPA acted upon the renewal application in a timely manner, there would have been a revised permitted effluent limitation for sulfates, and Springfield Coal's water discharge would have been in conformance with its permit.
> 3. The sulfate discharge limitations in Springfield Coal's NPDES permit and which the State now alleges Springfield Coal violated are based upon sulfate water quality standards which were officially rejected by the Board in September 2008, and which the State knew for years were not based in sound science, inappropriate for mining operations, and impossible to comply with insomuch as sulfate was not treatable by any practical means.
> 4. The State proposed in April 2010 that Grindstone Creek, which runs through the Industry Mine, be removed from Illinois Section 303(d) Impaired Water List based upon water quality data dating back to at least 2007.
> 5. Prior to any mining activity on the Industry Mine property, there were naturally occurring levels of a number of constituents, including sulfate and manganese, in the surface water runoff at the site at concentrations that would be considered exceedances of Springfield Coal's NPDES permit.
> 6. Complainant's claims are barred by the statute of limitations and/or statute of repose.
> 7. Pursuant to 415 ILCS 5/31(a), Springfield Coal entered into a compliance commitment agreement with IEPA on August 30, 2007, and such

agreement addressed the issues Complainant now raises in its Complaint.

8. Complainant's claims are barred by the doctrines of *laches*, estoppel and/or waiver.

9. Pursuant to 415 ILCS 5/31(a)(1), IEPA did not provide Springfield Coal with a notice of violation for all of the alleged violations contained in the State's Complaint. Consequently, Springfield Coal was given neither proper notice nor opportunity to respond under the statute regarding many of the alleged violations.

Springfield Coal's answer at pp. 19-21. These allegations are repeated in full to capture the scant factual allegations; paragraphs 1 and 6 do not allege any facts but appear to pertain to "defenses" other than *laches* and unclean hands. The Board will note that Springfield Coal reserved the right to supplement its defenses but failed to do so or to otherwise respond to the People's objections.

More importantly, paragraph 8 alleges no facts at all in reference to the *laches* claim and there is no mention of "unclean hands" in any paragraph of the affirmative defenses. Therefore, the allegations of (possible) facts are quite limited:

¶ 2: the NPDES permit has not been reissued since a renewal application was filed in August 2003 [admitted];

¶ 3: the sulfate limits in the NPDES permit are based upon water quality standards "officially rejected" by the Board in September 2008 [objected to as legal conclusions];

¶ 4: the State proposed in April 2010 that Grindstone Creek be removed from Illinois Section 303(d) Impaired Water List based upon water quality data dating back to at least 2007 [admitted];

¶ 5: prior to any mining, there were naturally occurring levels of sulfate and manganese in the surface water runoff at the site at concentrations in excess of the

NPDES permit limits [admitted];

¶ 7: Springfield Coal entered into a compliance commitment agreement with IEPA on August 30, 2007 [denied]; and

¶ 9: IEPA did not provide Springfield Coal with a notice of violation for all of the alleged violations contained in the State's Complaint [objected to as legal conclusions].

Laches is an equitable doctrine which precludes the assertion of a claim by a litigant whose unreasonable delay in raising that claim has prejudiced the opposing party. *People ex rel. Daley v. Strayhorn* (1988), 121 Ill.2d 470, 482. In order to properly plead this affirmative defense, a litigant must allege the two elements necessary for a finding of *laches*: 1) lack of diligence by the party asserting the claim, and 2) prejudice to the opposing party resulting from the delay. *Tully v. State* (1991), 143 Ill.2d 425, 432. Despite Springfield Coal's arguments that the Board ignored facts in the record and there might be additional evidence to be identified through discovery, it is clear that this Respondent failed to allege any lack of diligence by the Attorney General in asserting the claim and any prejudice to Springfield Coal resulting from the delay, and thus its assertion of *laches* is improper and unsupported.

The equitable doctrine of unclean hands provides that a party seeking equitable relief cannot take advantage of his own wrong. *State Bank of Geneva v. Sorenson*, 167 Ill. App. 3d 674, 680 (2nd Dist. 1988) ("equitable relief may be denied if the party seeking that relief is guilty of misconduct, fraud, or bad faith toward the party against whom relief is sought, and further provided that the misconduct, fraud, or bad faith is in connection with the transaction under

consideration."). There is no suggestion in the facts of any "misconduct, fraud, or bad faith"[1] and such facts must be pleaded for this defense to survive. See *Northern Trust Co. v. VIII South Michigan Associates*, 276 Ill. App. 3d 355, 368 (1st Dist. 1995) ("Even assuming equitable defenses would apply to this cause of action, as we have previously discussed, the Guarantors have not alleged sufficient facts to show that Northern committed any wrong."); *People v. Douglas Furniture*, PCB 97-133 (May 1, 1997), order at 4 ("The Board finds that Douglas Furniture failed to demonstrate how the State's actions were inappropriate and how the State has taken advantage of its own wrong.").

The Attorney General (here and previously) contends that as a creature of statute, the Board has no explicit grant of equitable powers and cannot properly entertain equitable defenses. The Board has not confronted this contention directly but there is another point to be made regarding the equitable doctrine of unclean hands and its applicability to Board enforcement actions. In *Douglas Furniture*, the Board cited to the *Sorenson* decision and stated that a party seeking equitable relief cannot take advantage of his own wrong. In the context of unclean hands, the party is the plaintiff, petitioner or complainant. In the context of an enforcement action, the People are *not* seeking equitable relief, e.g. injunctions, but rather monetary sanctions. Therefore, the equitable doctrine of unclean hands is not applicable to any complainant in any enforcement proceeding before the Board.

In summary, there are no grounds for reconsideration as to Springfield Coal's affirmative defenses.

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[1] In fact, Springfield Coal states that "it does not want to accuse the State of *nefarious* action by intentionally delaying the reissuance of the NPDES permit. . . ." Motion at page 3; emphasis added.

Freeman United's Affirmative Defenses

As part of its answer to the People's complaint, Freeman United pleaded its affirmative defenses separately, but first stated:

> Freeman United denies all allegations of alleged wrongdoing by itself and further denies all allegations which otherwise have not been expressly admitted in this Answer. In addition, Freeman United asserts the following affirmative defenses. Freeman United does not assume the burden of proof on these defenses where substantive law provides otherwise.

Freeman United's answer at pages 18-19. By these statements, the Respondent neither acknowledges or admits the claims of violation that it seeks to defeat by asserting new matters nor assumes the burden of proving such new matters; the Respondent also fails to plead facts sufficient to support such defenses. The defenses asserted are quite similar to those of Springfield Coal. Freeman United also "reserves the right to add further additional defenses after receiving information from The People or other parties through discovery." Freeman United's answer at page 20. However, like Springfield Coal, Freeman United failed to exercise its right to pursue discovery. In the request for reconsideration, Freeman United seeks the Board to apply waiver and estoppel against the State.

In its answer, waiver is pleaded without any facts in the Seventh Affirmative Defense: "The People's claims are barred by the doctrine of waiver." Freeman United's answer at page 20. Waiver is an affirmative defense which is itself waived if not specifically pleaded. *Dragon Construction, Inc. v. Parkway Bank & Trust*, 287 Ill. App. 3d 29, 34 (1st Dist. 1997). The Respondent pleads no allegations of fact within the affirmative defense and did not revise or replead after the People's objection. Freeman United contends (here and in its cross motion for summary judgment) that "the State, acting through IEPA, intentionally relinquished its known

right [to pursue enforcement]." Motion at page 6. As grounds for reconsideration, the Respondent complains that no cases were cited for the proposition that the Attorney General is not bound by the actions of the Illinois EPA. However, the Respondent cites to the Board's November 15, 2012 opinion and order (at page 33) where "the Board noted that it has consistently found that IEPA's actions under Section 31 of the Act do not bar prosecution by the Illinois Attorney General." *Id.* The Board (at page 33) made it clear that it had already cited cases to support this ruling.[2] There are no unaddressed issues of fact. The Illinois EPA had issued notices of violation prior to its January 22, 2010 referral to the Attorney General, but the Attorney General had received a notification from ELPC regarding the effluent violations six weeks earlier on December 10, 2009. See Davis affidavit at ¶s 2 and 4. The filing on February 10, 2010 of a comprehensive complaint does not support any claim that the Attorney General relinquished any right to enforce these numerous discharge violations. The prior efforts of the Illinois EPA in securing a compliance commitment agreement in June 2005 and issuing an additional notice of violation to Freeman United on October 8, 2009 also do not evince any waiver. All of these facts are properly in the record through the Davis affidavit and the documents attached as exhibits, and there is no indication that the Board failed to rely upon this information.

Estoppel is pleaded without any facts in the Eighth Affirmative Defense: "The People's claims are barred by the doctrine of estoppel." Freeman United's answer at page 20. The

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[2] On page 31, the following cases were cited to support the Attorney General's unfettered ability to take enforcement action: *People v. Eagle-Picher-Boge*, PCB 99-152 (July 22, 1999); *People v. Geon*, PCB 97-62 (Oct. 2, 1997); *People v. Heuermann*, PCB 97-92 (Sept. 18, 1997); *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). The People's response to Freeman United's cross-motion for summary judgment (at page 20) discussed and distinguished the *Chiquita* decision.

Respondent's argument on this issue is even more limited, to wit: the Board failed to explain to Freeman United's satisfaction how the estoppel requirements were not met. There are six elements of the defense of equitable estoppel: 1) words or conduct by the party against whom the estoppel is alleged constituting either a misrepresentation or concealment of material facts; 2) knowledge on the part of the party against whom the estoppel is alleged that representations made were untrue; 3) the party claiming the benefit of an estoppel must have not known the representations to be false either at the time they were made or at the time they were acted upon; 4) the party estopped must either intend or expect that his conduct or representations will be acted upon by the party asserting the estoppel; 5) the party seeking the estoppel must have relied or acted upon the representations; and 6) the party claiming the benefit of the estoppel must be in a position of prejudice if the party against whom the estoppel is alleged is permitted to deny the truth of the representation made. See *Vaughn v. Speaker*, 126 Ill. 2d 150, 162 (1989). The Board found (at page 33) that this Respondent failed to carry the burden of establishing these six criteria and to show any of the limited circumstances in which the doctrine of estoppel can lawfully be applied against the government.

The doctrine of estoppel "should not be invoked against a public body except under compelling circumstances, where such invocation would not defeat the operation of public policy." *People v. Chemetco*, PCB 96-76, slip op. at 10 (Feb. 19, 1998) (quoting *Gorgess v. Daley*, 256 Ill. App. 3d 143, 147 (1st Dist. 1993)). The courts are necessarily reluctant to apply doctrine of estoppel against the State because it "may impair the functioning of the State in the discharge of its government functions, and that valuable public interests may be jeopardized or lost by the negligence, mistakes or inattention of public officials." *Brown's Furniture*, 171 Ill. 2d

at 431-32; see also *Chemetco*, PCB 96-76, slip op. at 10-11 (Feb. 19, 1998). The State may be estopped when acting in its governmental capacity only under compelling circumstances. *Hickey v. Illinois Central Railroad Co.*, 35 Ill. 2d 427, 447-48 (1966). A party seeking to estop the government must prove three factors. First, it must prove that it relied on a government agency, its reliance was reasonable, and that it incurred some detriment as a result of the reliance. Second, the party must show that the government agency made a misrepresentation with knowledge that the representation was untrue. Third, "the government body must have taken some affirmative act; the unauthorized or mistaken act of a ministerial officer will not estop the government." *Chemetco*, PCB 96-76, slip op. at 11 (Feb. 19, 1998); *see also* Brown's Furniture, 171 Ill. 2d at 431, 665 N.E.2d at 806.

Once again, Freeman United's failure to carry its burden of proof derives from its failure to plead any facts regarding the affirmative defense, its failure to pursue any discovery, its failure to revise its pleadings to address the Complainant's objections, and so forth. Even obtaining leave to reply under a claim of material prejudice, Freeman United still failed to show any compelling circumstances to justify the application of this equitable remedy against the government. The fact that the Board did not articulate precisely what exactly the Respondent failed to show does not justify any reconsideration.

Evidentiary Determinations

The Respondents collectively argue that the Board failed to address their previous arguments and to properly consider certain evidence. These arguments include whether the monthly average violations were supported by the three grab samples required by Section 406.101(b) of the Board's Mine Pollution Control Regulations; whether discharges for Outfalls

009, 017 and 019 exceeded the permit limits; whether alleged deficiencies in the Crislip Affidavit result in genuine issues of material fact and thereby preclude summary judgment; and whether Outfall 019 was subject to regulation as a reclamation area under Special Condition 8 of the NPDES permit.

The People note that the Board was presented with a large amount of argument by the parties. The Attorney General (on March 6, 2012) and ELPC (on April 27, 2012) filed separate motions for partial summary judgment on the NPDES permit violations and relied upon the Discharge Monitoring Reports (DMRs) submitted to the Illinois EPA by the Respondents. Freeman United and Springfield Coal filed separate responses to the People's motion on April 27, 2012. Freeman United also filed a cross-motion for summary judgment on April 27, 2012. The Respondents filed separate responses to ELPC's motion on June 6, 2012. Freeman United filed a reply on July 10, 2012 to the People's response. ELPC filed a reply to the responses filed by the Respondents. On July 10, 2012 Springfield Coal and Freeman United also filed separately additional responses to ELPC's reply in support of its motion for summary judgment. The Respondents have filed a total of eight written arguments prior to the motion for reconsideration.

The Board issued a 71 page opinion and order, and addressed each of the contentions of the parties, including discussions of the affidavits and counter-affidavits. After summarizing the allegations in the two complaints, the Board provided a lengthy evaluation of the factual background with a focus on the applicable effluent limitations. November 15, 2012 slip op. at pages 6-11. The NPDES permit violations presented by the People's motion for summary judgment were set forth for discussion in the context of Springfield Coal's responsive arguments (pages 15-18), Freeman United's responsive arguments (pages 19-23), the People's response to

Freeman United's cross-motion (pages 23-26), and Freeman's surreply to the People (pages 27-29). The Board's analysis and findings regarding the motions filed by the People and Freeman United are provided (pages 29-34), and must be considered also in the context of a similar examination of the ELPC motion, the responses and surreplies by the Respondents, and ELPC's reply in support of its summary judgment request (pages 39-61) and the Board's analysis and findings regarding ELPC's motion (Pages 61-64).

The People assert that the defenses and arguments presented by the Respondents received comprehensive consideration by the Board. The Board found repeatedly that no genuine issues of material fact existed, that findings of liability were properly premised upon the DMRs submitted by the Respondents based upon samples collected by the Respondents, and that the complainants were legally entitled to relief. The motion for reconsideration reiterates the previous arguments presented and rejected, and fails to address these claims in light of the applicable standards for reconsideration, i.e. whether evidence in the record clearly supports contrary findings and whether applicable legal provisions were misapplied.

The Board must first have adequate cause to revisit its findings and conclusions before it may seek to determine upon reconsideration whether the burden of proof was met by the evidence put forth in the record. As with their alleged affirmative defenses, the claims that evidence was ignored and the law was erroneously applied have been inadequately pleaded and supported. The Respondents failed to pursue discovery to support their defenses and now seek merely to rely upon "discrepancies" in the evidence to explain away their liability for their failure to comply with the effluent limitations. The Board has already properly rejected their defenses and their previous attempts to evade responsibility based upon the overwhelming evidence

presented by the People, and is provided with no legally sufficient reason(s) to reconsider its findings and conclusions.

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, hereby objects to the motion for reconsideration filed by the Respondents.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN,
Attorney General
of the State of Illinois

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

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