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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

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

NOTICE OF ELECTRONIC FILING

To: Attached Service List

PLEASE TAKE NOTICE that on March 7, 2013, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, Sierra Club's and Prairie Rivers Network's **RESPONSE TO RESPONDENTS' MOTION TO CERTIFY QUESTIONS TO THE ILLINOIS APPELLATE COURT AND TO STAY ACTION**, a copy of which is attached hereto and herewith served upon you.

Respectfully Submitted,

Jessica Dexter
Environmental Law and Policy Center
35 East Wacker Drive, Ste. 1600
Chicago, IL 60601
312-795-3747

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

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

SIERRA CLUB AND PRAIRIE RIVERS NETWORK'S RESPONSE TO RESPONDENTS' MOTION TO CERTIFY QUESTIONS TO THE ILLINOIS APPELLATE COURT AND TO STAY ACTION

Intervenors Sierra Club and Prairie Rivers Network respectfully request that the Illinois Pollution Control Board ("IPCB" or "Board") deny the Motion to Certify Questions to the Illinois Appellate Court that was filed by Springfield Coal Company, LLC ("Springfield Coal") and Freeman United Coal Mining Company, LLC ("Freeman") (collectively, "Respondents") on February 21, 2013. The Board should also deny Respondents' Motion to stay the proceeding pending resolution of any interlocutory appeal.

As explained below, Respondents have not shown extraordinary circumstances that warrant an interlocutory appeal in this matter. Respondents have not presented questions of law sufficient to meet the requirements of Supreme Court Rule 308. There is no "substantial ground for difference of opinion" regarding the questions presented, and deciding either question differently would not "materially advance the ultimate termination of litigation proceedings." In fact, the questions presented to the Board are not even proper statements of the issues presented in this case.

STANDARD UNDER SUPREME COURT RULE 308

While the Board has authority to certify questions for interlocutory appeal under Rule 308, that authority is meant to be used in only "exceptional circumstances," and Rule 308 should be used "sparingly." *People v. PCB*, 473 N.E.2d 452, 456 (1st Dist. 1984). Indeed, the Board has repeatedly referred to the relief provided under Rule 308 as a form of "exceptional relief."

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Assignee of Caseyville Sport, PCB 08-30 at 4 (April 21, 2011); *People vs. State Oil Co.*, PCB 97-103 at 3 (May 16, 2002); *People v. Old World Indus.*, PCB 97-168 at 3 (Jan. 7, 1999). *See also*, *Schoonover v. American Family Ins. Co.,* 214 Ill. App. 3d 33, 40 (4th Dist. 1991) ("appeal from interlocutory orders under Supreme Court Rule 308 is not favored and should be sparingly used").

In order to certify questions under Rule 308, the Board must find that a two-pronged test has been met: "(1) whether the Board's decision involves a question of law involving substantial ground for a difference of opinion; and (2) whether the immediate appeal may materially advance the ultimate termination of the litigation." *Slightom v. IEPA*, PCB 11-25 at 9 (April 19 2012); *State Oil*, PCB 97-103 at 2.

Under the first prong, Respondents argue that there is "substantial ground for a difference of opinion" because they contend the questions they present are questions of first impression. Courts have recognized that issues of first impression can satisfy the first prong of the Rule 308 test. *Costello v. Governing Bd. of Lee Cnty. Special Educ. Ass'n*, 252 Ill. App. 3d 547, 552 (2d Dist. 1993)); *Land & Lakes*, PCB 91-7 at 1-2. However, not every imaginable question of first impression constitutes a "substantial ground for a difference of opinion." Indeed, where there is not substantial ground for a difference of opinion on an issue, case law is unlikely to have been developed to state the obvious. As discussed below, the questions presented to the Board, whether of first impression or not, do not present substantial ground for a difference of opinion.

The second prong of the test fails as to both questions. An interlocutory appeal will not materially advance the ultimate termination of this litigation. Even if Respondents are completely successful in their appeal on both questions, a penalty hearing must still occur for the approximately 491 violations that are not impacted by the arguments presented in the questions. The facts presented to the Board in such a penalty hearing will likely not differ much in either case, as the testimony will be geared to the 415 ILCS 5/33 and 5/42 factors the Board considers in assessing penalties. There is nothing about either question presented that, if resolved in another way by the Illinois Appellate Court, would "terminate" the litigation.

On the whole, the interlocutory appeal Respondents seek is inappropriate. The cases cited by Respondents as examples of when the Board has certified questions under Section 308 both involved constitutional questions for which the Board sought guidance from the courts. By contrast, the first question Respondents have presented to the Board for certification is a question involving application of the Board's own administrative rules. Both questions present issues for which the Board has recognized expertise. *See*, *Jurcak v. Environmental Protection Agency*, 161 Ill. App. 3d 48, 53 (1st Dist., 1987) ("[A] decision regarding permit conditions requires evaluation and judgment based on scientific data, knowledge of waste water treatment technologies and engineering methodology and the application of technical standards. This is not the province of the appellate court but of the Board, which is composed of seven technically qualified Board members with the expertise to make the necessary inquiries and evaluation."). Respondents have not alleged any extraordinary circumstances that justify an appeal prior to the Board's final judgment. As discussed below, the questions presented to the Board are founded on incorrect legal assumptions and inaccurate statements of the facts in this case.

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ARGUMENT

1. Respondents' first question misstates the law and the facts in this case and does not present an issue where there is substantial ground for difference of opinion.

The first question Respondents present to the Board for certification is:

> 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?

This question must be rejected, as it does not present an issue where there is "substantial ground for difference of opinion." The question is premised on the incorrect idea that a permittee can unilaterally change the terms of its NPDES permit, or decide that certain permit terms do not apply. There is no room for such an interpretation under either state or federal law.

As explained in Intervenors' Reply Regarding Their Motion for Summary Judgment, an NPDES permit is the only means by which the Clean Water Act allows a discharge of pollutants, and the only valid effluent limitations are those contained within the four corners of an NPDES permit. (Reply, p. 4-5). The federal cases cited in support of those well-settled points are relevant and applicable because the NPDES program is a federal program. To keep its delegated authority to run the program, Illinois must issue its permits consistent with federal law.

The question presented to the Board for certification is based on a faulty assertion: that Illinois Administrative Code regulations are "directly applicable to a NPDES permit." That clause can mean one of two things, and neither leads to the remedy Respondents seek. If Respondents mean that the administrative code provisions apply directly to permittees, regardless what the NPDES permit says, they are simply wrong. Such an interpretation is contrary to established law that NPDES permits are the sole source of authority to discharge pollutants and would create a non-functional permitting system. Once a permit writer establishes effluent limits and permit terms, a permittee cannot be allowed to shop around outside the permit for terms it likes better.

Alternatively, Respondents could mean by this language that the administrative code provisions "directly apply" when a permit writer is drafting the terms of an NPDES permit. This interpretation renders the question invalid and irrelevant to this proceeding. If Respondents are dissatisfied with the way in which those code provisions were applied in the permit, then the means of challenging those terms is through a permit appeal, not through this enforcement proceeding. *See*, *NRDC v. Outboard Marine*, 692 F. Supp. at 809-815, 818-819, and 823 (Rejecting permittee's dispute of the terms of the permit in the context of an enforcement proceeding) and *U.S. v. Citizens Utils. Co. of Ill.*, 1993 U.S. Dist. LEXIS 10340, 9 (N.D. Ill. 1993) ("We are 'obliged to enforce' all effective permit provisions and provide remedies for past violations even though an Illinois agency subsequently may modify the permit.").

Respondents also predicate this first question on the idea that the regulations cited "do not otherwise contradict the express terms of the permit." To the contrary, Respondents are asking

for an interpretation of the law that does conflict with the express terms of the permit. Absent such a conflict, this issue would not even have presented itself in this case.

First, the NPDES permit establishes numeric effluent limits for a number of pollutant parameters. Alternate effluent limitations are offered during certain precipitation events, but nowhere does the permit excuse compliance with the numeric effluent limitations on account of background concentrations. Thus, Respondents' argument that compliance is not required based on 35 Ill. Admin. Code 406.103 is in direct conflict with the effluent limitations established by the NPDES permit.[1]

Second, the permit calculates "average monthly discharge" as "the sum of all daily discharges measured during a calendar month divided by the number of daily discharges measured during that month." (NPDES Permit, Ex. 1 to Intervenors' Motion for Summary Judgment, p. 25.) There is no exception from the monthly average effluent limitations in the permit if the permittee takes fewer than three samples. Therefore, Respondents are asking for an interpretation of 35 Ill. Admin. Code 406.101 that contradicts the express terms of the permit.

Respondents claim that this question is one of first impression in Illinois, and that therefore there is "substantial ground for difference of opinion." However, one cannot even reach the supposedly novel question without first suspending the fundamental principle that a discharge of pollution to waters of the U.S. can only be allowed by an NPDES permit, and that a permittee must comply with the terms of its NPDES permit. Respondents now seek other terms they prefer to what is expressly required by the permit. The permit terms cannot be altered by this enforcement proceeding. Therefore, there is no substantial ground for a difference of opinion on this issue, and the Board should decline to certify this question.

2. Respondents' second question cannot materially advance the termination of this litigation and does not present an issue where there is substantial ground for difference of opinion.

The second question Respondents present to the Board for certification is:

> 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?

This question clearly fails the second prong of the Rule 308 test because it cannot materially advance the termination of this litigation. As Intervenors argued in the Reply Regarding Their Motion for Summary Judgment, a Compliance Commitment Agreement (CCA) does not bar citizen enforcement of Respondents' violations. Even if the Attorney General were precluded from bringing this action, the Intervenors' action has established liability for the violations at

[1] It is important to note that Respondents have not even alleged facts sufficient to overcome the presumption in 35 Ill. Admin. Code 406.103 that background concentrations are not the cause of effluent limit violations. Respondents waived this issue by failing to present facts showing background concentrations were the cause of specific violations and that the mine only contributed trace amounts of pollutants to those background concentrations at the time those violations occurred. (See, Intervenors' Reply at 14-15). Interlocutory appeal of this question is therefore not even consistent with the facts presented to the Board.

issue in this case. Therefore, a penalty hearing would still be necessary and an interlocutory appeal of this question would have no effect on the termination of this litigation.

Furthermore, the CCA at most only applies to the violations that are the subject of the agreement. (See Intervenors' Reply p. 8-9). That would mean that even if Respondents prevail on an interlocutory appeal of this question, only three manganese violations from Outfall 019 in 2004 would be affected, and the proceeding would continue with the Attorney General's participation in much the same way as it would have without the interlocutory appeal.

This question also fails the first prong of the Rule 308 test, because the plain language of the provision that is the basis of the question applies to Illinois EPA, not the Attorney General. Therefore there is no substantial ground for difference of opinion on the issue. 415 ILCS 5/31 (10) does not limit in any way the Attorney General's ability to bring an enforcement action on its own volition when Illinois EPA does not refer the case. (See Intervenors' Reply, p. 6). Here, the Attorney General brought this action in response to Intervenors' 60-day notice of intent to sue under the Clean Water Act's citizen suit provision. Illinois EPA did not refer the violations to the Attorney General, so 5/31(10) is not applicable in any event.

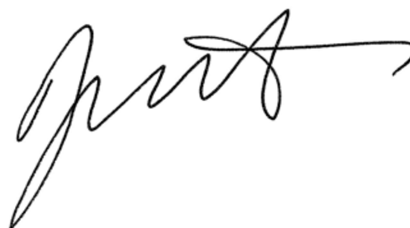
Because the second question presented to the Board cannot materially advance the termination of the litigation and because there is no substantial ground for difference of opinion on the plain language of the statute, the Board must reject Respondents' request to certify this question under Rule 308.

CONCLUSION

Respondents have not presented questions where there is substantial ground for difference of opinion and the questions cannot materially advance the termination of this litigation. Accordingly, the Board should DENY the motion to certify questions to the Illinois Appellate Court because both prongs of the Rule 308 test fail as to both questions.

In the alternative, if the Board elects to certify questions, the proceeding should not be stayed while the interlocutory appeal is resolved. A penalty hearing will be necessary regardless of the outcome of such an appeal, and the nature of that hearing would change very little depending on the outcome of the appeal. In the interim, the Board should schedule the penalty hearing and Intervenors should be allowed to conduct discovery necessary to prepare for the hearing.

Respectfully Submitted,



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Jessica Dexter

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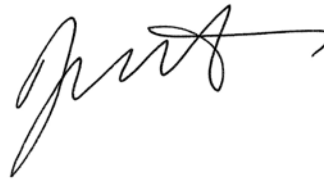
Staff Attorney
Environmental Law and Policy Center
35 East Wacker Drive, Ste. 1600
Chicago, IL 60601
312-795-3747

Attorney for Sierra Club and Prairie Rivers Network

CERTIFICATE OF SERVICE

I, Jessica Dexter, hereby certify that I have filed the attached **RESPONSE TO RESPONDENTS' MOTION TO CERTIFY QUESTIONS TO THE ILLINOIS APPELLATE COURT AND TO STAY ACTION** in PCB 2010-061 upon the below service list by depositing said documents in the United States Mail, postage prepaid, in Chicago, Illinois on March 7, 2013.

Respectfully submitted,



Jessica Dexter
Staff Attorney
Environmental Law and Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601
312-795-3747

PCB 2010-061 Service List:

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

Steven M. Siros
E. Lynn Grayson
Allison E. Torrence
Jenner & Block LLP
353 N. Clark Street
Chicago, IL 60654

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

Dale A. Guariglia
John R. Kindschuh
Bryan Cave, LLP
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, MO 63102