

ILLINOIS POLLUTION CONTROL BOARD  
April 15, 2010

PEOPLE OF THE STATE OF )  
ILLINOIS, )  
 )  
Complainant, )  
 )  
v. ) PCB 2010-061  
 ) (Enforcement – Water)  
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, )  
 )  
Intervenor-Complainant, ) PCB 2010-061  
 ) (Enforcement – Water)  
v. )  
 )  
FREEMAN UNITED COAL MINING )  
CO., LLC, and SPRINGFIELD )  
COAL CO., LLC, )  
 )  
Respondents. )

ORDER OF THE BOARD (by G.L. Blankenship):

On February 10, 2010, the Office of the Attorney General (complainant), on behalf of the People of the State of Illinois, filed a four-count complaint (complaint) against Freeman United Coal Mining Company, LLC, and Springfield Coal Company, LLC (respondents). The complaint concerns respondents' strip mine near Industry in McDonough and Schuyler Counties. On February 25, 2010, the Environmental Law and Policy Center (ELPC) filed a motion to intervene (Motion) in this proceeding on behalf of Prairie Rivers Network and the Illinois Chapter of the Sierra Club, and requested that the Board file ELPC's complaint attached to the motion.

The Board grants ELPC's Motion to intervene. The Board accepts the complaint for filing but does not rule on whether to accept it for hearing until respondents' time for filing any motion under 35 Ill. Adm. Code 103.212 elapses. Below, the Board first gives the regulatory background regarding a motion to intervene. The Board then gives the procedural background of

the case before summarizing the Motion and all applicable responses. Finally, the Board analyzes the Motion and provides its conclusion and Order.

### **REGULATORY BACKGROUND**

Section 101.402 of the Board's Procedural Rules sets forth as follows:

- a) The Board may permit any person to intervene in any adjudicatory proceeding. If a person seeks to intervene in an adjudicatory proceeding, the person must file a motion to do so with the Clerk and serve a copy of the motion on all parties to the proceeding. The motion must set forth the grounds for intervention.
- b) In determining whether to grant a motion to intervene, the Board will consider the timeliness of the motion and whether intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding.
- c) Subject to subsection (b) of this Section, the Board will permit any person to intervene in any adjudicatory proceeding if:
  - 1) The person has an unconditional statutory right to intervene in the proceeding;  
or
  - 2) It may be necessary for the Board to impose a condition on the person.
- d) Subject to subsection (b) of this Section, the Board may permit any person to intervene in any adjudicatory proceeding if:
  - 1) The person has a conditional statutory right to intervene in the proceeding;
  - 2) The person may be materially prejudiced absent intervention; or
  - 3) The person is so situated that the person may be adversely affected by a final Board order.
- e) 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.

## **PROCEDURAL HISTORY**

On February 10, 2010, the complainant filed a four-count complaint against Freeman United, and Springfield Coal concerning respondents' strip mine near Industry in McDonough and Schuyler Counties. Complainant alleges that Respondents violated Sections 12(a) and 12(f) of the Environmental Protection Act (Act) (415 ILCS 5/12(a) and (f) (2008)) by discharging iron, manganese, sulfates, pH and TSS into waters of the State in excess of permit limits so as to cause or tend to cause water pollution in Illinois in combination with matter from other sources. The Board accepted the complaint for hearing on February 18, 2010.

The ELPC filed a motion to intervene in this proceeding on February 25, 2010, on behalf of Prairie Rivers Network and the Illinois Chapter of the Sierra Club. ELPC's motion was accompanied by a complaint. Complainant filed its response to the motion on March 1, 2010. Freeman United filed its response on March 9, 2010. Neither complainant nor Freeman United object to ELPC's motion to intervene in this matter.

On March 15, 2010, Springfield Coal timely filed its response to ELPC's Motion, requesting that the Board enter an order denying ELPC's request to intervene in this matter. ELPC filed a motion for leave to reply to Springfield United's response on March 25, 2010. This motion was also accompanied by ELPC's reply. On April 2, 2010, Springfield Coal filed a motion for leave to reply to ELPC's reply, as well as an accompanying reply. On April 9, 2010, Freeman United filed its response to ELPC's and Springfield Coal's motions for leave to reply. Finally, on April 14, 2010, ELPC filed a motion for leave to reply to Freeman United's response, accompanied by a reply.

The Board has the right to permit a reply if doing so will prevent material prejudice. 35 Ill. Adm. Code 101.500(e). The Board grants ELPC's and Springfield Coal's motions for leave to reply, and addresses the arguments of the parties below.

### **ELPC'S MOTION TO INTERVENE**

The ELPC filed its motion for leave to intervene on behalf of Prairie Rivers Network and Sierra Club, Illinois Chapter. Both groups have members who live in the affected areas addressed in the complaint and are concerned over issues which may impact the recreational activities and environmental health of these areas. Motion at 1-2. ELPC requests that it be permitted to intervene to ensure that complainant's enforcement action is diligently prosecuted and to raise additional complaints that complainant has failed to raise. *Id.* at 4.

Prior to complainant filing its complaint on February 10, 2010, ELPC had submitted letters to Freeman United and Springfield Coal giving notice of intent to sue under the citizen suit provision of the Clean Water Act (CWA) (33 U.S.C. § 1365 (2006)), for violations of NPDES Permit # IL0061247 (permit) at the Industry mine. Motion at 2. This notice was also served upon the Illinois Attorney General's Office, the administrator of the Illinois Environmental Protection Agency, and the regional and national administrators of the U.S. Environmental Protection Agency. *Id.* ELPC intended to file suit in federal district court to

enforce the CWA and the provisions of the permit at the close of the sixty-day notice period required by the citizen suit provision of the CWA. *Id.* at 3.

ELPC argues that it has an established interest in proceedings that affect the enforcement of the CWA and the permit due to its prior notice of intent to sue. *Id.* Most notably, the complaint does not raise two claims on which the ELPC gave notice of intent to sue in its letters: (1) violations of Special Condition No. 1 of the permit, which prohibits the permittee from contributing to the violation of water quality standards in Grindstone Creek; and (2) failure of Freeman United and Springfield Coal to properly transfer the permit, leading to discharges to waters of the State without a valid NPDES permit in violation of 415 ILCS 5/12(f) and 33 USC § 1311. *Id.* at 5.

ELPC notes that Congress, in enforcing the CWA, stated that “[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.” *Id.* at 3, citing 33 USC 1251(e) (2006). ELPC further states that the Illinois Attorney General’s Office sent an official letter to the U.S. Environmental Protection Agency in July, 1980, stating that it “has a policy of not opposing citizen intervention in proceedings under the [NPDES program] in those cases where intervenors meet the statutory and regulatory requirements for intervention.” *Id.* at 4, citing 46 Fed. Reg. 24296 (Apr. 30, 1981).

ELPC believes it may be directly and materially harmed if complainant does not raise colorable claims of violations, secure penalties sufficient to compel future compliance with the law and request that the Board immediately issue an order to respondents to cease and desist all violations of the permit. *Id.* at 5. Furthermore, ELPC is concerned that complainant’s action may preclude it from filing a citizen’s complaint as citizen’s suits are barred where “a State has commenced and is diligently prosecuting an action under a State law comparable to [the administrative penalty procedures of the CWA].” *Id.*, citing 33 USC § 1319(g)(6)(A)(ii) (2006).

ELPC affirms that the harm to it may be avoided by allowing ELPC to intervene to (1) request that the Board immediately issue an order to respondents under Section 33 of the Act (415 ILCS § 5/33 (2008)) to comply with the permit and the terms and conditions thereof; (2) prosecute a citizen’s complaint against Freeman United and Springfield Coal for their violation of Special Condition 1 of the permit and Illinois water quality standards; and (3) prosecute a citizen’s complaint against Freeman United and Springfield Coal for their failure to properly transfer the permit and the resulting discharges to waters of the State without a permit. *Id.* at 6.

### **COMPLAINANT’S AND FREEMAN UNITED’S RESPONSES TO THE MOTION**

Complainant does not object to the motion to intervene. People’s Response to Motion to Intervene, page 1. Complainant does not believe that intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding, and therefore requests that the motion be granted. *Id.*

Freeman United does not object to the intervention request. Freeman United Coal Mining Company, LLC's Response to Motion to Intervene, page 1.

### **SPRINGFIELD COAL'S RESPONSE TO THE MOTION**

Springfield Coal states that ELPC has not shown any statutory right to intervene in this matter, nor has it shown that it will be materially prejudiced absent intervention. Response to the Environmental Law & Policy Center's Motion For Leave To Intervene On Behalf Of Prairie Rivers Network And Sierra Club, Illinois Chapter (response), page 2. Springfield Coal believes that the other available avenues for participation (*amicus curiae* briefs, filing of written/oral testimony) provide ELPC with sufficient opportunity to present any arguments deemed appropriate, and preclude any material prejudice from occurring. *Id.*

Springfield Coal states that ELPC has failed to show how it may be affected by a final Board order in this case, and does not consider ELPC's "concerns" with pollution and the issues in question to be adequate reasons for allowing ELPC's motion to intervene. *Id.* at 2-3. Springfield Coal indicates that a number of the activities pointed out by ELPC would not be possible in the mentioned bodies of water, and that ELPC has failed to support these allegations with any affidavits or measure of specificity. *Id.* at 3.

Springfield Coal does not believe that ELPC is able to prove any injury to its members that is more specific than those faced by the People of the State of Illinois, the current complainant in this proceeding. *Id.* Springfield Coal states that ELPC has failed to show that complainant will not adequately represent its interests, since the State has a vested interest in preventing pollution within Illinois and protecting the interests of its citizens, and because ELPC's members fall within the ambit of the "People of Illinois." *Id.* at 3-4.

It is Springfield Coal's position that this matter arose out of a violation notice filed by the IEPA two months before ELPC issued the citizen suit notice letter to Freeman United. *Id.* The violation notice sets forth allegations which are represented in the complaint. *Id.* Springfield Coal also addresses ELPC's concern that the complaint does not request that the Board issue an order under Section 33 of the Act, stating that Springfield Coal met with the IEPA subsequent to receiving the Violation Notice to discuss a plan for eliminating future excursions. *Id.* These discussions resulted in Springfield Coal submitting a compliance plan to IEPA on February 18, 2010, to prevent future violations. *Id.* Furthermore, Springfield Coal states that complainant is more than able to suggest such relief itself if such relief is needed, and in the alternative, ELPC can seek such relief through an *amicus curiae* brief or through written or oral testimony. *Id.* at 5.

Springfield Coal believes that complainant considered but chose not to pursue violations of Special Condition No. 1 of the permit (which prohibits Springfield Coal from contributing to the violation of water quality standards) due to changes in the water quality standards over the past few years calling into question whether such violations existed. *Id.* at 5. Such a count was in the initial complaint drafted by complainant (but not in the final filed Complaint). *Id.* Yet, the same argument appears ("almost word-for-word") in ELPC's draft complaint submitted with its motion to intervene. *Id.*

Springfield Coal also addresses ELPC's concern that complainant failed to raise a claim that the permit was not properly transferred from Freeman United to Springfield Coal. *Id.* at 6. Springfield Coal points out that, even if the allegation is correct that notice of the permit transfer was only sent to IEPA 15 days prior to the transfer instead of the 30 days required by the permit, IEPA reviewed the notice when it was filed in 2007 and has also had ample time since that date to challenge the transfer, yet has chosen not to. *Id.*

Springfield Coal cites three previous Board decisions in support of its position. In 2222 Elston LLC v. Purex Industries, et al., PCB 03-55 (Jan. 23, 2003), the Board denied the city of Chicago's intervention request in an underground storage tank enforcement case where the city had spent \$350,000 cleaning up pollution at the site in question. *Id.* at 6-7. In Midwest Generation v. Illinois EPA, PCB 04-185 (Nov. 4, 2004), the Board denied the Sierra Club's motion to intervene in a trade secret proceeding where the Sierra Club failed to articulate how "its purposes cannot be fulfilled by means of participating other than as a party ... such as by making statements at hearing and filing *amicus curiae* briefs or public comment." *Id.* at 7. Lastly, in In the Matter of Midwest Generation, LLC, AS 07-03 (April 17, 2008), the Board denied ELPC's motion to intervene in an adjusted standard proceeding where ELPC had ample opportunity to participate in the proceeding through public comment, *amicus curiae* briefs and comments at hearing, and where ELPC could not state with certainty that its position would differ from IEPA's in the case. *Id.*

### **ELPC'S REPLY**

ELPC claims that Springfield Coal's response is untimely since ELPC sent a copy of the motion by certified mail to Springfield Coal on February 25, 2010, and Springfield Coal filed the response on March 15, 2010. Reply to Springfield Coal's Response To The Environmental Law & Policy Center's Motion To Intervene (reply), page 2-3. ELPC correctly quotes the Board's procedural rule allowing a party to 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[.]" *Id.* at 1. Therefore, ELPC asserts that Springfield Coal has waived its objections to the motion. *Id.* at 3.

ELPC claims that "concern" over pollution and the issues in question is sufficient to prove injury, citing Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 183 (2000), which states that "environmental plaintiffs claim injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." Reply, page 3. Friends of the Earth found that a plaintiff who lived within a few miles of the facility in question and was "concerned about harmful effects from discharged pollutants" established a protected interest sufficient to show standing under the CWA. *Id.* at 4.

ELPC states that affidavits supporting specific injuries of specific members are not required at this time, and that such affidavits or similar evidence will be offered at the appropriate time. *Id.*

ELPC contends that the additional claims raised are not merely attempts to unnecessarily delay the proceedings, as claimed by Springfield Coal. *Id.* It is ELPC's position that the new claims rest "almost entirely upon the same set of facts" that will be used to prove the claims in the currently submitted complaint. *Id.* ELPC also asserts that intervention will not unduly delay or materially prejudice the proceeding, nor is it an attempt to circumvent prosecutorial discretion, and cites to Complainant's response to the motion to intervene in support of same. *Id.* at 5.

Lastly, ELPC disputes the relevance of the Board cases referred to by Springfield Coal. ELPC distinguishes the only enforcement action cited by Springfield Coal (2222 Elston LLC, PCB 03-55), acknowledging that the Board Order denying intervention noted that (1) the respondent's motion to dismiss was still pending, and (2) the city of Chicago could file its own action in the case. *Id.* ELPC points out that In the Matter of Midwest Generation, AS 07-03, is an adjusted standard petition and therefore did not involve the federal policy strongly favoring citizen intervention in enforcement actions. *Id.* at 6. Furthermore, the movants in that case had no position at odds with the complainant, unlike the situation presented in this matter. *Id.* Finally, Midwest Generation, PCB 04-185, was a trade secret appeal in which the Board denied intervention where the movant's rationale for intervention did not concern the sole issue in the appeal. *Id.* at 6-7. ELPC argues that its interests are precisely those involved in this proceeding, *i.e.* stopping Springfield Coal's ongoing violation of the Act, and ensuring future compliance with the Act. *Id.* at 7.

### **SPRINGFIELD COAL'S RESPONSE TO ELPC'S REPLY**

On April 2, 2010, Springfield Coal filed a second response to the Environmental Law & Policy Center's Motion for Leave to Intervene on Behalf of Prairie Rivers Network and Sierra Club, Illinois Chapter (second response), in response to the reply. In its second response, Springfield Coal challenges ELPC's position that Springfield Coal's response was untimely, noting that Springfield Coal only received the motion on March 1, 2010. Second Response, page 1. Springfield Coal attaches a United States Postal Service tracking sheet showing the delivery date, and also includes a copy of the envelope used to deliver the motion, in order to synchronize the tracking number on the tracking sheet with the package. *Id.* at Exhibits A and B, respectively. The tracking sheet indicates that the package was delivered on March 1, 2010. Springfield Coal states that it filed its response on March 15, 2010, 14 days after receiving the motion, and within the timeframe allowed under the Board's procedural rules. *Id.* at 2. Springfield Coal believes that ELPC has mischaracterized the service requirements of 35 Ill. Adm. Code 101.300(c), and that the receipt date referred to means the date the mailing is received. *Id.* at 2.

Springfield Coal believes the fact that it has had to file this second response is further evidence that allowing ELPC's motion would delay this proceeding. *Id.* at 3.

Springfield Coal also cites 35 Ill. Adm. Code 101.504, which states that "[a]ll motions and responses must clearly state the grounds upon which the motion is made and must contain a concise statement of the position or relief sought. Facts asserted that are not of record in the proceeding must be supported by oath, affidavit, or certification in accordance with Section 1-109 of the Code of Civil Procedure [735 ILCS 5/1-109]." *Id.* at 3. Springfield Coal points out

that ELPC has not provided any such supporting documentation, and that ELPC has still not offered any compelling reasons as to why ELPC would be materially prejudiced should it use any other means of non-party participation in this case. *Id.* at 4.

**FREEMAN UNITED’S RESPONSE TO THE  
MOTIONS FOR LEAVE TO REPLY**

Freeman United does not object to ELPC’s and Springfield Coal’s motions for leave to reply to issues concerning ELPC’s motion for leave to intervene. Freeman United Coal Mining Company, LLC’s Response to Motions for Leave to Reply, page 1. Freeman United reemphasized that it also does not object to ELPC’s request for permissive intervention in this case. *Id.*

However, Freeman United does now object to the complaint attached to ELPC’s motion for leave to intervene. *Id.* Freeman United believes that the complaint adds new claims and expands the scope of this matter, in contrast to a previous Board holding that an intervenor “must take the case as he finds it.” *Id.* at 1-2, citing Diesing v. City of Crystal Lake, PCB No. 91-30 (Nov. 7, 1991). Freeman United states it is improper for an intervenor to file a complaint which adds new and additional claims. *Id.* at 2.

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

ELPC requests that the Board enter an order striking, from Freeman United’s response to the motions for leave to reply, the portions in which Freeman United objects to the complaint attached to ELPC’s motion to intervene. Reply to Freeman United’s Response to Motions to Reply, page 1. ELPC believes Freeman United’s response is untimely. *Id.* ELPC cites the Board’s procedural rule on the issue, 35 Ill. Adm. Code 101.500(d), which 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[.]” *Id.* at 5. ELPC states that the April 2, 2010 filing date of Freeman United’s response is beyond the 14-day period in which Freeman United could timely respond to ELPC’s motion to intervene. *Id.* at 6. ELPC also points out that Freeman United already responded to the motion to intervene on March 9, 2010, in which Freeman United did not object to the filing of the complaint. *Id.*

ELPC states that the case cited by Freeman Coal in support of its objection, Diesing, dealt with a complaint that “merely restated the issues set forth by [plaintiffs] Curtis/Diesing and did not state new issues.” *Id.* at 2, citing Diesing, PCB 91-30 at 2. ELPC believes that, since the issue of raising new claims was not before the Board at that time, Diesing cannot hold that intervenors are barred from raising new claims. *Id.*

ELPC quotes a case cited in Diesing which states “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.” *Id.* at 3, citing Lake States Engineering Corp. v. One Naperville Corp., 102 Ill. Dec. 100, 499 N.E. 2d 657, page 660 (Ill. App. Ct. 1986). ELPC also quotes the Lake States court as ruling that “the trial court abused its discretion in denying



[the intervenor] the right to add new parties and issues.” *Id.*, citing Lake States, 499 N.E. 2d at 662.

### **BOARD DISCUSSION**

The Board may permit any person to intervene in any adjudicatory proceeding. 35 Ill. Adm. Code 101.402(a). The Board notes that its procedural rules on intervention are based on an “either/or” standard, meaning that, subject to Section 101.402, the Board may in its discretion allow intervention if only one of the reasons for granting intervention are met, rather than all of them being required. *See* 35 Ill. Adm. Code 101.402(c) and (d).

The Board first addresses whether or not Springfield Coal’s response to the motion is timely, and then determines whether or not ELPC has met any one of the three listed standards required for intervention to be granted.

#### **Springfield Coal’s Response to the Motion is Timely**

The Board’s procedural rules hold that parties may file a response “[w]ithin 14 days after service of a motion.” 35 Ill. Adm. Code 101.500(d). The rules further provide that “[i]n 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.” 35 Ill. Adm. Code 101.300(c). ELPC sent the motion to respondent’s on February 25, 2010. Springfield Coal received the motion on March 1, 2010. Service was therefore complete on March 1, 2010. Springfield Coal then filed its response on March 15, 2010. Springfield Coal’s response was filed precisely fourteen days after receiving the motion, and is therefore timely filed.

#### **ELPC’s Motion to Intervene is Timely and Will Not Unduly Delay the Proceeding**

In determining a motion to intervene, “the Board will consider the timeliness of the motion and whether intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding.” 35 Ill. Adm. Code 101.402(b). ELPC filed its motion on February 25, 2010, fifteen days after the initial complaint filing and one week after the Board accepted the complaint for hearing. No hearing has been scheduled, no dispositive motions are pending and no discovery orders have been issued. Therefore, the Board finds the motion to be timely. 35 Ill. Adm. Code 101.402(b).

Furthermore, the Board finds that allowing ELPC to intervene would not unduly delay the proceeding or materially prejudice Springfield Coal as the claims sought by ELPC rest almost entirely upon the same set of facts that will be used to prove up the claims raised by the complainant. Moreover, ELPC served notice of its originally intended complaint upon all parties nearly two months prior to complainant’s filing, and therefore no party should be caught unaware of ELPC’s interest in involvement in the matter. Finally, complainant in this matter has requested the motion be granted. People’s Response, page 1. Because complainant supports the motion, it cannot be stated that granting the motion would “circumvent prosecutorial discretion.” Response, page 7.

### **ELPC May Be Materially Prejudiced Absent Intervention**

Subject to a movant meeting the standards set forth above, the Board may grant intervention if the intervening party “may be materially prejudiced absent intervention[.]” 35 Ill. Adm. Code 101.402(d)(2). ELPC had initially intended to file its complaint in federal district court to enforce the CWA and the provisions of the permit. Motion at 3. However, under 33 USC § 1319(g)(6)(A), ELPC may now be barred from bringing its action in federal district court. *See* 33 USC § 1319(g)(6)(A)(ii) (Any violation “with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection” shall not be the subject of a civil penalty under subsection (d) of the same subsection, § 1321(b) or § 1365). Springfield Coal does not dispute ELPC’s contention that ELPC may be barred from bringing its action as described. The Board finds that ELPC may be materially prejudiced in that it may be unable to pursue the course of action originally intended. Therefore, ELPC meets the intervention requirement set forth in 35 Ill. Adm. Code 101.402(d)(2).

Because ELPC meets the standard of 35 Ill. Adm. Code 101.402(d)(2), it is unnecessary for the Board to address the questions of whether ELPC has a statutory right or whether ELPC will be adversely affected by a final Board order in this case.

### **ELPC’s Rights as an Intervenor**

As an intervenor, ELPC will have “all the rights of an original party” to this proceeding. 35 Ill. Adm. Code 101.402(e). This includes the right to appeal the Board’s final decision. Kibler Development Corp. v. IEPA, PCB 04-35, slip op. at 5 (May 4, 2006). However, as with any intervenor, ELPC “must take the case as it finds it.” Saline County Landfill, Inc. v. IEPA, County of Saline, PCB 02-108, slip op. at 6 (Apr. 18, 2002).

### **Freeman United’s Response to ELPC’s Complaint**

Freeman United filed its response to ELPC’s motion to intervene on March 9, 2010. In that response, Freeman United did not object to the filing of ELPC’s complaint. It is only in Freeman United’s April 9, 2010 response to ELPC’s and Springfield Coal’s motions for leave to reply that Freeman United objects to the filing of ELPC’s complaint. The Board notes however, that some confusion may have arisen due to a March 15, 2010 Hearing Officer order stating “[t]he parties were unclear as to whether any response to ELPC’s complaint was required at this time. The hearing officer advised the parties that the Board would provide further instruction on that issue.”

### **ELPC’s Complaint is Accepted for Filing**

The Board accepts ELPC’s complaint for filing. The Board does not accept the complaint for hearing until respondents have been awarded appropriate time to file any applicable motions. As such, respondents have 30 days from the date of this order, up to and including May 15, 2010, to file any motions to strike, dismiss, or challenge the sufficiency of the complaint (*See* 35 Ill. Adm. Code 101.506), or to file any motions alleging the complaint to be

duplicative or frivolous (*See* 35 Ill. Admin. Code 103.212(b)). Respondents will have 60 days from the date of this order, up to and including June 14, 2010, to file an answer to the complaint (*See* 35 Ill. Admin. Code 103.204(d)), unless the answer is stayed under 103.204(e). The Board will issue an order accepting or denying the complaint for hearing.

### CONCLUSION

The Board, in its discretion, grants ELPC's motion to intervene in this matter. The Board accepts ELPC's complaint for filing but does not rule on whether to accept the complaint for hearing until respondents' time for filing any motion under 35 Ill. Adm. Code 103.212(b) elapses. Respondents have 30 days, up to and including May 15, 2010, to file any motions under 35 Ill. Adm. Code 103.212(b) or 35 Ill. Adm. Code 101.506. Respondents have 60 days, up to and including June 14, 2010, to file an answer to the complaint.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on April 15, 2010, by a vote of 5-0.



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John T. Therriault, Assistant Clerk  
Illinois Pollution Control Board