BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

PRAIRIE RIVERS NETWORK, by and for its members, SIERRA CLUB, ILLINOIS CHAPTER, by and for its members	)	
Complainant,	)	
v.	)	PCB 2010-061 (Enforcement-Water)
FREEMAN UNITED COAL MINING CO., L.L.C., and SPRINGFIELD COAL CO., L.L.C.	)	
Respondents.	)	

NOTICE OF ELECTRONIC FILING

To: 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, Sierra Club's and Prairie Rivers Network**'s RESPONSE TO RESPONDENTS' MOTION FOR RECONSIDERATION**, a copy of which is attached hereto and herewith served upon you.

Respectfully Submitted,

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RESPONSE TO RESPONDENTS' MOTION FOR RECONSIDERATION

For the reasons detailed below, Intervenors Sierra Club and Prairie Rivers Network respectfully request that the Illinois Pollution Control Board (IPCB) deny the Motion for Reconsideration of the IPCB's November 15, 2012 Opinion and Order that was filed by Springfield Coal Company, LLC ("Springfield Coal") and Freeman United Coal Mining Company, LLC ("Freeman") (collectively, "Respondents") on December 21, 2012. Respondents have merely restated the arguments they previously presented in their responses to the Motions for Summary Judgment, and have not shown any grounds for IPCB to reconsider its November 15, 2012 Opinion and Order.

STANDARD FOR RECONSIDERATION

Under IPCB rules, "In ruling upon 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. Admin. Code 101.902 (2012). *See also, Citizens Against Regional Landfill v. County Bd. of Whiteside County*, PCB 92-156 slip op. at 2 (Mar. 11, 1993) (A motion to reconsider may be brought "to bring the [Board's] attention to newly discovered evidence not available at the time of the hearing, changes in the law or errors in the [Board's] previous application of existing law." (citation omitted)). However, "Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 560-61 (7th Cir. Ill. 1985). The burden of proof to establish grounds for the motion to reconsider lies on

the party seeking relief from judgment. *G.R.P. Mech. Co. v. Kienstra Concrete, Inc.*, 2006 U.S. Dist. LEXIS 5645 (S.D. Ill. Jan. 26, 2006), *Mid Am. Ventures, Inc., v. Image Concepts, Inc.*, 2008 Ohio 457, P9 (Ohio Ct. App. Cuyahoga County Feb 7, 2008) and *Flemming v. Rosadro*, 2011 U.S. App. LEXIS 22479 (2d Cir. N.Y. Nov. 3, 2011) ("A motion for relief from judgment is generally not favored and is properly granted only upon a showing of exceptional circumstances, with the burden of proof resting on the party seeking relief from the judgment.").

ARGUMENT

Respondents have not shown any of the factors the Board considers when deciding a motion to reconsider, as expressed in 35 Ill. Admin. Code § 102.902 and in the cases cited above. Respondents have not presented any new evidence to the Board, let alone new evidence that would not have been available at the time of briefing. Instead, Respondents attached exhibits to the Motion to Reconsider that had already been submitted and considered by the Board during the briefing of the Motion for Summary Judgment. Respondents have not cited to any change in the law on any of the issues raised in the motion. Nor have Respondents pointed to "evidence in the record that was overlooked," (Motion to Reconsider, p. 2) as all of the issues raised in the Motion to Reconsider were acknowledged in the Board's 71-page Opinion and Order issued on November 15, 2012.

The exact grounds Respondents allege would justify the Board's reconsideration are unclear. It appears that Respondents either 1) wanted the Board to be more explicit in its Opinion and Order, 2) wanted another chance to explain their arguments, or 3) want to turn back the clock so they can conduct discovery they failed to do in the first place to support their affirmative defenses. None of these are reasons the Board should reconsider its decision under 35 Ill. Admin. Code § 102.902.

The Opinion and Order addressed all of the issues raised in the Motion to Reconsider

It appears that Respondents take issue with the way the Board presented its Opinion and Order, perhaps concluding that the Board failed to address several of their arguments. Intervenors disagree that the IPCB failed to address any of the issues that are reargued in the Motion to Reconsider. The Opinion and Order shows that the IPCB thoroughly considered each of the issues, and then implicitly or explicitly rejected them by granting the motion for summary judgment on liability and stating that some of the issues raised by Respondents may be relevant to the question of penalty.

First, Respondents argue that the Board did not adequately consider their affirmative defenses. However, in the Opinion and Order, the Board explicitly considered the affirmative defenses, dedicating more than eight pages to the discussion of those claims alone. (Opinion and Order, pp. 18, 20-22, 24, 26, 27-29, 30, 32-33, 48, 49-50, 61, 62-63). The Board set out Respondents'

arguments in great detail, and explicitly acknowledged that, if proven, those defenses would bar claims against Respondents. In response to those arguments, the Board specifically concluded:

- That neither Freeman United nor Springfield Coal has met the burden of establishing the compelling circumstance element of the laches defense; (Opinion and Order at 32)
- That Springfield Coal's invocation of the "unclean hands" doctrine was without merit; (Opinion and Order at 32)
- That, "as a matter of law, waiver does not apply"; (Opinion and Order at 33)
- That Freeman United has not established the elements of an estoppel defense, even considering the alleged facts as undisputed; (Opinion and Order at 33) and
- That although the facts alleged in the affirmative defenses are undisputed, the requisite elements have not been established for any affirmative defense. (Opinion and Order at 33)

It is well-established that "the party who asserts an affirmative defense has the burden of proof and must establish it by a preponderance of the evidence" *Schackleton v. Federal Signal Corp.*, 196 Ill. App. 3d 437, 444 (Ill. App. Ct. 1st Dist. 1989). *See also, Cordeck Sales, Inc. v. Constr. Sys.*, 382 Ill. App. 3d 334, 366 (Ill. App. Ct. 1st Dist. 2008) and *O'Keefe v. Greenwald*, 214 Ill. App. 3d 926, 936 (Ill. App. Ct. 1st. Dist. 1991). The Board considered the evidence presented by Respondents, and found that Respondents had failed to establish the necessary elements of those defenses. No newly-discovered evidence or change in the law regarding the affirmative defenses was presented in the Motion to Reconsider.

Next, Respondents reargue that because the mines took too few samples to meet regulatory requirements that the violations that result from those monthly averages should be excused. This is a legal question that was properly resolved on summary judgment, and warrants no reconsideration here. The Board considered all sides of this issue on pages 43-44, 52, 57, 59, and 63 of the Opinion and Order, and in holding the mine liable for 624 violations, found the argument to be without merit.

Third, Springfield Coal takes issue with the Board's treatment of a few data discrepancies, including 1) a transcription error identifying three discharges from 018 as being from outfall 017 that was corrected in Intervenors' reply brief (p. 17 and corrected Exhibit 3), 2) an average value that was mistakenly included as a daily maximum exceedance and corrected in Intervenors' reply brief (*Id.*), and 3) a sampling value for pH the mine disputed without any supporting evidence that was proven with the value reported on the applicable DMR (*Id.*). All of these clarifications were acknowledged by the Board on page 54 of its Opinion and Order. The Board implicitly accepted those clarifications by finding 624 (rather than 625) total violations in its Opinion and

Order, reducing the total number by the one incorrect value submitted in Intervenors' original Motion for Summary Judgment. There is nothing to reconsider.

Finally, Respondents reargue that the discharges from Outfall 019 were designated as "Reclamation" and therefore should have been subject to different effluent limits. The Board considered arguments on this issue on pages 47, 54, 58, and 62 of the Opinion and Order. Respondents arguments did not prevail, as the Board found the mine liable for 624 violations of the NPDES permit.

Since the Board considered all of the arguments and evidence presented on these issues and since Respondents have not produced any newly discovered evidence or change in applicable law, the motion to reconsider should be denied.

A motion to reconsider is not an opportunity to reargue the case

Throughout the motion to reconsider, Respondents resubmit several legal arguments they wish the Board to reconsider and find in their favor, including several affirmative defenses and arguments Respondents hope will excuse their permit violations. However, a motion to reconsider is not an appropriate means to "rehash arguments which have already been briefed by the parties and considered and decided by the Court." *CIENA Corp. v. Corvis Corp.*, 352 F. Supp. 2d 526, 527 (Del. 2005). As discussed above, all of these issues were briefed by the parties and considered by the Board in making its decision on the motion for summary judgment.

Similarly, courts reject attempts to include new arguments in a motion to reconsider, when those arguments were not previously raised by the parties. *Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 560-61 (7th Cir. Ill. 1985). If arguments are not raised during the briefing, they are waived and cannot be asserted in a motion to reconsider. *Id*. Thus, whether the restatement of Respondents' legal arguments in the motion to reconsider are new arguments or old arguments that are being rehashed, the Board has no cause now to reconsider those arguments.

Respondents had ample opportunity to conduct discovery before the Board decided the case

Asking for discovery after an issue has already been decided by the Board is inappropriate. Where a party "did not enjoy sufficient discovery prior to summary judgment being entered against him," that party's "own lack of diligence is responsible, not any unfairness[.]" *Thompson v. DDB Needham Chicago,* 1997 U.S. Dist. LEXIS 3954, *12-*13 (Mar. 31, 1997). The rule in the Seventh Circuit and the Northern District of Illinois is "[i]f a party fails to exercise such diligence before summary judgment, the Court will not rescue that party by revisiting that judgment." *Id.*, citing *DeBruyne v. Equitable Life Assurance Society of the U.S.*, 920 F.2d 457, 471 (7th Cir. 1990). Other cases similarly reject attempts to introduce evidence

that "could have been adduced during the pendency of the summary judgment motion." *Green v. Whiteco Indus.*, 17 F.3d 199, 202 n.5 (7th Cir. Ind. 1994). *See also, Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 560-61 (7th Cir. Ill. 1985).

In the *Thompson* case cited above, the court rejected a plea for discovery post-judgment when the party seeking relief from judgment had five months to realize he needed discovery on a central issue in the case. *Thompson*, 1997 U.S. Dist. LEXIS 3954, *12-*13. In the instant case, parties have been litigating the issue for nearly three years. Respondents have had more than ample opportunity during that time to conduct any discovery they deem necessary to support their affirmative defenses. Meanwhile other parties in the case conducted discovery in preparation to brief the motion for summary judgment. *See*, Springfield Coal's response to Prairie Rivers' First Interrogatories, attached to Intervenors' Motion for Summary Judgment. Respondents' failure to pursue discovery until *after* the Board has decided the motion for summary judgment has effectively waived their ability to seek discovery to relieve them from the judgment.

CONCLUSION

Because Respondents have not presented any new evidence, any change in law, or any other legitimate grounds for the Board to reconsider its Opinion and Order, the Board should DENY the motion to reconsider, and proceed to scheduling the penalty hearing.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Jessica Dexter, hereby certify that I have filed the attached **RESPONSE TO RESPONDENTS' MOTION FOR RECONSIDERATION** in PCB 2010-061 upon the below service list by depositing said documents in the United States Mail, postage prepaid, in Chicago, Illinois on January 11, 2013.

Respectfully submitted,

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