ORIGINAL

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 March 7, 2013, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, PEOPLE'S RESPONSE TO RULE 308 MOTION, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

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CERTIFICATE OF SERVICE

I hereby certify that I did on March 7, 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 RULE 308 MOTION upon the Respondents listed on the Service List.

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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 & 11-02 (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 RULE 308 MOTION

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, objects to the request for interlocutory appeal filed jointly by the Respondents pursuant to Section 101.908 of the Board's procedural rules, and states as follows:

Springfield Coal and Freeman United request that the Board certify certain proposed questions of law for an interlocutory appeal under Supreme Court Rule 308 and that the Board stay this action pending resolution of the certified questions. The Complainant does not challenge the authority of the Board to consider such a request under its Procedural Rules. However, the applicable legal provisions and case decisions will be first explored so that the objections to the motion may be considered in the appropriate context.

Applicable Law

Section 101.908 provides: "Upon motion of any party the Board may consider an interlocutory appeal in accordance with Supreme Court Rule 308." The substantive requirements of such requests are governed by Rule 308(a):

> When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the court's own motion or on motion of any party. The Appellate Court may thereupon in its discretion allow an appeal from the order.

In requesting that the Board consider an interlocutory appeal, the Respondents contend [motion at ¶ 18] that the Board has previously certified questions under Rule 308, and cite two older cases as examples: *City of Rockford v. Winnebago County Bd.*, PCB 87-92 (Nov. 25, 1987), and *People v. Sante Fe Park Enter., Inc.*, PCB 76-84 (Dec. 29, 1983). In the former case, the Board had vacated the county board's denial of local siting; such a *final* decision would be directly appealable under Section 41 of the Act, but the Board did "certify" questions of law (without the request of any party) for an appeal that was never taken. The *Sante Fe Park* case, however, did involve an appeal upon a certified question of law pursuant to Rule 308: whether a statute exempting sporting events from the noise pollution prohibitions of the Act was "constitutionally impermissible." This latter case resulted in the opinion in *People v. Pollution Control Board*, 129 Ill. App. 3d 958 (1st Dist. 1984),[1] which the Respondents cite [at ¶ 19] as

[1] It is important to note the 1983 Board decision and its subsequent appeal were preceded by the dismissal of an enforcement action by the Attorney General, reversed and remanded in *People v. Pollution Control Board*, 83 Ill. App. 3d 802 (1st Dist. 1980). In the first appeal, the appellate court held the statutory exemption concerning noise emissions from sporting events to be unconstitutional as an improper delegation of legislative authority and *remanded* the cause for further proceedings before the Board, thereby retaining jurisdiction under Section 41(d) of the Act ("The Appellate Court shall retain jurisdiction during the pendency of any further action conducted by the

judicial recognition of the Board's authority to invoke Rule 308. The People suggest that any authority to consider interlocutory appeals is more precisely derived from Section 41 (authorizing the direct review of administrative orders by the appellate court) in conjunction with Rule 335(i)(1) ("Insofar as appropriate, the provisions of Rules 301 through 373 (except for Rule 326) are applicable to proceedings under this rule.").

In more recent years, the Board has declined to allow interlocutory appeals. For instance, in *People of the State of Illinois v. State Oil Company*, PCB 97-103, the Board discussed the relevant law before denying a request under its procedural rule for an interlocutory appeal per Rule 308:

> The movants ask that the Board issue an order in accordance with 35 Ill. Adm. Code 101.908 and Supreme Court Rule 308(a) (153 Ill. 2d R. 308), certifying an appeal of the Board's April 4, 2002 order in this matter. The Board, in its procedural rules, specifically provides for Board certification of interlocutory appeals in accordance with Supreme Court Rule 308(a). See 35 Ill. Adm. Code 101.908. . . .
>
> The Board's authority to certify interlocutory appeals is also supported by judicial interpretation. See *People v. PCB*, 129 Ill. App. 3d 958, 473 N.E.2d 452 (1st Dist. 1984); *Getty Synthetic Fuel v. PCB*, 104 Ill. App. 3d 285, 432 N.E.2d 942 (1st Dist. 1982).
>
> The Illinois Supreme Court has indicated that Rule 308 appeals are to be allowed only in

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Board under an order by the Appellate Court. The Appellate Court shall have jurisdiction to review all issues of law and fact presented upon appeal."). The 1984 decision resulted from the appeal by the track operator; its argument on appeal was that the Board is without authority to decide the constitutionality of the statute and thus the Board's order was void. Since the court ruled that the statute was constitutional and that the Board had erred, it was unnecessary for the court to address the argument regarding the Board's authority.

The People note that, before ruling on constitutionality, the Board had considered its legal ability to evaluate the validity of the statutes and was encouraged to do so by the arguments of the Attorney General *People v. Sante Fe Park Enter., Inc.*, PCB 76-84 (Sept. 23, 1983). However, it is now clear that as an administrative agency, the Board does *not* have the ability to declare a legislative enactment to be unconstitutional. When administrative agencies declare statutes unconstitutional or question their validity, their actions are a nullity and cannot be upheld. *Goodman v. Ward* (2011), 241 Ill. 2d 398. See also *Cinkus v. Village of Stickney Municipal Officers Electoral Bd.* (2008), 228 Ill. 2d 200; *Delgado v. Board of Election Com'rs of City of Chicago* (2007), 224 Ill. 2d 481; *Bryant v. Board of Election Com'rs of City of Chicago* (2007), 224 Ill. 2d 473.

> certain exceptional circumstances. *People v. Pollution Control Board*, 473 N.E.2d at 456, citing *People ex. rel. Mosley v. Carey*, 74 Ill.2d 527 (1979). Thus, Rule 308 should be strictly construed and sparingly exercised. *People v. PCB*, 473 N.E.2d at 456. In order for the Board to grant Rule 308(a) certification, it must determine that a two-prong test is satisfied: (1) whether the Board's decision involves a question of law involving substantial ground for difference of opinion; and (2) whether immediate appeal may materially advance the ultimate termination of the litigation. *Residents Against a Polluted Environment and the Edmund B. Thornton Foundation v. County of LaSalle and Landcomp Corporation*, PCB 96-243 (Nov.7, 1996); *Land and Lakes Co. v. Village of Romeoville*, PCB 91-7 (Apr. 11, 1991)). However, even after the trial court has made the required finding and the application has stated why an immediate appeal is justified, allowance of an appeal is discretionary. *Voss v. Lincoln Mall Management*, 166 Ill. App. 3d 442, 519 N.E.2d 1056 (1st Dist. 1988); *Camp v. Chicago Transit Authority*, 82 Ill. App. 3d 1107, 403 N.E.2d 704 (1st Dist. 1980).

(May 16, 2002; slip op. at 2). The appellate case law holds that the application of Rule 308 is limited to exceptional circumstances. "Rule 308 should be strictly construed and sparingly exercised. . . . [and review] thereunder should be limited to the question certified by the trial court." *People v. Pollution Control Board*, 129 Ill. App. 3d at 965.[2]

In rejecting requests for interlocutory appeal, the Board has employed a two prong test in its rulings on motions pursuant to Section 101.908: 1) whether the Board's decision involves a question of law involving substantial ground for a difference of opinion; and 2) whether immediate appeal may materially advance the ultimate termination of the litigation. See *E.R. 1, LLC v. Erma I. Seiber and Fairmount Park, Inc.*, PCB 08-30 (April 21, 2011); *Estate of Gerald D. Slightom v. IEPA*, PCB 11-25 (April 19, 2012). This test, of course, is simply what Rule 308(a) requires.

The Respondents cite cases that suggest an interlocutory appeal may be warranted

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[2] As discussed *supra*, this opinion does *not* precisely support the Board's authority to certify interlocutory appeals (as claimed in the *State Oil* decision). Moreover, *Getty Synthetic Fuel v. PCB*, 104 Ill. App. 3d 285 (1st Dist. 1982), which is also cited as a supporting "judicial interpretation" in the *State Oil* decision, actually involved the appeal of a final Board order and does not cite Rule 308 at all.

regarding legal issues of "first impression" and "novel" questions of law, and the following argument will focus on the nature of the questions proposed for appellate review. However, the plain meaning of Rule 308 is the mere existence of any difference of opinion cannot itself justify an interlocutory appeal that would necessarily delay the resolution of the underlying litigation.

Argument

The Respondents have proposed two questions for certification: 1) Whether the regulations regarding background concentrations and monthly averaging of samples are incorporated into an NPDES permit; and 2) Whether a Compliance Commitment Agreement precludes in any manner an enforcement action by the Attorney General. The motion contends [at ¶ 24] that these questions "are significant, novel questions of law that are highly germane to this litigation and go directly to the issue of Respondents' liability."

The applicability of any regulations that do not conflict with the terms and conditions of the permit was simply not at issue in the summary judgment rulings, and there is no disagreement by the Complainant that such rules are indeed applicable. In fact, the application of both Sections 406.103 (background concentrations) and 406.101 (sample averaging) was the focus of rulings adverse to the Respondents. For instance, the Board clearly stated that "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." Order (Nov. 15, 2012) at 15. The problem is simply that, having failed to develop such proof (through discovery or otherwise) and having relied largely upon factually unsupported affirmative defenses, liability was imposed through summary judgment.

Section 406.103 clearly provides that compliance with the numerical effluent standards is

excused *only* when the effluent concentrations in excess of the standards result *entirely* from the contamination of influent before it enters the affected land. Springfield Coal's evidence did not show that any background concentrations in the influent accounted *entirely* for the values reported in excess of the permit limits and thus failed to preclude findings of liability based upon the data reported in the DMRs. The Board's rulings on these factual matters are subject to the manifest weight of the evidence and abuse of discretion standards on appeal. The lack or failure of any countervailing proof is not a legal question at all.

Similarly, Section 406.101 applies specifically to mine waste effluent and water quality standards and requires three grab samples in order to calculate a monthly average. The Board fully considered the competing arguments as to whether a genuine issue of material fact might preclude summary judgment: "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." Order (Nov. 15, 2012) at 47. "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.' [citations omitted] 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." Order (Nov. 15, 2012) at 52.

The existence of a Compliance Commitment Agreement is not solely a legal question. The People acknowledged the existence of the CCA accepted by the Illinois EPA on June 16,

2005 and addressed the affirmative defense asserted by Freeman United regarding whether the Illinois EPA allowed this CCA to be extended on August 30, 2007. In other words, there is no factual dispute regarding the existence of the June 2005 CCA but there was no evidence proving that any CCA existed in August 2007 and thereafter. Moreover, by its express terms, the duration of the June 2005 CCA was limited to two years and the scope was limited to manganese discharges from Pond 019. Therefore, as the People argued in the motion for summary judgment, no genuine issue of material fact existed:

> While Freeman United might have complied with the terms of the CCA through the performance of the designated compliance actions, those actions did not achieve compliance with the NPDES Permit's manganese effluent limitations applicable to Pond 19 (i.e., permitted outfall 019). The legal issue whether any civil penalties may or should be imposed for these particular discharges during the two year term of the June 2005 CCA is not explicitly addressed in the Section 31 provisions, but it is not an issue of fact. In contrast, according to the DMRs evaluated and summarized by Mr Crislip, there is no genuine issue of material fact as to the higher than permissible levels of manganese in the discharges from Pond 19 during and after the CCA.

People's MSJ at 7.

In conjunction with its legal claim that Section 31(a)(10) prohibited the Illinois EPA from making any referral to the Attorney General, Freeman United attempted and failed to prove two collateral factual allegations. It claimed that the Illinois EPA never issued another violation notice and that the Attorney General only found out about the violations from the Illinois EPA referral. These allegations were rebutted by the documents tendered by the Davis affidavit which demonstrated the Illinois EPA's issuance of a notice of violation to Freeman United on October 8, 2009 and explained that the Attorney General was informed of the violations through the ELPC's 60-day notice dated December 9, 2009. Thus, neither assertion was proven and no

genuine issue of material fact was created. This leaves merely the legal question of whether an enforcement action by the Attorney General is somehow precluded by the existence of a CCA.

The People's response to Freeman United's cross-motion for summary judgment addressed the legal claims by looking to the plain meaning of Section 31 and distinguishing what was cited as Board precedent, including the decision in *People v. Chiquita Processed Foods*, PCB 02-56 (Nov. 21, 2002). In its rulings against the Respondents, the Board considered all of the arguments but noted that Freeman United conceded it recognizes the Attorney General's authority to bring enforcement on her own motion. Order (Nov. 15, 2012) at 20. The Board also discussed the applicability and implications of the *Chiquita* decision to the claims but found that "the Attorney General did not get wind of the Industry Mine allegations" until receipt of the notice of intent letter that was also sent to Freeman United. Order (Nov. 15, 2012) at 25. After a lengthy evaluation of these claims, the Board ruled explicitly that the existence of a CCA "does not bar the People from bringing an enforcement action on its own motion." Order (Nov. 15, 2012) at 31.

Now that the questions proposed for certification under Rule 308 have been considered in the context of the arguments and rulings, the focus turns to whether "there is substantial ground for difference of opinion" as to 1) Whether the regulations regarding background concentrations and monthly averaging of samples are incorporated into an NPDES permit; and 2) Whether a Compliance Commitment Agreement precludes in any manner an enforcement action by the Attorney General. As to the first question, there seems to be no dispute that the regulations regarding background concentrations and sample averaging are indeed applicable to permit compliance. Obviously, opposing counsel disagree as to the second question. Therefore, a more

appropriate inquiry regarding the CCA issue is whether Section 31 places any constraint on the filing of an enforcement action. The motion certainly does not identify any provision of that statute constraining the performance of the duties of the Attorney General in this regard. The Attorney General is a constitutional officer, of course, but there is no legal provision that purports to bar any such action on behalf of the People. There is simply no language in Section 31 constraining the Attorney General in regard to the filing of a complaint.

The only interface between a CCA and the Attorney General is the newly enacted provision at Section 31(a)(7.6) of the Act ("Successful completion of a Compliance Commitment Agreement or an amended Compliance Commitment Agreement shall be a factor to be weighed, in favor of the person completing the Agreement, by the Office of the Illinois Attorney General in determining whether to file a complaint for the violations that were the subject of the Agreement."). This new provision was previously cited because it clearly shows that even where a violator successfully completes a CCA, the statute does not limit the Attorney General's authority to take enforcement and seek penalties, but merely directs that such conduct be considered a mitigating factor. Subsection (a)(7.6) did not become effective until August 23, 2011 and does not apply to this case. The Board noted Springfield Coal's argument that this new provision does not have retroactive effect. Order (Nov. 15, 2012) at 15. Therefore, even though the parties agree that it is not applicable to the complaint filed in 2010, it is also undisputed that this provision does not bar the People from bringing an enforcement action on its own motion.

There is thus no basis in the record for the Board to find that "there is substantial ground for difference of opinion" regarding the questions proposed by the Respondents. Hence, the Complainant need not address the final prong of the test as to whether an immediate appeal from

the order may materially advance the ultimate termination of the litigation. The posture of this action is that an evidentiary hearing is to be conducted on the civil penalties and other relief to be imposed on the Respondents for the violations adjudicated in the November 21, 2012 Order. Once a final order may be obtained to terminate the litigation, an appeal may be taken pursuant to Section 41 of the Act. The Respondents may at such time challenge the findings and conclusions of the Board.

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, respectfully objects to the motion for interlocutory appeal 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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