

ILLINOIS POLLUTION CONTROL BOARD
April 18, 2013

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

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)
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.)

ORDER OF THE BOARD (by D. Glosser):

This matter is before the Illinois Pollution Control Board (Board) on a motion for certificate of appeal and to stay pending proceedings (Mot.) filed on February 21, 2013 by Springfield Coal Company, LLC (Springfield Coal) and Freeman United Coal Mining Co., LLC (Freeman United) (collectively, respondents), pursuant to 35 Ill. Adm. Code 101.908 and Illinois Supreme Court Rule 308. The motion requests that the Board certify two questions for interlocutory appeal to the Illinois Appellate Court, and that the Board stay this action pending resolution of the certified questions. Mot. at 1. On March 7, 2013, the People of the State of Illinois (People) filed a response (People Resp.) to the motion. On the same day, the

Environmental Law and Policy Center (ELPC), on behalf of Sierra Club and Prairie Rivers Network, also filed a response (ELPC Resp.) to the motion. For the following reasons, the Board denies respondents' motion.

Below, the Board first describes the procedural background. Next, the Board summarizes respondents' motion for certificate of appeal as well as the separate responses filed by the People and ELPC. The Board then provides a discussion on the motion.

PROCEDURAL BACKGROUND

On February 10, 2010, the People filed a four-count complaint against respondents alleging water pollution and National Pollutant Discharge Elimination System (NPDES) permit violations. The violations allegedly occurred at respondents' strip mine located in McDonough and Schuyler Counties, approximately 5 miles southwest of Industry, Illinois, between January 2005 and December 2009. On February 18, 2010, the Board accepted the People's complaint for hearing.

On February 25, 2010, ELPC filed a motion to intervene. On April 15, 2010, the Board granted ELPC's motion to intervene and on July 15, 2010, the Board accepted ELPC's four-count complaint for hearing.

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. On April 27, 2012, Freeman United and Springfield Coal each filed responses to the People's motion, with Freeman United's response also including a cross-motion for summary judgment on certain counts.

On April 27, 2012, ELPC filed a motion for partial summary judgment regarding the NPDES permit violations. On June 6, 2012, Freeman United and Springfield Coal separately responded to ELPC's motion.

On November 15, 2012, the Board granted the People's motion for partial summary judgment and denied Freeman United's cross-motion for partial summary judgment. The Board also granted ELPC's motion for partial summary judgment. The Board declined to issue a civil penalty and ordered the parties to hearing to address factual issues that may affect the penalty finding.

On December 21, 2012, respondents filed a joint motion to reconsider the Board's granting of the partial motions for summary judgment. On January 11, 2012, the People and ELPC separately responded to the respondents' motion. On February 7, 2013, the Board denied respondents' motion for reconsideration.

On February 21, 2013, respondents filed a joint motion to certify questions of law for interlocutory appeal to the Illinois Appellate court. Respondents' motion additionally requests the Board stay further proceedings pending the resolution of the appeal. On March 7, 2013, the Board received separate responses to the motion from the People and ELPC.

LEGAL BACKGROUND

The Board's procedural rules allow the Board to consider an interlocutory appeal under Supreme Court Rule 308 (Ill. S. Ct. Rule 308). 35 Ill. Adm. Code 101.908. Supreme Court Rule 308(a) provides in part:

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. Ill. S. Ct. Rule 308 (2011).

The Board's authority to certify interlocutory appeals is also supported by judicial interpretation. *See* People v. Pollution Control Board, 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 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). Accordingly, Rule 308 should be strictly construed and sparingly exercised. People v. Pollution Control Board, 473 N.E.2d at 456.

In order for the Board to grant 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 a 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); *see also* People v. State Oil Company, et al., PCB 97-103 (May 16, 2002) and E.R.1, LLC v. Erma Seiber et. al., PCB 8-30 (Apr. 21, 2011). 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).

ARGUMENTS OF THE PARTIES

On February 21, 2013 respondents filed the motion for interlocutory appeal and to stay the pending proceedings. On March 7, 2013, the People and ELPC separately filed responses to respondents' motion. The Board will now summarize the arguments presented in each filing separately.

Respondent's Motion to Certify Questions and Stay Action

In support of their motion for certification, respondents state that the Board's February 7, 2013 order denying respondents' motion for reconsideration and the Board's November 15, 2012

order granting the People's and ELPC's motions for partial summary judgment involve questions of law as to which there are substantial grounds for differences of opinion. Mot. at 3, ¶ 14. Additionally, respondents assert that an immediate appeal from the orders may materially advance the ultimate termination of the litigation. *Id.* In their motion, respondents propose two questions for certification. Respondent's questions are as follows:

- a. Whether the Illinois Administrative Code regulations directly applicable to a NPDES permit, including those regulations regarding background concentrations (35 Ill. Adm. Code 406.103) and monthly averaging of samples (35 Ill. Adm. Code 406.101) (as amended), are incorporated into a NPDES permit when those regulations do not otherwise contradict the express terms of the permit?
- b. Whether the existence of a Compliance Commitment Agreement precludes in any manner an enforcement action by the Illinois Attorney General against the person who has entered into and fully complied with the Compliance Commitment Agreement? Mot. at 4, ¶15.

Respondents contend that the Board's order granting partial summary judgment is a proper subject for interlocutory appeal under Supreme Court Rule 308. Mot. at 5, ¶ 21. Moreover, respondents assert that "an issue presents 'substantial ground for difference of opinion' when the issue is one of first impression." Mot. at 5, ¶22, *citing Costello v. Governing Bd. Of Lee County Special Educ. Ass'n*, 252 Ill. App. 3d 547, 548 (1993). Respondents therefore conclude that novel issues may properly be certified for appellate review because they present legal questions of first impression. *Id.* In support of their motion, respondents maintain that there is no established Illinois law on the questions they present to the Board for certification and conclude that their questions are thus novel, legal questions of first impression "ripe for the appellate court's consideration." Mot. at 5-6, ¶ 23.

Respondents additionally maintain that certification of the questions will materially advance the litigation. Mot. at 6, ¶ 24. Respondents again base their argument on the claim that the questions they present to the Board for certification present matters of first impression, and further, that their questions are directly related to the issue of their liability. *Id.* Respondents assert that making determinations on such legal questions regarding their legal liability will automatically materially advance the litigation. *Id.* Respondents allude to the likelihood of an appeal by any involved party if a final order from the Board were to be issued at this stage, due to the amount of penalties sought by the People and ELPC. *Id.* Respondents claim that certifying their questions for interlocutory appeal to the Illinois Appellate Court will reduce the likelihood of such appeals. *Id.*

Respondents also request that the Board stay the proceedings pending resolution of the appeal. Mot. at 6, ¶ 25.

The Peoples' Argument

The People argue that respondents' motion to certify questions fails to satisfy the Board's two-prong test for granting 308(a) certification. People Resp. at 5. Regarding the first prong of the test, the People assert that there is no basis in the record for the Board to find that there is "substantial ground for difference of opinion" with either of the questions respondents present to the Board for certification. *Id.* at 9. Maintaining that this first prong of the Board's test for granting 308(a) certification has not been met, the People argue that the second prong of the Board's test need not be considered for either question. Thus, the People object to respondents' motion for interlocutory appeal. *Id.* at 9-10.

The People first discuss respondents' question regarding the applicability of regulations that do not conflict with the terms and conditions of an NPDES permit. The People argue there is no disagreement as to this question, and concede that regulations that are not in conflict with the terms and conditions of a permit fully apply. *Id.* at 5. The People specifically acknowledge the applicability of the regulations respondents explicitly cite in their first question: Section 406.103 on background concentrations and Section 406.101 on sample averaging. *Id.* at 5. The People claim, however, that the applicability of these regulations was not at issue in the Board's decision to grant partial summary judgment to complainants. *Id.* at 5,6, *citing* People and ELPC (intervenors) v. Freeman United Coal Mining Company and Springfield Coal Company, LLC, PCB 10-61 and 11-2 (conslid.) slip op. at 15 (Nov. 15, 2012). Rather, the People argue that, in deciding to grant partial summary judgment, the Board adequately considered both provisions and the evidence presented by respondents, but the Board found no genuine issue of material fact to preclude summary judgment. *Id.* The People maintain that the legal applicability of the regulations was not in question; respondents merely failed to produce proof sufficient for the Board to find that either provision provided an adequate defense to respondents' NPDES permit violations. *Id.* at 6.

Second, the People address respondents' question concerning the ability of the People to take enforcement action and seek penalties for violations where a Compliance Commitment Agreement (CCA) exists and has been complied with by the violator. The People acknowledge that opposing counsel disagrees as to this question, but still assert that there is no basis in the record for the Board to find that "there is substantial ground for difference of opinion." *Id.* at 9. The People argue that the plain language of Section 31(a)(7.6) of the Environmental Protection Act (Act) (415 ILCS 5/31(a)(7.6) (2010) "does not limit the People's authority to take enforcement and seek penalties, but merely directs that such conduct be considered a mitigating factor. *Id.* at 9.

Furthermore, the People argue that because the provision at Section 31(a)(7.6) of the Act (415 ILCS 5/31(a)(7.6) (2010) is newly enacted and did not become effective until August 23, 2011, it does not retroactively apply to this case, because the complaints by the People and ELPC were both filed in 2010. *Id.* at 9. On these grounds, the People conclude that there is no basis for the Board to find that there is a ground for substantial difference of opinion as to respondent's second question. *Id.* at 9. Claiming neither of respondent's questions satisfies the first prong of the Board's test for granting 308(a) certification, the People argue respondent's petition should be denied.

ELPC's Argument

In response to the motion, ELPC argues that respondents' motion fails to demonstrate "extraordinary circumstances" necessary to warrant an interlocutory appeal, and that neither question presented by respondents sufficiently satisfies the requirements for granting Supreme Court Rule 308(a) certification. ELPC's Resp. at 1. Specifically, ELPC contends that both questions fail to satisfy both prongs of the Rule 308(a) two-prong test, and ELPC thereby concludes the interlocutory appeal respondents seek is inappropriate. *Id.* at 2.

ELPC argues that the Board has the authority to certify questions for interlocutory appeal only in "exceptional circumstances." ELPC's Resp. at 1, *citing* People v. PCB, 473 N.E.2d 452,456 (1st Dist. 1984). Additionally, ELPC notes that the two cases relied upon by respondents as occasions where the Board has certified questions for appeal both involved constitutional questions for which the Board sought guidance from the courts. *Id.* at 2. In contrast, ELPC asserts that the first question presented by respondents involves application of the Board's own rules, and that both questions involve matters in which the Board has recognized expertise. *Id.*

Specifically addressing respondent's first question, ELPC argues respondents "misstate the law and the facts of the case" and fail to present an "issue where there is substantial ground for difference of opinion." *Id.* at 3. ELPC contends that respondents' question is premised on an incorrect assumption: that Illinois Administrative Code regulations are "directly applicable to an NPDES permit." *Id.* Additionally, ELPC argues that, contrary to respondents' assertion, the application of Sections 406.103 and 406.101 of the Board's rules does conflict with the terms of the permit. *Id.* at 4. ELPC argues that all applicable regulations and terms are limited to those contained within the four corners of the NPDES permit, and that any additional term outside of the plain language of the permit thus necessarily conflicts with the express terms of the permit. *Id.*

Because the NPDES permit at issue in this case makes no explicit exception for non-compliance due to background concentrations, ELPC argues that the application of Section 406.103 of the Board's rules is in direct conflict with the permit. *Id.* Similarly, because the express terms of the permit at issue in this case make no exception from the prescribed effluent limitations if respondent takes fewer than three samples per month, ELPC argues that the application of Section 406.101 of the Board's rules would be in direct conflict with the permit. *Id.* Finally, ELPC acknowledges that while this question may present a matter of first impression in Illinois, the issue it raises is not one on which there is substantial ground for disagreement. *Id.*

Second, ELPC addresses respondents' question concerning the ability of the People to take enforcement action and seek penalties for violations where a CCA exists and has been complied with by the violator. *Id.* ELPC argues that even if the People may be precluded from bringing an enforcement action, there is no bar on citizen enforcement of respondents' violations. *Id.* ELPC maintains that respondents' liability has already been established for the violations at issue through citizen enforcement, so an interlocutory appeal would have no

material effect on the termination of the litigation, and a penalty hearing will still have to take place. *Id.* at 4-5. Additionally, ELPC argues that the CCA at issue only applies to violations that are the subjects of the agreement. *Id.* at 5. ELPC contends that even if respondents were to prevail on the question, only three violations would be at issue. *Id.* As to the other violations not addressed by the CCA in question, ELPC argues the People’s participation would in no way be barred. ELPC therefore argues these proceedings would necessarily continue as prescribed with a penalty hearing on the other violations. ELPC argues that interlocutory appeal in this case would thus have no material effect on the termination of the litigation. *Id.* at 5.

ELPC contends that respondents’ second question fails the first prong of the Board’s 308(a) test, because 415 ILCS 5/31 in no way limits the People’s authority to bring an enforcement action when Illinois EPA does not refer the case. *Id.* ELPC contends that in this case, the People brought the action in response to ELPC’s 60-day notice of intent to sue under the Clean Water Act’s citizen suit provisions, not on referral from the Illinois Environmental Protection Agency. *Id.* ELPC therefore concludes that 415 ILCS 5/31 does not apply to the circumstances of this litigation, as there is no significant ground for difference of opinion as to respondent’s second question. *Id.*

DISCUSSION

The Board will first examine respondent’s arguments generally under Supreme Court Rule 308(a) and then discuss each of the two questions specifically. The Board will then address the motion to stay.

Supreme Court Rule 308(a)

In general, the Board is not persuaded by respondents’ arguments that the questions should be certified pursuant to Supreme Court Rule 308(a). First, respondents contend that “an issue presents ‘substantial ground for difference of opinion’ when the issue is one of first impression.” Mot. at 5, ¶ 22. The contention that a question presents a matter of first impression does not automatically satisfy the first prong of the Board’s test for granting Rule 308(a) certification. A question may be of first impression and yet may still not involve an issue on which there are substantial grounds for difference of opinion.

The Board is also not persuaded that where a question directly concerns the issue of a respondent’s liability, the question “undeniably materially advances this litigation.” Mot at 6, ¶ 24. Such claims are insufficient to satisfy the second prong of the Board’s test for Rule 308(a) certification. The Board notes that most questions presented for certification will affect a defendant’s liability. In order to establish that the exceptional relief of a Rule 308(a) interlocutory appeal is warranted, a movant must provide considerable evidence that a question will significantly advance the ultimate termination of the case before the Board.

Granting certification under Supreme Court Rule 308(a) is up to the discretion of the Board, and following well-established precedent, certification for interlocutory appeal is to be granted only in exceptional circumstances and where both prongs of the Rule 308(a) test have

been satisfied. The Board finds that respondents' arguments fail to establish that, under Supreme Court Rule 308(a), this situation rises to a level warranting such exceptional relief.

Respondents' First Question

Respondents' first question concerns the applicability of "regulations that do not conflict with the terms and conditions of an NPDES permit," namely 35 Ill. Adm. Code 406.103 on background concentrations and 35 Ill. Adm. Code 406.101 on monthly averaging of samples. Mot. at 4. Respondents contend that because this question is a matter of first impression, it therefore presents an issue on which there is substantial ground for difference of opinion. Additionally, respondents argue that the question directly concerns their liability, and that granting certification will therefore materially advance the ultimate termination of this litigation. The Board does not find respondents' arguments persuasive.

Respondents' first question generally involves the Board's interpretation and application of its own administrative regulations. The Illinois Appellate Court has long afforded the Board great deference in interpreting and applying its own rules and regulations. *See, Granite City Div. of Nat. Steel Co. v. Illinois Pollution Control Board*, 155 Ill.2d 149, 174, 184 Ill. Dec. 402, 414 (1993) (holding "where the Board's construction of its regulations is a reasonable one, that construction is preferred and entitled to deference"); *see also, Commonwealth Edison Co. v. Pollution Control Board*, 127 Ill. App. 3d 446, 448, 82 Ill. Dec. 559, 468 N.E.2d 1339, (1984) *People v. Nastasio*, 19 Ill.2d 524, 168 N.E.2d 728 (1969). In light of the Board's authority to interpret and apply its own rules and regulations, the Board finds that respondents' 'first impression' argument fails to provide sufficient indication that substantial ground for difference of opinion exists on the first question presented to the Board for certification.

Further, in its November 15, 2012 order granting partial summary judgment to the People and ELPC, the Board directly addressed respondents' attempts to rely on Section 406.103. The Board appropriately ruled on the applicability of these provisions, finding that the matter of their applicability "do[es] not alter the fact that the DMRs [daily monitoring reports], signed by the companies, establish violations of the permit limits." PCB 10-61 & 11-02 slip op. 63 (Nov. 15, 2012). The Board found that because both the People and ELPC alleged violations of the express terms of respondents' NPDES permit, and the affidavit of Mr. Crislip established that the DMRs provided a factual basis for the alleged violations, the effluent exceeded permit limits. *See Id.* at 29-30, 64.

Additionally, the Board found that background concentration limits, along with the enforceability of other provisions of the Illinois Administrative Code, as well as the effects of CCAs are "issues to be considered in determining appropriate penalty." PCB 10-61 & 11-02 slip op. 63 (Nov. 15, 2012). Thus, even in if the Board accepted that regulations such as Section 406.103 concerning the existence of background concentrations can apply in this case, the Board has already ruled on the factual evidence put forth by respondents and determined the rule is only relevant in terms of determining the appropriate penalty, not in determining respondents' liability. "Mr. Crislip's affidavit summarizing the reporting on the DMRs sufficiently establishes that the Industry Mine Discharge exceeded permit limits." *Id.* at 34. Therefore, the Board finds that respondents' assertion that this question goes to their liability in these proceedings is not

only insufficient, but it is also erroneous. The Board further finds that respondents failed to sufficiently satisfy either prong of the Board's two-prong test to grant Rule 308(a) certification on their first question.

Respondent's Second Question

Respondents' second question concerns the ability of the People to take enforcement action and seek penalties for violations where a CCA exists and has been complied with by the violator. Respondents again contend that because this question is a matter of first impression, it therefore presents an issue on which there is substantial ground for difference of opinion. Additionally, respondents argue that the question directly concerns their liability, and that granting certification will therefore materially advance the ultimate termination of this litigation. The Board does not find respondents' arguments on the second question persuasive.

Under the plain language of Section 31(a)(10) of the Act (415 ILCS 5/31(a)(10) (2010)), the existence of a CCA prohibits the IEPA from referring a case. However, nothing in Section 31(a)(10) of the Act (415 ILCS 5/31(a)(10) (2010)) bars the People or a citizen's group from bringing an action. *See* PCB 10-61 & 11-02 slip op. 31-32 (Nov. 15, 2012). Further, in its November 15, 2013 order granting partial summary judgment to the People and ELPC, the Board found that the effects of CAAs are appropriate for consideration in determining penalties. *See Id.* at 63. The Board finds that other than declaring the novelty of their question, respondents present no basis for concluding that there are substantial grounds for difference of opinion on the relevance of the existence of a CCA in these proceedings.

Furthermore, the Board finds that respondents present no significant evidence to indicate that granting an interlocutory appeal on this question will materially advance the termination of these proceedings. Most notably, a CCA is only relevant to an enforcement action where an alleged violation is addressed by the subject of the CCA. Thus, even if the existence of a CCA somehow limited the People's or ELPC's ability to prosecute the violations, such limitation would apply only to the items covered by the CCA. In these proceedings, the CCA at issue exclusively addressed Outfall 19 and discharges of manganese. *See Id.* at 64, *citing* Austin Aff. at Exh. 1B. The CCA in no way addressed any of the remaining violations for which the Board has found respondents liable. Therefore, even if respondents were to prevail on this question through interlocutory appeal, only three manganese violations from Outfall 19 in 2004 would be affected. A penalty hearing on each of the other violations would still be necessary, and thus the ultimate termination of these proceedings would in no way be effected if interlocutory appeal were granted on this question. The Board finds that respondents failed to sufficiently satisfy either prong of the Board's two-prong test to grant Rule 308(a) certification on their second question.

Motion to Stay

As the Board denies the motion for certificate of appeal, the Board finds it unnecessary to stay the present hearings. Accordingly, the Board also denies respondents' motion to stay the pending proceedings.

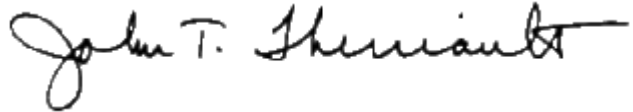
CONCLUSION

The Board finds that respondents have failed to prove that this exceptional relief is warranted. Simply because a question presents a matter of first impression does not automatically mean that it constitutes a question of law involving substantial ground for difference of opinion on which certification should be granted. Furthermore, respondents have not put forth any persuasive argument to the Board that an immediate appeal on either question will materially advance the ultimate termination of this litigation. Therefore, the Board denies respondents' motion for interlocutory appeal and to stay the pending proceedings. The parties are directed to enter into discovery, if they have not already done so, and proceed to hearing.

IT IS SO ORDERED.

Board Member J. A. Burke abstains.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, hereby certify that the Board adopted the above opinion and order on April 18, 2013, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board