

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF:

PEOPLE OF THE STATE OF )  
 ILLINOIS )  
 )  
 Complainant, )  
 )  
 v. )  
 )  
 FREEMAN UNITED COAL )  
 MINING CO., L.L.C., and )  
 SPRINGFIELD COAL CO., L.L.C. )  
 )  
 Respondents. )

PCB 2010-061  
(Enforcement-Water)

To:

John Therriault, Clerk  
 Illinois Pollution Control Board  
 James R. Thompson Center  
 100 West Randolph St., Suite 11-500  
 Chicago, IL 60601

Persons included on the attached  
SERVICE LIST

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the Environmental Law and Policy Center's **Motion for Leave to Reply to Freeman United's Response to Motions for Leave to Reply and Reply to Freeman United's Response to Motions to Reply**, a copy of which is herewith served upon you.

Respectfully submitted,




---

Jessica Dexter  
 Staff Attorney  
 Environmental Law and Policy Center  
 35 East Wacker Drive, Suite 1300  
 Chicago, IL 60601  
 312-795-3747

DATED: April 14, 2010

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF:

PEOPLE OF THE STATE OF )  
ILLINOIS )  
 )  
Complainant, )  
 )  
v. )  
 )  
FREEMAN UNITED COAL )  
MINING CO., L.L.C., and )  
SPRINGFIELD COAL CO., L.L.C. )  
 )  
Respondents. )

PCB 2010-061  
(Enforcement-Water)

**MOTION FOR LEAVE TO REPLY TO FREEMAN UNITED'S RESPONSE TO  
MOTIONS FOR LEAVE TO REPLY**

I, JESSICA DEXTER, hereby file a MOTION FOR LEAVE TO REPLY to FREEMAN UNITED COAL MINING COMPANY, L.L.C.'s April 9, 2010 RESPONSE TO MOTIONS FOR LEAVE TO REPLY in this matter on behalf of PRAIRIE RIVERS NETWORK, its individual members, and SIERRA CLUB, ILLINOIS CHAPTER, and its individual members (collectively, "Movants"). In support of this Motion, ELPC states the following:

1. The Board has the authority to grant Movants a right to reply where failure to do so would create material prejudice. 35 Ill. Admin. Code 101.501(e).
2. Movants would be materially prejudiced by the Board's decision to hear paragraphs 3 and 4 of Freeman United's Response, as they do not respond to the Motions to Reply, but to Movants' February 25, 2010 Motion to Intervene. Freeman United has already responded to the February 25 Motion; its latest response is untimely, and Freeman United has

therefore waived its opportunity to object to ELPC's motion. Moreover, Freeman United's objection misstates the applicable law on intervention.

3. WHEREFORE, Movants respectfully requests that the Board GRANT their Motion for Leave to Reply and file the attached Reply to Freeman United's Response to Motions for Leave to Reply.

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF:

PEOPLE OF THE STATE OF )  
 ILLINOIS )  
 )  
 Complainant, )  
 )  
 v. )  
 )  
 FREEMAN UNITED COAL )  
 MINING CO., L.L.C., and )  
 SPRINGFIELD COAL CO., L.L.C. )  
 )  
 Respondents. )

PCB 2010-061  
(Enforcement-Water)

**REPLY TO FREEMAN UNITED’S RESPONSE TO MOTIONS TO REPLY**

I, JESSICA DEXTER, hereby REPLY to Freeman United Coal Mining Company, L.L.C.’s April 9, 2010 RESPONSE TO MOTIONS TO REPLY in this matter on behalf of PRAIRIE RIVERS NETWORK, its individual members, and SIERRA CLUB, ILLINOIS CHAPTER, and its individual members (collectively, “Movants”). Movants respectfully request that the Illinois Pollution Control Board (the “PCB” or “Board”) enter an order striking paragraphs 3 and 4 of Freeman United’s Response, since these paragraphs are untimely and Freeman United has thus waived its right to object to Movants’ motion. In the event that the PCB decides to hear Freeman United’s Response despite its untimely nature, the Board should find that it misstates the applicable law on intervention. Movants respectfully request that the PCB grant Movants’ Motion to Intervene and file the attached Complaint notwithstanding Freeman United’s Response. In support of this request, ELPC states the following:

**Freeman United’s Response Misstates the Applicable Law on Intervention**

1. The PCB regulation governing filing of motions and responses is found in the PCB’s procedural rules at 35 Ill. Admin. Code § 101.500. Section 101.500(e) reads as follows:

An intervenor will have 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. The limits may include providing that: the intervenor is bound by Board and hearing officer orders already issued or by evidence already admitted; that the intervenor does not control any decision deadline; and that the intervenor cannot raise issues that were raised or might more properly have been raised at an earlier stage of the proceeding.

2. This regulation does not establish any rule that “an intervenor must take the case as he finds it,” as Freeman United claims, nor does it make it “improper for an intervenor to file a complaint which adds new and additional claims.” April 9, 2010 Response at para. 4. On the contrary, it states that intervenors shall have all the rights of original parties – including the right to bring new claims and raise new issues – unless the Board exercises its discretion to limit the rights of the intervenor “as justice may require.” The fact that the rule states that the Board may restrict an intervenor’s ability to raise new issues *as an example of a discretionary measure within the Board’s power* is strong evidence that there exists no absolute bar to new claims raised by intervenors.

3. Freeman United mistakenly describes a blanket rule that intervenors can never raise new claims. Such an interpretation would obliterate the discretion the rule explicitly gives the Board in this area. Nothing in the Board’s procedural rules or precedents supports Freeman United's contention, which contradicts Illinois law regarding intervention.

4. Diesing v. City of Crystal Lake, PCB No. 91-30 (Nov. 7, 1991), the only authority cited by Freeman United in its Response, is not to the contrary. There, the Intervenor City of Crystal Lake filed a complaint that “merely restated the issues set forth by [plaintiffs] Curtis/Diesing and did not state new issues.” PCB No. 91-30, Nov. 7, 1991 Order, p. 2. Since the question of an intervenor raising a new claim was not even before the Board, the decision in Diesing cannot hold that intervenors are barred from raising new claims.

5. Diesing did quote from Lake States Engineering Corp. v. One Naperville Corp., 102 Ill. Dec. 100, 499 N.E. 2d 657 (Ill. App. Ct. 1986) the general rule that “an intervenor must take the case as he finds it.” In Lake States, however, the Second District’s full statement of this rule continued on: “an intervenor must take the case as he finds it *and the proceedings cannot be changed by introducing new matters not relevant to the controversy or which unduly complicate it.*” 499 N.E. 2d at 660 (emphasis added). The full statement of this rule clearly contemplates intervenors raising issues that are relevant to the existing controversy and do not unduly complicate the litigation. In fact, the Lake States court ultimately ruled that “the trial court abused its discretion in denying [the intervenor] the right to add new parties and issues.” Id. at 662. This directly contradicts Freeman United’s interpretation of the rule.

6. Lake States’ analysis of the intervention provisions of the Illinois Code of Civil Procedure is instructive, since the PCB’s procedural regulations closely track these provisions. The Illinois Code of Civil Procedure, 735 ILCS 5/2-408(f), provides the following:

An intervenor shall have all the rights of an original party, except that the court may in its order allowing intervention, whether discretionary or a matter of right, provide . . . that the applicant shall not raise issues which might more properly have been raised at an earlier stage of the proceeding, that the applicant shall not raise new issues or add new parties . . . as justice and the avoidance of undue delay may require.

7. Interpreting this provision, the court concluded that “the plain language of the statute directs that a party shall be permitted to intervene upon certain conditions, which are subject to the trial court’s discretion . . . [including] whether the intervening party may add new issues or parties as justice and the avoidance of undue delay may require.” 499 N.E. 2d at 660.

8. The court in Lake States further noted that the purpose of intervention is “to expedite litigation by disposing of the entire controversy among the parties . . . [and] to prevent a

multiplicity of actions.” Id. Thus, the body considering intervention “should admit the issues and parties which are inextricably interrelated with those raised in the original suit.” Id.

9. Here, the new issues sought to be raised by Movants – violations of water quality standards caused by Respondents’ discharges, and Respondents’ failure to properly transfer NPDES Permit No. IL0061247, leading to discharges without a NPDES permit in violation of the law – are inextricably interrelated to the single overarching issue in this case: Respondents’ liability for violations of the Illinois Environmental Protection Act. Determining liability for violations of a NPDES permit will require the Board to determine who holds the permit, which in this case will require the Board to determine whether the permit was properly transferred. Similarly, the Board in case will hear evidence on the pollutants contained in the wastewater discharges, evidence that is also relevant to the question of whether water quality standards have been violated by those discharges. In this way, both of Movants’ proposed new claims are inextricably related to the issues raised in the original Complaint in this matter, and as the People of the State of Illinois stated in their March 1, 2010 Response to Motion to Intervene, raising them “will not unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding.” The Board should do as the trial court in Lake States was ultimately required to do, and permit Movants to intervene and file their additional claims.

10. WHEREFORE, Movants respectfully request for the reasons stated above that the Board GRANT their February 25, 2010 Motion to Intervene.

**Freeman United’s Response is Untimely**

11. Even if Freeman United’s Response correctly stated the law on intervention before the Board, it is untimely. Freeman United has thus waived the objections raised therein.

12. The PCB regulation governing filing of motions and responses is found in the PCB's procedural rules at 35 Ill. Admin. Code § 101.500. Section 101.500(d) states that parties may file a response "[w]ithin 14 days after service of a motion . . . . If no response is filed, the party will be deemed to have waived objection to the granting of the motion[.]"

13. The PCB regulation governing computation of time for purposes of the PCB's procedural rules is found at 35 Ill. Admin. Code § 101.300.

14. 35 Ill. Admin. Code § 101.300(a) provides:

Computation of Time. Computation of any period of time prescribed in the Act, other applicable law, *or these rules* will begin with the first calendar day following the day on which the act, event or development occurs and will run until the close of business on the last day, or the next business day if the last day is a Saturday, Sunday or national or State legal holiday. [emphasis added]

15. 35 Ill. Admin. Code § 101.300(c) provides that "In the case of service by registered or certified mail, or by messenger service, service is deemed complete on the date specified on the registered or certified mail receipt or the messenger service receipt."

16. On February 25, 2010, Movants electronically filed with the PCB a Motion to Intervene and Complaint in the present action, PCB 2010-061.

17. On the same day, ELPC served a copy of this Motion and Complaint, by certified mail, upon Freeman United. The certified mail receipts for service on each and every party specify that Motion and Complaint were sent on February 25, 2010.

18. Service on Freeman United was thus complete on February 25, 2010.

19. In its April 2, 2010 Response to Movants' Motion to Intervene, Springfield Coal contended that Movants' interpretation of section 101.300 was incorrect, and that the 14-day period for a response did not begin until Respondents received service.

20. Even assuming for the sake of argument that Springfield Coal is correct, Freeman United received Movants' Motion to Intervene on March 1, 2010. Attached as Exhibit A is a



copy of the certified mail receipt for delivery of Movants' Motion to Intervene to Freeman United, which bears the tracking number 7006 0810 0004 6798 4341. The USPS tracking sheet for this number, attached as Exhibit B, shows that the Motion was delivered March 1, 2010.

21. Applying the rule of section 101.300(a), the 14-day period in which Freeman was required to reply began to run on either February 26, 2010 or March 2, 2010. The 14-day period beginning on February 26, 2010 ended on March 11, 2010. The 14-day period beginning March 2, 2010 ended March 16, 2010.

22. March 11, 2010 was a Thursday. March 16, 2010 was a Tuesday.

23. Neither March 11, 2010 nor March 16, 2010 was a national or State legal holiday.

24. Therefore, the 14-day period in which Freeman United could timely respond to Movants' February 25 Motion to Intervene ended no later than March 16, 2010.

25. This deadline was in no way unduly swift, and Freeman was in no way prejudiced by the requirement to respond within a 14-day period. In fact, Freeman United *filed an initial response to this motion on March 9*. In that Response, Freeman United stated that it "does not object to [Movants'] intervention request." Note that Freeman United's March 9 Response also did not object to the Complaint filed with Movants' intervention request, which asked the Board to allow Movants to "file the attached complaint." Motion to Intervene at para. 23.

26. Freeman United should not be permitted to change its mind and object to the February 25, 2010 Motion to Intervene and Complaint through the back-door approach of a response to later-filed motions. The Board should rule that 35 Ill. Admin. Code § 101.500(d) deems Freeman United objections to ELPC's Motion and Complaint to be waived.

27. WHEREFORE, Movants respectfully request for the reasons stated above that the Board STRIKE paragraphs 3 and 4 of Freeman United's April 9, 2010 Response to Motions to Reply as untimely, and GRANT Movants' February 25, 2010 Motion to Intervene.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'JD', with a long horizontal flourish extending to the right.

---

Jessica Dexter  
Staff Attorney  
Environmental Law & Policy Center  
1300 East Wacker Drive, Ste. 1300  
Chicago, IL 60601  
312-795-3747

**CERTIFICATE OF SERVICE**

I, Jessica Dexter, hereby certify that I have served the attached **Motion for Leave to Reply to Freeman United's Response to Motions for Leave to Reply** and **Reply to Freeman United's Response to Motions to Reply** in PCB 2010-061 upon:

Mr. John T. Therriault  
Assistant Clerk of the Board  
Illinois Pollution Control Board  
100 West Randolph Street, Suite 11-500  
Chicago, Illinois 60601

via electronic filing on April 14, 2010; and upon the attached service list by depositing said documents in the United States Mail, postage prepaid, in Chicago, Illinois on April 14, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'JD', with a long horizontal flourish extending to the right.

Jessica Dexter  
Staff Attorney  
Environmental Law and Policy Center  
35 East Wacker Drive, Suite 1300  
Chicago, IL 60601  
312-795-3747

**SERVICE LIST**

April 14, 2010

Carol Webb, Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
P.O. Box 19274  
Springfield, Illinois 62794-9274

Thomas A. Korman, R.A.  
Freeman United Coal Mining Company, LLC  
222 N. LaSalle Street Suite 800  
Chicago, IL 60601

Thomas Davis - Asst. Attorney General  
Office of the Attorney General,  
Environmental Bureau  
500 South Second Street  
Springfield, IL 62706

Springfield Coal Company, LLC  
BCRA Co. R.A.  
161 N. Clark Street Suite 4300  
Chicago, IL 60601

Dale A. Guariglia, Pamela A. Howlett &  
Dennis J. Gelner II  
Bryan Cave, LLP  
One Metropolitan Square  
211 North Broadway, Suite 3600  
St. Louis, MO 63102-2750

Bill S. Forcade, E. Lynn Grayson &  
James A. Vroman  
Jenner & Block LLP  
353 N. Clark Street  
Chicago, IL 60654