

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.)
)
 FREEMAN UNITED COAL)
 MINING CO., L.L.C., and)
 SPRINGFIELD COAL CO., L.L.C.)
)
 Respondents.)

PCB 2010-061
(Enforcement-Water)

To: Attached Service List

PLEASE TAKE NOTICE that on June 22, 2012, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, PRAIRIE RIVERS NETWORK AND SIERRA CLUB'S REPLY REGARDING THEIR MOTION FOR SUMMARY JUDGMENT, a copy of which is attached hereto and herewith served upon you.

Respectfully Submitted,



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

Dated: June 22, 2012

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**MOTION FOR LEAVE TO REPLY TO FREEMAN UNITED'S AND SRINGFIELD
COAL CO'S RESPONSE TO MOTIONS FOR SUMMARY JUDGMENT**

I, JESSICA DEXTER, hereby file a MOTION FOR LEAVE TO REPLY to Freeman United Coal Mining LLC's Response to the Prairie Rivers Network and Sierra Club's Motion for Summary Judgment and Request for Reconsideration of Freeman United's Motion to Strike and/or Dismiss Intervenor's Complaint and Springfield Coal Company's Response to Motion for Summary Judgment (collectively, "Responses) in this matter on behalf of Prairie Rivers Network, its individual members, and Sierra Club, Illinois Chapter, and its individual members (collectively, "Petitioners"). In support of this Motion, ELPC states the following:

1. The Board has the authority to grant Petitioners a right to reply where failure to do so would create material prejudice. 35 Ill. Admin. Code 101.501(e).

2. In the Responses, the defenses raised by Springfield Coal and Freeman make numerous incorrect statements of law, especially regarding Illinois' NPDES permit program.
3. These issues were raised for the first time in the Responses, and Petitioners have not had the opportunity to address them, nor could Petitioners have anticipated these arguments in the Motion for Summary Judgment.
4. Petitioners' Reply seeks to correct the statements of law and provide the Board with research supporting the proper legal interpretation.
5. If the motion for leave to reply is denied, Petitioners would be materially prejudiced because a Board decision following those incorrect statements of law would not only deny citizens the relief sought in this case, it could weaken the NPDES permit program and have an adverse impact on the Illinois NPDES permit program as a whole, and consequently on Petitioners' ability to address water pollution issues throughout the state.
6. Petitioners would also be materially prejudiced by the inability to respond to Freeman's request for reconsideration of its motion to strike and/or dismiss Petitioners' complaint. This is a new issue and is not properly a response to the motion for summary judgment. Petitioners would be materially prejudiced by an inability to respond to this new request because, if granted, Petitioners lose all rights to pursue the relief sought to remedy the pollution from the Industry Mine.

WHEREFORE, Petitioners respectfully request that the Board GRANT their Motion for Leave to Reply and file the attached Reply to Regarding its Motion for Summary Judgment.

Respectfully submitted,

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

Jessica Dexter
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PCB 2010-061
(Enforcement-Water)

**PRAIRIE RIVERS NETWORK AND SIERRA CLUB'S REPLY
REGARDING THEIR MOTION FOR SUMMARY JUDGMENT**

No genuine issues of material fact were raised in the response briefs filed by Respondent Springfield Coal Company LLC ("Springfield Coal") or Respondent Freeman United Coal Company, LLC ("Freeman"), (together, "Respondents"), on June 6, 2012. Instead, each brief raises questions of law that are properly settled by the Illinois Pollution Control Board ("IPCB" or "Board") by granting Intervenor-Petitioner Prairie Rivers Network and Intervenor-Petitioner Sierra Club's (together, "Petitioners") motion for summary judgment in this case.

STANDARD FOR SUMMARY JUDGMENT

IPCB grants motions for summary judgment when the Board finds no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. 35 Ill. Admin. Code 101.516 (b) (2012). *See also* 735 ILCS 5/2-1005 (c) (2012). Summary judgment resolves questions of law and assumes all facts in favor of the nonmoving party. *See In re Estate of Hoover*, 155 Ill. 2d 402, 401 (Ill. 1993). *See also People ex rel. Adams Elec. Coop. v. Vill. of Camp Point*, 286 Ill. App. 3d 247, 251 (4th Dist. 1997) ("Where the record presents a question of law only, summary judgment is an appropriate remedy.") The response briefs filed by Respondents raise a number of issues, but each issue presents a question of law---not a genuine issue of material fact---that is properly resolved by the Board by granting the motion for summary judgment.

Where some issues can be resolved on summary judgment, but a genuine issue of material fact is found regarding other issues, the IPCB may grant partial summary judgment and set a hearing to resolve the issues for which a genuine issue of material fact was found. 735 ILCS 5/2-1005 (c). In this case, if the Board finds a genuine issue of material fact as to some, but not all, violations, the Board should enter judgment regarding the violations that appear without substantial controversy and direct further proceedings to determine the remaining violations. Similarly, if the Board finds a genuine issue of material fact regarding the appropriate penalty the Board may grant summary judgment on the issue of liability and reserve issues related to penalties for a hearing. 735 ILCS 5/2-1005 (c).

ARGUMENT

Neither Springfield Coal nor Freeman has raised a genuine issue of material fact regarding the violations at issue in this enforcement case. To prove liability in an enforcement case under Section 12(f) of the Illinois Environmental Protection Act, the Petitioners must show that the Respondents “cause[d], threaten[ed] or allow[ed] the discharge of any contaminant into waters of the State...in violation of any term or condition imposed by [an NPDES] permit.” 415 ILCS 5/12 (f). Respondents have not disputed any of the *facts* that prove violations of the terms and conditions of the Industry Mine NPDES permit.

Petitioners’ motion for summary judgment presented painstaking documentation for each of the 625 violations alleged. Discharge Monitoring Reports (“DMRs”) that had been submitted to the Illinois Environmental Protection Agency by the Respondents were provided for each violation alleged.¹ DMRs are considered by courts to be “conclusive and irrebuttable evidence that violations have occurred.” *Natural Res. Def. Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 819 (N.D. Ill. 1988). *See also United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1109 (W.D. Wis. 2001) (“In an enforcement action, a defendant’s [Discharge Monitoring Reports] constitute admissions regarding the levels of effluent that the defendant has discharged. If the [Discharge Monitoring Reports] show that the defendant has exceeded its [National Pollutant Discharge Elimination System] permit limitations, then permit violations are established.”). Petitioners meticulously compared these DMRs with the NPDES permit that governs those discharges and identified each violation of the NPDES permit’s effluent limits. (Dexter Aff. ¶ 8)

Tellingly, neither Respondent has argued that there were errors in the DMRs they prepared. Neither Respondent disputes that the NPDES permit, (Ex. 1 to Pet’r Motion for Summary Judgment), applies to the discharges at issue in this case. Instead, each Respondent makes a series of legal contentions that they argue would excuse them from complying with the terms of their NPDES permit. Respondents present basic facts they argue support those theories. For example, they state that the mine entered into a

¹ Although the rules of evidence do not strictly apply in Illinois Pollution Control Board proceedings, see 5 ILCS 100/10-40 (a) (“Evidence not admissible under those rules of evidence may be admitted, however, (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs”), an affidavit authenticating documents is attached to this reply brief.

Compliance Commitment Agreement (CCA) in 2005; requested an extension of the CCA in 2007; that a new water quality standard for sulfate was adopted in 2008; that background concentrations of certain pollutants existed at the mine; that chemical additions were periodically conducted at Ponds 18 and 19; and that certain attempts to comply with the permit were undertaken. However, even assuming these facts in favor of Respondents, the legal theories supposedly supported by those facts are meritless. Given that there is no genuine issue of material fact and the legal arguments presented do not excuse the violations, the questions of law presented by the response briefs should be resolved by granting Petitioners' motion for summary judgment.

I. Petitioners' choice to move for summary judgment on counts for which there is no genuine issue of material fact does not undermine their status as Intervenors.

IPCB should not strike, dismiss or otherwise limit its April 15, 2010 decision to grant intervention to the Petitioners simply because they moved for summary judgment on some, but not all, of the claims presented in their complaint. In its order granting intervention, the Board stated that, "As an intervenor, [the Petitioners] will have 'all the rights of an original party' to this proceeding. 35 Ill. Adm. Code 101.402(e)." IPCB Order 2010-61, p 10 (April 15, 2010).

The Board recognized that Petitioners sought intervention to "ensure that complainant's enforcement action is diligently prosecuted and to raise additional complaints that complainant has failed to raise." IPCB Order 2010-61, p 3 (April 15, 2010). The fact that Petitioners identified many more violations than the People of the State of Illinois ("State") by examining the same set of facts highlights the value that Petitioners have added to the diligent prosecution of this case.

The Board has not limited Petitioners' participation in the case to only those claims the State declined to bring. To the contrary, on July 15, 2010, IPCB accepted Petitioners' complaint for hearing and assigned it a separate docket number, which was then consolidated with the People's case. IPCB Order 2010-61 (July 15, 2010). Count Two of the accepted complaint alleged NPDES permit violations. Nothing in the Board's orders bars Petitioners from moving for summary judgment on Count Two, or on any count for that matter.

Petitioners respect the IPCB's time and resources and have not sought summary judgment on fact-intensive claims for which a hearing would be more appropriate. The suggestion that Petitioners should be punished because they have not pressed for summary judgment relief on claims where summary judgment is not warranted borders on the Draconian. Accordingly, the Board should decline Freeman's request to strike, dismiss, or otherwise limit Petitioners' participation in this case.

II. Petitioners' more thorough review of violations does not create a genuine issue of material fact.

Springfield Coal argues that the difference between the number of violations alleged by the State and the number of violations alleged by Petitioners precludes granting summary judgment to either party. (Springfield Coal Br. at 8-9). Springfield Coal cites no law supporting this position.

There is no genuine issue of material fact with regard to the violations. Both the State and Petitioners rely on the same, undisputed underlying facts: the DMRs prepared by the Respondents. These DMRs admit specific discharges of pollution. No diverging factual inferences were made. Rather, the State and Petitioners took different approaches to applying the law to the facts. Recognizing that the State has limited resources to devote to any particular enforcement action, Petitioners undertook a painstaking review that compared the discharges admitted² in the DMRs to the effluent limitations that Springfield Coal admits are required by the NPDES permit. (Dexter Aff. ¶ 7,8). The fact that Petitioners identified more violations than the State does not make the additional violations any less grounded in undisputed fact. This is just one example of the value Petitioners bring to the diligent prosecution of this case as intervenors.

III. NPDES permit terms cannot be modified by an enforcement proceeding.

Most of the arguments presented by Springfield Coal and Freeman are complaints about the NPDES permit limits or excuses presented to justify why they should not be required to comply with the permitted effluent limits. These are not factual disputes about whether or not Respondents violated the terms of the NPDES permit, but legal arguments meant to relieve Respondents from liability for those violations. *Natural Res. Def. Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 818 (N.D. Ill. 1988) (“permit requirements can be interpreted as a matter of law”). Accordingly, these questions of law are properly resolved on summary judgment. For the reasons described below, the Board should grant summary judgment in favor of Petitioners.

The law is well-settled that an NPDES permit is the only means by which the Clean Water Act allows a discharge of pollutants. 33 U.S.C. 1311(a). *See also, Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1374 (D.C. Cir. 1977) (“Congress intended the NPDES permit to be the only means by which a discharger from a point source may escape the total prohibition of § 301(a).”). Courts have rejected attempts to look beyond the NPDES permit for effluent limitations or relief from permit requirements. *Wis. Res. Prot. Council, v. Flambeau Mining Co., No. 11-cv-45-bbc, slip op. at 59-61 (W. D. Wis. Apr. 13, 2012)*. (Holding that actions by the state outside of NPDES process are not a substitute for an NPDES permit and do not shield defendant from enforcement liability); *Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486, 498-503 (2d Cir. 2005) (Holding that regulatory scheme that did not require effluent limitations to be reviewed by permitting authority was invalid under the Clean Water Act); and *N. Plains Res. Council*

² (Response to Petitioner PRN's First Requests to Admit, Interrogatories and Requests for Production of Documents from Springfield Coal, Requests to Admit #1-15).

v. Fidelity Exploration & Dev. Co., 325 F.3d 1155, 1164 (9th Cir. 2003). (Holding that state regulation could not relieve discharger from NPDES permitting requirements). Thus, the only valid effluent limitations are contained within the four corners of an NPDES permit.

The law is also clear that an enforcement case is not a forum by which a discharger can modify unsatisfactory terms of an NPDES permit. The federal district court in the Northern District of Illinois dealt with this issue at length in its *NRDC v. Outboard Marine* decision. 692 F. Supp. at 809-815, 818-819, and 823. There, the defendant argued that it should not be held to the total suspended solids (TSS) effluent limits in its permit. To that, the court bluntly stated that the defendant was “disputing the merits of TSS restrictions before the wrong tribunal.” 692 F. Supp. at 823. The defendant in *Outboard Marine* also argued that it should not be liable for violations of its NPDES permit because it had requested a permit appeal and variance that could change the effluent limits in its permit. The court rejected this argument, stating,

[T]he permit unquestionably speaks of a specified limit—not a target or goal or a desired level. [Defendant] attempts to turn that day into night, somehow transmitting a limit into a non-limit. ... As already discussed at length, neither its modification request nor its 1987 appeal to the Board stayed the effect of the restriction.

692 F. Supp. at 818. *See also, 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 have presented similar arguments to the Board in this case. These arguments have no legal traction, and the Board must assess violations based on the limits included in the NPDES permit.

The only legally proper means to modify an NPDES permit is to follow the prescribed permit modification procedures. There is no dispute that IEPA has not actually modified the NPDES permit following these procedures.

The subsections below describe why each argument presented to the Board has no legal merit. But Petitioners would also like to point out that the arguments presented in the response briefs only serve to underline the point made in Petitioners’ motion for summary judgment: Respondents do not believe they have to comply with the limits contained in the NPDES permit. This attitude is but one of the many aggravating factors the Board should consider when assessing penalties in this case.

a. A Compliance Commitment Agreement does not relieve Respondents of liability for violations of the NPDES permit

The Respondents argue that, for various reasons, proposed Compliance Commitment Agreements (“CCA”) submitted to Illinois EPA act as a bar preventing Petitioners from pursuing violations of the NPDES permit. As explained below, 1) the existence of a

CCA does not bar citizen enforcement actions; and 2) compliance with the NPDES permit is still required under a CCA; 3) only one of the alleged CCAs was valid; 4) the CCAs only apply to a small fraction of violations.

i. A Compliance Commitment Agreement does not bar citizen enforcement of violations

Respondents misconstrue 415 ILCS 5/31 to bar citizen enforcement actions when the agency has entered into a CCA with a permittee. The plain language of the statute shows that, as a matter of law, a bar on citizen suits was not intended.³

The section of 415 ILCS 5/31 that limits what the Agency can do in light of a CCA reads:

If the person complained against complies with the terms of a Compliance Commitment Agreement accepted pursuant to this subsection (a), **the Agency** shall not refer the alleged violations which are the subject of the Compliance Commitment Agreement to the Office of the Illinois Attorney General or the State's Attorney of the county in which the alleged violation occurred.

415 ILCS 5/31 (10) (emphasis added). This section only bars the Illinois EPA from referring a case, and places no limitation on what a citizen can do---or, for that matter, what cases the Illinois Attorney General may bring on her own volition. No limits on citizen enforcement are found anywhere else in § 5/31. In fact, one section explicitly encourages citizen suits regardless of what the Agency chooses to do: “Any person may file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order.”

Accordingly, the statute on its face does not bar citizen enforcement actions where there is a CCA, and Respondents’ legal argument does not stand.

ii. A Compliance Commitment Agreement cannot modify the terms of an NPDES permit.

Regardless of what Illinois EPA may agree to in a CCA, the NPDES permit limits continue to apply. The stated purpose of a CCA is to identify actions “necessary to bring the person complained against into compliance with the Act, any rule adopted under the Act, any permit granted by the Agency or any condition of such a permit.” 415 ILCS 5/31 (a) (7). Thus, a CCA is meant to ensure that a violator complies with the terms of its NPDES permit, not provide an excuse for noncompliance.

³ Springfield Coal cites to *People of the State of Illinois v. Midwest Grain Prod. Of Illinois, Inc.*, PCB No. 97- 97-179, slip op. at 4 (Aug. 21, 1997), as support for the idea of a bar on citizen actions when a CCA exists. However, this decision merely declined to strike the affirmative defense based on a “lack of information presented” and the Board never reached the substantive question in the cited opinion or any subsequent opinion. *Id.* Surviving a motion to strike is a very low threshold, and should not be interpreted to validate a legal theory that has never been properly considered. Furthermore, the issue raised in *Midwest Grain* was whether the affirmative defense might block the attorney general from bringing suit and does not purport to address the issue of the effect of a CCA on a citizen enforcement action.

Illinois EPA has no authority to waive any permit term or condition in the context of a CCA. Courts around the country have held that agreements entered into with state enforcement authorities do not replace the terms and conditions of an NPDES permit. *Riverkeeper, Inc. v. Mirant Lovett, LLC*, 675 F. Supp. 2d 337 (S.D.N.Y. 2009) (Holding that consent order in enforcement action cannot validly modify permit, in part because it fails to satisfy CWA public notice and participation requirements), *Or. State Pub. Interest Research Group, Inc. v. Pac. Coast Seafoods Co.*, 361 F. Supp 2d 1232, 1242-43 (D. Or. 2005) (Rejecting argument that limits prescribed in state enforcement order was legal equivalent of NPDES permit), and *Citizens for a Better Env't-Cal. v. Union Oil Co. of Cal.*, 83 F.3d 1111, 1119 (9th Cir. 1996) (Holding that state cease and desist order “did not modify, effectively or otherwise, the terms of [the] NPDES permit.”). As discussed in Section III above, the only valid way to modify the terms of an NPDES permit is to follow the prescribed NPDES permit modification procedures. That was not done here, and Respondents are liable for violations of the NPDES permit as written.

iii. No Compliance Commitment Agreement came into effect in 2007 “by operation of law”

For purposes of summary judgment, we assume the truth of the statement that Illinois EPA accepted a CCA from Freeman in 2005. We also assume Respondents’ allegations that 1) on August 30, 2007 Freeman submitted a proposed CCA extension, 2) Illinois EPA never formally responded to that proposal, and 3) Illinois EPA verbally advised the mine to “continue to operate the Industry Mine pursuant to the terms of the August 30, 2007 CCA extension request.” (Ex. 1 to Springfield Coal Response to Pet’r Motion (hereinafter “Austin Aff.”) ¶ 15 and 16). However Respondents’ argument that a CCA was in effect “by operation of law” (Freeman Br. at 9) beginning on September 30, 2007 is a legal argument that the Board should find meritless.

Respondents cite to 415 ILCS 5/31 (a) (9) for the proposition that the 2007 CCA was valid. This section states,

The Agency's failure to respond within 30 days to a written response submitted pursuant to subdivision (2) of this subsection (a) if a meeting is not requested or pursuant to subdivision (5) of this subsection (a) if a meeting is held, or within the time period otherwise agreed to in writing by the Agency and the person complained against, shall be deemed an acceptance by the Agency of the proposed terms of the Compliance Commitment Agreement for the violations alleged in the written notice issued under subdivision (1) of this subsection (a) as contained within the written response.

415 ILCS 5/31 (a) (9). Under its plain language, this section is only triggered if a CCA is submitted under one of three conditions: 1) in written response to a violation notice as prescribed in subsection (a)(2); 2) in written response to a meeting conducted as prescribed in subsection (a)(5); or 3) “within the time period otherwise agreed to in

writing by the Agency and the person complained against.” Respondents have not alleged that any of these conditions existed at the time the 2007 CCA was submitted. Respondents merely allege that “On March 30, 2007, Freeman United sent IEPA a proposed two-year CCA extension.” (Austin Aff. ¶12). Surely a permittee cannot unilaterally obtain a CCA by submitting an unsolicited CCA extension proposal and arguing it has come into effect as a matter of law after 30 days. Because none of the listed conditions precedent have been met, 415 ILCS 5/31(a)(9) is not triggered and the 2007 proposed CCA is not deemed accepted “as a matter of law.”

Further, Respondents have cited no law supporting their contention that a CCA obtained by Freeman would automatically transfer to Springfield Coal upon transfer of ownership. Section 5/31 is silent on the specific issue, but it does require that amendments to a CCA be in writing and by mutual agreement of the Agency and the signatory. Here, the 2007 proposed CCA was submitted by Freeman, and ownership of the Industry Mine was transferred the next day. No valid amendment of the CCA was ever accomplished. Arguably, Springfield Coal would need to obtain its own CCA since it is not a party to the agreement between Freeman and the Agency. Even if the 2007 CCA was deemed automatically accepted, it would have no effect on Freeman (because it no longer owned the mine) or Springfield Coal (because it was not party to the agreement).

iv. A Compliance Commitment Agreement does not extend to violations not addressed in the violation notice and agreement

Even if the Board is not persuaded by the arguments above, the 2005 CCA applied, at most, to three manganese violations from Outfall 019 in 2004, the violations covered by the CCA.⁴ (Ex. 1A to Springfield Coal’s Response to People’s Complaint). Respondents cannot claim universal immunity for violations not addressed by the CCA. Throughout 415 ILCS 5/31, the language indicates that multiple violations are to be treated separately, and that enforcement decisions are not wholesale “all or nothing” decisions with respect to a particular polluter and its prospective violations. For example, 415 ILCS 5/31 (a) (10) states that the Agency “shall not refer the alleged violations *which are the subject of the Compliance Commitment Agreement* to the Office of the Illinois Attorney General.” (emphasis added). That subsection goes on to state, “However, nothing in this subsection is intended to preclude the Agency from continuing negotiations with the person complained against or from proceeding pursuant to the provisions of subsection (b) of this Section for alleged *violations that remain the subject of disagreement* between the Agency and the person complained against following fulfillment of the requirements of this subsection (a).” 415 ILCS 5/31 (a) (10) (emphasis added). By logical extension (and to construe the statute to avoid surplusage), violations that are not the subject of a CCA are fair game for the Agency to refer to the Illinois Attorney General for enforcement action.⁵

⁴ Petitioners argue that the 2007 proposed CCA never took effect. However, if the Board deems the 2007 proposed CCA to have been effective, it still only applies to the violations identified in the violation notice that are the subject of the proposed CCA. (Ex. 1A to Springfield Coal’s Response to People’s Complaint).

⁵ This reading is supported by 415 ILCS 5/31 (a) (8), which states that “Nothing in this subsection (a) is intended to require the Agency to enter into Compliance Commitment Agreements for any alleged violation that the Agency believes cannot be resolved without the involvement of the Office of the Attorney

Since Section 5/31 only bars the Agency from referring an action for three manganese violations from Outfall 019 in 2004, Respondents' theory extending the statute to apply to Petitioners arguments could only reach those same three violations. But, as discussed above, the Board should find the CCA does not impact Petitioners' ability to pursue any violations under the Illinois Environmental Protection Act.

b. Monthly average effluent limits apply even if permittee's sampling frequency is deficient.

Both Springfield Coal and Freeman argue that they should not be held liable for violations of monthly average effluent limitations when they took only one or two samples of a parameter in a given month. This theory supports 61 of the 66 "factual deficiencies" identified by Springfield Coal. In reality, Respondents are making a legal argument that is properly resolved by the Board on summary judgment. There is no genuine issue of material fact regarding how many samples were actually reported on the DMRs.

To support this theory, Respondents point to 35 Ill. Admin. Code 406.101, which states that, "compliance with the numerical standards of this part shall be determined on the basis of three or more grab samples averaged over a calendar month," and/or 35 Ill. Admin. Code 304.104 (b) (1), which states that "the monthly average shall be the numerical average of all daily composites taken during a calendar month. A monthly average must be based on at least three daily composites."

The plain language of these regulations requires that at least three samples be taken. Neither regulation purports to excuse violations of the monthly average when fewer than three samples are taken. To the contrary, § 304.104 (b) (1) states that the monthly average is "the numerical average of all daily composites taken during a calendar month." Declining to infer a compliance loophole into these regulations makes good policy sense. If the rule were as Respondents imply, why would any discharger ever take three or more samples? Permittees could simply elect to not sample their discharges a third time in any month where a violation might occur and, thus, effectively waive their monthly effluent limitations. Clearly, this is not the intent behind the regulation.

Averaging rules under the federal Clean Water Act contain no such exception to compliance with a monthly average effluent limitation. To the contrary, the Federal District Court for the Northern District of Illinois found that a single sample taken within a given month can violate both the daily maximum and the monthly average effluent limitations. *Natural Res. Def. Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 821 (N.D. Ill. 1988). *NRDC v. Outboard Marine* goes on to point out that "If [defendant] believed the [sample] during a storm event was unrepresentative of its daily discharges over a given month, it could have taken additional samples to bring down the monthly average." *Id.*

General or the State's Attorney of the county in which the alleged violation occurred, for, among other purposes, the imposition of statutory penalties."

Further, the NPDES permit at issue here does not contain any evidence of an exemption from the monthly average effluent limitation. Instead, the Standard Conditions define Average Monthly Discharge Limitation as “the highest allowable average of daily discharges over a calendar month, calculated as the sum of all daily discharges measured during a calendar month divided by the number of daily discharges measured during that month.” (Ex. 1 to Pet’r Motion for Summary Judgment (hereinafter “NPDES Permit”) p. 25). There is no reference to an exception that applies based on the number of samples collected.

If anything, the failure to collect at least three samples would be a monitoring or reporting violation in addition to the discharge violations are proven by such samples. The NPDES permit requires that a minimum of 9 samples be taken per quarter for total suspended solids, iron, sulfates, chlorides and manganese. (NPDES Permit, pp. 2-6). Respondents’ argument is founded on their admission that in many instances they failed to take at least three samples a month. Closer examination of these facts would likely reveal that both Springfield Coal and Freeman violated their monitoring requirements on many of these same occasions. *See Pub. Interest Research Group, Inc. v. Elf Atochem N. Am., Inc.*, 817 F. Supp. 1164, 1179 (D.N.J. 1993) (“Clearly, where a permit holder fails to monitor for a given pollutant as required under its permit, it can be held liable for a monitoring violation.”). Petitioners have not brought such claims here, but would consider amending their complaint to add the monitoring violations if the averaging rules are misinterpreted to defeat the monthly average effluent limitations.

c. Changes in water quality standards do not automatically modify effluent limitations in NPDES permits.

The next legal question presented by both Springfield Coal and Freeman is whether the new sulfate standard automatically modified their permit effluent limits. As a matter of law, it did not. Respondents remain liable for violations of the sulfate limits in the NPDES permit.

Freeman argues that it should not be held liable for violations of the sulfate water quality standard. However, the sulfate standard was not modified by the Board until September 2008, more than a year after Freeman transferred ownership to Springfield Coal in August 2007. This argument is beyond the pale. Allowing permittees to disregard NPDES effluent limits merely because a revised water quality standard was under consideration is not justified by law or science. Clearly, Freeman is liable for the violations of the sulfate effluent limit that occurred while it owned and controlled the Industry Mine. For the same reason, Springfield Coal is liable for all violations of the sulfate standard until the revised sulfate standard became effective.

Springfield Coal is also liable for all violations of the sulfate effluent limitation that occurred since the new sulfate standard became effective in 2008. As discussed in Section III above, the terms of an NPDES permit can only be modified after following explicit permit modification procedures. The NPDES permit for the Industry Mine was

not in fact modified to reflect changes in the water quality standard. (Austin Aff. ¶ 21). Yet after Springfield Coal took over the mine in 2007, sulfate violations increased in severity, as if the permit had been modified. (Ex. 4 to Pet'r Motion for Summary Judgment, pp. 7, 8 and 9). As the following paragraphs demonstrate, a permittee cannot unilaterally decide that it does not need to comply with its NPDES effluent limits without being held accountable for those violations.

Standard Condition 6 of the NPDES Permit states that the permit may be: “modified, revoked and reissued, or terminated for cause by the Agency pursuant to 40 CFR 122.62. *The filing of a request by the permittee for permit modification, revocation and reissuance or termination or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.*” (NPDES Permit, p. 25 (emphasis added)).

The regulation referenced in Special Condition 6 allows permit modification for specific causes, including “new regulations.” 40 CFR 122.62 (a). Under this regulation, permits may only be modified during their terms when water quality standards are amended if:

(A) The permit condition requested to be modified was based on a promulgated effluent limitation guideline, EPA approved or promulgated water quality standards, or the Secondary Treatment Regulations under part 133; and

(B) EPA has revised, withdrawn, or modified that portion of the regulation or effluent limitation guideline on which the permit condition was based, or has approved a State action with regard to a water quality standard on which the permit condition was based; and

(C) A permittee requests modification in accordance with § 124.5 within ninety (90) days after Federal Register notice of the action on which the request is based.

40 CFR 122.62 (a) (3). The language governing permit modification under the federal regulations is permissive, and does not mandate permit modification under any circumstances. *See* 40 CFR 122.62 (“If cause exists, the Director *may* modify or revoke and reissue the permit accordingly.”) (emphasis added). Similarly, the Illinois regulations governing permit modification state:

If the Board adopts new regulations affecting the terms and conditions of an outstanding permit, the Agency *may* issue to the permittee a new or supplemental permit setting forth the affected terms and conditions as modified.

35 Ill. Admin. Code 405.103 (emphasis added). No provision in the regulations mandates that permit terms be modified. No provision in the regulations allows for automatic modification of NPDES effluent limits when new regulations are adopted. No provision in the regulations excuses violations of effluent limitations when a water

quality standard is revised. Put simply, Respondents' legal position on this issue is wrong.

The policy of not automatically modifying permit terms when new regulations are adopted is sound. First, water quality standards are but one of several things that permit writers consider when drafting effluent limitations for an NPDES permit. Regulations (such as antibacksliding rules) may in fact require that some effluent limitations not be weakened. Second, several water quality standards (sulfate included) involve complex calculations before an effluent limitation is identified. Those calculations should not be left to the permittee to interpret. Third, if a water quality standard becomes more stringent, permittees would certainly balk at the idea that they would have to comply with a more stringent limitation without being afforded the process of a permit modification. Fourth, it would be difficult to notify all affected permittees of an automatic change in permit terms, which could cause confusion as to which effluent limits apply. Finally, as discussed in Section III above, attempts to modify NPDES permits outside of approved permitting procedure have been routinely rejected by courts.

d. Respondents are Required to Meet Manganese and pH Limits as Stated in the NPDES Permit.

Respondents argue that they are not liable for violations of the manganese and pH limitations included in the NPDES permit. They cite the effluent limitations listed in 35 Ill. Admin. Code 406.106 as the source of this relief. However, as explained in Section III above, a permittee must adhere to the effluent limits stated in its NPDES permit. As a matter of law, no source outside of the NPDES permit can modify or eliminate the effluent limits contained therein. Thus, Respondents remain liable for those violations, regardless of whether the facts they allege are true.

When IEPA writes a permit, it must incorporate effluent limitations to satisfy various regulations under the NPDES program. See U.S. EPA, *NPDES Permit Writers Manual*, Section 3-3.⁶ Some limits are Technology Based Effluent Limitations, while other limits are Water Quality Based Effluent Limitations. Section 406.106 of Chapter 35 the Illinois Administrative Code is a source of Technology Based Effluent Limitations that apply to coal mines in Illinois. This regulation states:

§ 406.106: Effluent Standards for Mine Discharges.

- a) The effluent limitations contained in 35 Ill. Adm. Code 304 shall not apply to mine discharges or non-point source mine discharges.
- b) Except as provided in Sections 406.109 and 406.110, a mine discharge effluent shall not exceed the following levels of contaminants:

⁶ Available at http://cfpub.epa.gov/npdes/writermanual.cfm?program_id=45.

Constituent	Storet Number	Concentration
Acidity	00435	(total acidity shall not exceed total alkalinity)
Iron (total)	01045	3.5 mg/l
Lead (total)	01051	1 mg/l
Ammonia Nitrogen (as N)	00610	5 mg/l
pH	00400	(range 6 to 9)
Zinc (total)	01092	5 mg/l
Fluoride (total)	00951	15 mg/l
Total suspended solids	00530	35 mg/l
Manganese	01055	2.0 mg/l

1) The ammonia nitrogen standard is applicable only to an operator utilizing ammonia in wastewater treatment.

2) The manganese effluent limitation is applicable only to discharges from facilities where chemical addition is required to meet the iron or pH effluent limitations. The upper limit of pH shall be 10 for any such facility that is unable to comply with the manganese limit at pH 9. The manganese standard is not applicable to mine discharges which are associated with areas where no active mining, processing or refuse disposal has taken place since May 13, 1976.

c) New source coal mines shall be subject to a total iron limitation of 3.0 mg/l in addition to the requirements of subsection (b) above.

35 Ill. Admin. Code 406.106. The NPDES permit contains some limits that align with this regulation (manganese: 2.0 mg/L, total suspended solids: 35 mg/L, pH range: 6 to 9, iron: 3.5 mg/L, total acidity shall not exceed total alkalinity), but not others (lead, ammonia nitrogen, zinc and fluoride). The NPDES permit *does not* contain any exception (as a special condition or elsewhere) to either the manganese effluent limit or

the pH limit related to chemical addition or inability to comply with the manganese standard. By contrast, the NPDES permit does contain alternative effluent limitations for precipitation-driven discharges, so Illinois EPA permit writers clearly know how to write an exception when it deems one is allowed.

The fact that some effluent limits from 406.106 are included in the NPDES permit but not others reflects the reality that IEPA permit writers review the effluent limitations in the regulations and make professional judgments regarding the applicability of effluent limitations and special conditions to specific industrial processes and facilities. *See* NPDES Permit Writers' Manual, at Section 5.2.2 ("Permit writers need to have a detailed knowledge of the industrial facility applying for a new or reissued NPDES permit to identify applicable effluent guidelines and know how to use them to derive TBELs."). Once the NPDES permit is finalized, a permittee cannot go back to pick and choose which sections of the regulations it would prefer to comply with. Such a change, including the addition of an exemption from the effluent limitation, would require a permit modification.

By the same logic Respondents use to justify their reliance on § 406.106 (b) (2) to excuse their violations of permit limits, Petitioners might seek additional penalties for reporting violations for failure to monitor for lead, ammonia nitrogen, zinc and fluoride in accordance with the limits put forth in § 406.106 (b). But the fact is neither of these things is contained in the NPDES permit, and the NPDES permit controls the discharges as a matter of law.

At the end of the day, the Industry Mine is prohibited from "discharg[ing] any contaminant in his effluent in excess of the standards and limitations for that contaminant which are set forth in [its] permit." 35 Ill. Admin. Code 304.141 (a). Therefore, the manganese limit of 2.0 mg/L and the pH limit of no less than 6.0 and no greater than 9.0 apply to Industry Mine, and Springfield Coal and Freeman are each liable for respective violations of those permit limits.

e. Background concentrations of pollutants do not excuse violations.

Respondents argue that background concentrations of manganese, sulfates, iron, TSS and pH are present at levels that mean they don't have to comply with the effluent limitations in the NPDES permit. But, as a matter of law, 35 Ill. Admin. Code 406.103 is an effluent limitation, not an excuse that relieves permittees from liability for violations of an NPDES permit. Moreover, even if the regulation did operate to wipe away liability, Respondents have not alleged facts that meet the terms of the regulation.

Section 406.103 is listed in the Illinois Administrative Code as one of the "Effluent Standards" for mine waste. As discussed in Section IV.d. above, effluent standards are one of the things permit writers review when drafting NPDES permits. Effluent limitations are included (or not included) in NPDES permits based on the professional judgments of permit writers.

The alleged background concentrations were known when the NPDES permit was last reissued in 2003. (Austin Aff. at ¶ 22-23). Nevertheless, the NPDES permit does not contain a special condition exempting the Industry Mine from its effluent limits on account of background concentrations. If conditions existed that justified different effluent limitations than are listed in Part 406, the permit writer would have calculated alternate limits into the permit. Section 406.103 does not purport to eliminate effluent limitations altogether. If Respondents are unhappy with the way the permit accounts for background concentrations, that should have been addressed through a permit appeal or by a proper permit modification. Permit terms cannot be modified or eliminated in an enforcement proceeding.

Further, Section 406.103 only applies to effluent limitations based on the effluent standards listed in Part 406. As discussed in Section IV.d., it is not clear which effluent limitations in the NPDES permit came from Part 406, which is more evidence that any application of 406.103 happens during permit drafting. The claimed exemption cannot in any event apply to the sulfate violations, because no sulfate effluent standards are included in Section 406.106.

Finally, Section 406.103 establishes a rebuttable presumption that background concentrations or discharges upstream from affected land are not the cause of violations of the effluent standards in Part 406. Although there is no uniform test of how much evidence is necessary to rebut a presumption, *Smith v. Tri-R Vending*, 249 Ill. App. 3d 654, 661 (1993), overcoming a rebuttable presumption is a hefty burden. *R.J. Mgmt Co. v. SRLB Dev. Corp.*, 346 Ill. App. 3d 957, 965 (2d Dist. 2004). (“When the presumption is strong, great evidence is needed to rebut it.”). A rebuttable presumption is considered at the summary judgment stage like any other legal question: assuming all facts alleged in the light most favorable to the non-moving party. *Wausau Ins. Co. v. All Chicagoland Moving & Storage Co.*, 333 Ill. App. 3d 1116, 1120 (2d. Dist. 2002). However, the summary judgment standard does not fill in the cracks where facts have not been alleged to overcome the burden of the presumption. *Smith v. Tri-R Vending*, 249 Ill. App. 3d at 661 (1993) (Stating that the non-moving party must plead sufficient facts to overcome the presumption).

Respondents have not even alleged facts that fit the terms of the regulation, let alone facts sufficient to overcome the rebuttable presumption. Section 406.103 describes an intent not to require permittees to clean up background concentrations “when only traces of contaminants are added to the background.” Respondents have not alleged that they have only added traces of manganese, iron, TSS and pH. Without evidence of those facts, Section 406.103 does not apply. In any case, even if Section 406.103 were interpreted to exempt the Industry Mine from complying with the NPDES permit, that exemption would only apply to violations where Respondents can show that background concentrations were the cause of the violations. No such specific allegations have been made here, so the presumption that background concentrations are not the cause of violations has not been rebutted. Accordingly, Respondents are liable for violations of the NPDES permit effluent limits.

f. Under the NPDES permit, Outfall 019 was subject to manganese effluent limits.

Freeman argues that it should not be held liable for violations of manganese from Outfall 019 because it claims that Outfall 019 was subject to alternative “Reclamation Area Drainage” effluent limits (which do not include a manganese effluent limit) rather than the “Acid Mine Drainage” effluent limits (which include manganese limits) provided on page 4 of the NPDES Permit. (NPDES Permit). However, Freeman is liable for its Outfall 019 manganese violations because Outfall 019 has never been properly redesignated as “Reclamation Area Discharge.”

Re-designating an outfall requires adherence to a formal process. Special Condition 8 of the NPDES Permit identifies this process, stating:

The special reclamation area standards of 35 Ill. Admin. Code 406.109 apply only on approval from the Agency. To obtain approval, a request form and supporting documentation shall be submitted 45 days prior to the month that the permittee wishes the discharge to be classified as a reclamation area discharge. The Agency will notify the permittee upon approval of the change.

(NPDES Permit, p. 23). Neither Respondent provided evidence that it ever submitted a proper application for redesignation consistent with Special Condition 8 of the NPDES permit. Moreover, neither Respondent alleged or provided evidence that IEPA ever approved a change in designation of Outfall 019. Instead, Freeman points to statements in its 2005 Compliance Commitment Agreement that identify Outfall 019 as a “Reclamation Area.” As a matter of law, this is not enough to meet the legal requirements detailed in Special Condition 8 for redesignation of an Outfall. (NPDES Permit, p. 23). Furthermore, the Construction Authorizations in the NPDES permit specifically state that Outfall 019 was reclassified as “acid mine drainage.”⁷ (NPDES Permit, p. 15). Therefore, Freeman is liable for violations of manganese from Outfall 019.

g. There are no genuine issues of material fact regarding other violation “discrepancies.”

Finally, the five remaining “factual discrepancies” alleged by Springfield Coal, (Springfield Coal Br. at 8-9), are easily shown as not factual discrepancies at all. Instead (in all but one case) the violations subject to these discrepancies are proven by the irrefutable evidence of Springfield Coal’s DMRs.

⁷ The Construction Authorizations also show an example of what it looks like when IEPA approves a reclassification as reclamation. (Exh. 1 to Pet’r Motion for Summary Judgment, p. 21) (“Outfall No. 27 is re-classified as reclamation area drainage as proposed in Log. No 5071-03”). No such provision is included regarding Outfall 019.

Three of these discrepancies are the result of a transcription error, where three violations of the 7.0 mg/L maximum limit for Outfall 018 (April 2008, June 2008 and February 2011) were presented in the "Outfall 017" column of Exhibit 3. The citations provided reference DMRs that, in fact, show violations of iron from Outfall 018 on those dates. The attached corrected Exhibit 3 reflects this correction, with the number of violations remaining the same.

The January 2010 violation of pH (9.04) from outfall 019 is shown in the DMR cited in Exhibit 3. Springfield Coal, without reference to a specific DMR, claims this value should be 8.38, but the DMR cited for the violation clearly shows a value of 9.04. See *Natural Res. Def. Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 819 (N.D. Ill. 1988) ("[A] permit-holder's statements in its DMRs are conclusive and irrebuttable evidence that permit violations have occurred.").⁸

Springfield Coal also points out that the September 2010 violation alleged for sulfate from Outfall 009 showed an average value for sulfate (which has no average limit) and therefore should not be counted as a violation. The average value of 1136 has been deleted from the corrected Exhibit 3 and the number of violations has been adjusted to show 341 violations against Springfield Coal, rather than 342 violations originally identified by the Petitioners.

IV. Springfield Coal is liable for violations of its NPDES permit, regardless of whether efforts were made to prevent them.

Springfield Coal contends that it has "submitted numerous compliance plans to the IEPA and has spent considerable time and resources to comply with the NPDES permit." (Springfield Coal Response, at 12-14). Assuming for the purposes of summary judgment that Springfield Coal "invested a significant amount of financial resources, time and effort into complying with the NPDES Permit," (Springfield Coal Response, at 14), the DMRs unquestionably show that, despite these efforts, the mine has continued to violate its NPDES permit.

Whether or not a permittee has tried to comply with the terms of its NPDES permit is not relevant to the question of the permittee's liability for violations that actually occurred under the permit. Violators of the federal Clean Water Act face strict liability, and are not excused by any claim of good faith or lack of knowledge. *Kelly v. U.S. EPA*, 203 F.3d 519, 522 (7th Cir. 2000). See also *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 946 n.14 (7th Cir. 2004) (stating that in assessing liability for violations, "a defendant's intent or purpose is irrelevant").

⁸ Although Springfield Coal has not referenced a DMR supporting its claim, it is likely referring to the regular DMR submission found on page SC01673 of its Response to Petitioner PRN's First Requests to Admit, Interrogatories and Requests for Production of Documents from Springfield Coal, which is a different document than the quarterly precipitation sampling Petitioners have cited to prove this violation. (Petitioner PRN's First Requests to Admit, Interrogatories and Requests for Production of Documents from Springfield Coal, Attachment 2, p 112.)

Similarly, a polluter's intent is irrelevant to prosecution of violations of the Illinois Environmental Protection Act. *Freeman Coal Mining Corp. v. Pollution Control Bd.*, 21 Ill. App. 3d 157, 163 (5th Dist. 1974) ("that the discharges were accidental and not intentional, or that they occurred in spite of [the mine's] efforts to prevent them, is not a defense") and *Meadowlark Farms, Inc. v. Pollution Control Bd.*, 17 Ill. App. 3d 851, 861 (5th Dist. 1974) ("The Environmental Protection Act is *malum prohibitum*; no proof of guilty knowledge or *mens rea* is necessary to a finding of guilt").

Thus, as a matter of law, Springfield Coal's attempts to comply with its NPDES permit have no bearing on its liability for violations of that permit under the Illinois Environmental Protection Act.

V. The doctrine of laches does not apply to claims brought against Freeman.

Freeman argues that Petitioners' claims are barred by laches. The equitable doctrine of laches bars relief where a party has been misled or prejudiced because of another party's delay in asserting a right. *Van Milligan v. Bd. of Fire & Police Comm'rs*, 158 Ill. 2d 85, 89 (1994). This doctrine is not applicable to enforcement actions under the Illinois Environmental Protection Act and Freeman failed to demonstrate that the Petitioners lack of diligence prejudiced Freeman. The Board should therefore deny the defense of laches here.

The Board has declined to apply the doctrine of laches to environmental enforcement cases "unless conduct or special circumstances make it inequitable to grant relief." *People v. Env'tl. Control and Abatement, Inc.*, PCB No. 95-170, p. 20-21 (Jan. 4, 1996) ("The Board has held that the equitable doctrine of laches generally does not apply to enforcement actions brought before the Board under the Act"). See also *People v. Big O, Inc.*, PCB No. 97-130 (Apr. 17, 1997).

Similarly, federal courts assessing citizen enforcement suits under the Clean Water Act have rejected the doctrine of laches as a bar to enforcement actions. *Conn. Fund for Env't, Inc. v. Upjohn Co.*, 660 F. Supp. 1397, 1413-14 (1987) (stating that no court had relied on laches to bar an environmental enforcement action); *Student Pub. Interest Research Group of N.J., Inc. v. P.D. Oil & Chem. Storage, Inc.*, 627 F. Supp. 1074, 1085 (1986) ("The law is established that the defense of laches may not be asserted against the government. . . . As citizen plaintiffs stand in the shoes of the government 'as private attorneys general,' it makes no sense to apply laches in a citizen suit."). See also *Hickey v. Illinois Central Railroad Co.*, 35 Ill. 2d. 427, 447 (1966) (noting that "it is, of course, elementary that ordinary limitations statutes and principles of laches and estoppel do not apply to public bodies under usual circumstances").

Freeman has shown no "conduct or special circumstances" warranting the use of laches to bar Petitioners' claims. To the contrary, Freeman has not even shown evidence supporting the two elements of a laches defense: 1) Petitioners' lack of diligence and 2) resulting prejudice to Freeman. *Van Milligan*, 158 Ill. 2d at 89.

Freeman's diligence argument seems to be founded principally⁹ on its opinion that Petitioners "sat on [their] rights for an unreasonable amount of time." (Freeman Response Br. at 19). However, the Illinois Environmental Protection Act does not impose a statute of limitations for citizen suits against violators of the Act. 415 ILCS 5/31 (d) (1). The Board has found the lack of a limitations statute to be legally significant, holding that "if the right to bring a lawsuit is not barred by the statute of limitations, unless conduct or special circumstances make it inequitable to grant relief, then the equitable doctrine of laches does not bar a lawsuit either." *Big O*, PCB No. 97-130, at 3 (Apr. 17, 1997). Liability for violating an NPDES permit does not expire under the Illinois Environmental Protection Act. Petitioners were well within their rights to file an enforcement case for the violations that occurred under Freeman's watch.

Freeman's only allegation of prejudice is that during this "unreasonable length of time" Petitioners "allow[ed] potential penalties to accrue" against Freeman. (Freeman Response Br. at 18-19). First of all, neither Respondent has challenged the August 31, 2007 transfer of ownership and liability from Freeman to Springfield Coal as invalid. Accordingly, in the motion for summary judgment, Petitioners have alleged no accrued penalties since August 2007, so Freeman's claim of prejudice by any delay tests the bounds of logic. Second, Freeman's legally erroneous reliance on the CCA to wipe the slate clean of violations reveals no prejudice caused by Petitioners. Petitioners were not a party to the CCA, and were not privy to any legally-incorrect notions held by Freeman. It would be patently unfair to bar Petitioners' enforcement suit on a claim of prejudice to Freeman simply because Petitioners did not "dissuade" Freeman from erroneous legal positions Petitioners' were not aware of.

Assuming all facts in favor of Freeman, it has not proven either element of the defense of laches; a defense that the Board does not apply except in the case of "special circumstances." Accordingly, the Board should find that the doctrine of laches does not bar Petitioners' claims.

VI. The Illinois Environmental Protection Act does not bar enforcement of violations that occurred while Freeman operated the Industry Mine.

In a footnote, Freeman suggests that the Board should dismiss Petitioners' claims against Freeman, based on the holding in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987), which bars citizens from enforcing "wholly past" violations of the Clean Water Act. However, *Gwaltney* is a federal case interpreting citizen suits under the federal Clean Water Act, and Illinois has not adopted this limitation on enforcement actions under the Illinois Environmental Protection Act. This legal question does not create a genuine issue of material fact.

⁹ Freeman also insinuates that diligence required Petitioners to inform Freeman of its interest in its NPDES permit violations. However, the Illinois Environmental Protection Act does not require Petitioners to communicate concerns to polluters in order to preserve a right to bring an enforcement suit. Freeman has not alleged Petitioners did not meet the notice requirements of the Illinois Environmental Protection Act.

The Board has manifest authority to assess penalties for violations of the Illinois Environmental Protection Act, whether ongoing or wholly past. The statute governing IPCB orders specifically states:

It shall not be a defense to findings of violations of the provisions of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order, or a bar to the assessment of civil penalties that the person has come into compliance subsequent to the violation, except where such action is barred by any applicable State or federal statute of limitation.

415 ILCS 5/33 (a). Illinois Courts also have “declined to hold categorically that penalties may not be imposed for wholly past violations.” *Modine Mfg. Co. v. Pollution Control Bd.*, 549 N.E.2d 1379, 1382-84 (Ill. App. Ct. 2d Dist. 1990). *See also E. Moline v. Pollution Control Bd.*, 136 Ill. App. 3d 687, 693-95 (3d Dist. 1985) (“There is no general rule precluding the assessment of a penalty merely because the violation has ceased prior to the commencement of enforcement proceedings.”); and *Doall Co. v. Skokie Valley Asphalt Co., Inc.*, PCB No. 94-256, p. 6-7 (July 7, 1995) (“While the alleged violations are wholly-past and the site has already been cleaned up, the Board has authority to impose penalties for wholly-past violations.”).

The Board has also specifically allowed citizen enforcement cases under the Illinois Environmental Protection Act to pursue past violations. *E.R. 1, LLC v. Seiber*, PCB Order 08-30 (April 21, 2011) (“The Board has consistently found that the Board can award private citizens cost recovery for past violations of the Act.”) Rather than using past violations as a bar to enforcement, under the Illinois Environmental Protection Act, the question of “subsequent compliance” is one of the factors the Board considers when awarding penalties. 415 ILCS 5/33 (c) (v). Petitioners emphasize that, in any case, there has not been subsequent compliance at the Industry Mine. Years of ongoing violations are documented in Petitioners’ motion for summary judgment. The only thing that allows Freeman to even present this argument is the fact of a legal transfer of ownership of the mine to Springfield Coal. Even if a *Gwaltney*-like rule did apply in Illinois, as a matter of policy, polluters should not be allowed to wipe the slate clean and escape liability for years of violations simply by reincorporating into a new legal entity.

VII. Penalties may be assessed at either the summary judgment stage or after a hearing.

The Board is not barred from considering penalties in summary judgment motions and briefs. The Illinois Environmental Protection Act merely states that “[t]he penalties provided for in this Section may be recovered in a civil action.” 415 ILCS 5/42 (d). This provision does not restrict penalty determinations to any particular stage of a civil action. Similarly, the Illinois Administrative Code authorizes parties to seek summary judgment “for all or any part of the relief sought.” 35 Ill. Adm. Code 101.516 (a).

In practice, the Board specifically directs parties to address specific penalty recommendations in the summary judgment filings. *See People v. Roxana Landfill, Inc.*

PCB No. 12-123 p. 5 (May 3, 2012) (“[T]he Board further directs the hearing officer to advise the People and Roxana that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any (including whether to impose a civil penalty), and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors.”). The fact that the Board has not ultimately resolved all penalty issues at summary judgment (for example, those cited by Respondents¹⁰) does not mean that considering penalty issues at summary judgment is “procedurally improper.” If the Board determines that an evidentiary hearing on the penalty issue is unnecessary because there are not material facts in dispute, the Board can (and has) determined penalties at the summary judgment phase. *See, People v. Ogoco, Inc.*, PCB 06-16 (Sept 21, 2006) (granting motion for summary judgment, ordering respondent to cease and desist from further violations, and demanding a \$28,000 civil penalty); *People v. Steve’s Concrete & Excavating*, PCB 08-87 (Mar. 5, 2009) (granting motion for summary judgment, ordering respondent to cease and desist from further violations, and demanding a \$12,000 civil penalty); *People v. Dayne Rogers & Black Gold International*, PCB 00-127 (Aug. 9, 2001) (granting motion for summary judgment, ordering respondent to cease and desist from further violations, and awarding \$38,730.46 in fees).

In the alternative, the Board frequently grants partial summary judgment, reserving judgment on subsets of violations or penalties to be decided after a hearing. *See, People v. Draw Drape Cleaners, Inc.*, PCB 03-51 (Aug. 19, 2004) (Granting partial summary judgment and directing parties to “proceed expeditiously to a hearing on the remedy and penalty”) and *People v. Whiteway Sanitation, Inc.*, PCB 95-64 (Feb. 9, 1988) (Finding respondents liable for violations and directing hearing officer to establish hearing or briefing schedules for the penalty issues and remaining liability issues). If the Board finds genuine issues of material fact as to penalties, granting partial summary judgment on liability and sending the penalty question to hearing is appropriate.

VIII. Petitioners’ proposed penalties are justified under the law.

Petitioners provided legal support for the calculation of penalties requested in its motion for summary judgment, and it is not appropriate use of a reply brief to simply reiterate those cases in the face of Respondents unsupported arguments against the penalty calculation. Respondents raise three arguments contesting Petitioners’ calculation of

¹⁰ Springfield Coal also cites to two inapposite common law cases (*Mobil Oil Corp. v. Maryland Cas. Co.*, 288 Ill. App. 3d 743, 758 (Ill. App. Ct. 1997) and *Doe v. Montessori Sch. Of Lake Forest*, 287 Ill. App. 3d 289, 301 (Ill. App. Ct. 1997)) discussing whether damages or attorney’s fees should be assessed in a motion for summary judgment or a motion to dismiss. Although these cases are not analogous to the statutory penalty scheme considered here, the result is the same: whether summary judgment can be granted on the issue of penalties depends on the case presented to the decisionmaker.

penalties that warrant a reply. None of these arguments actually reveals an error in calculation.

First, Freeman claims that Petitioners “erroneously calculated” the maximum penalty by including 69 violations of the monthly average that are based on one or two samples. But on its face, this is an argument about tallying the number of violations, not calculating penalties. Section III.b. above explains why the contested violations are in fact violations as a matter of law.

Second, Freeman argues that a monthly average limitation should not be considered thirty days of violations unless Petitioners can prove that the violations are continuous. Freeman cites no law in support of this interpretation because there is no such rule. A monthly average is a limitation that assesses a permittee’s compliance by viewing the entire month as a whole. There is no breakdown into days of discharge. *Cf. IEPA v. City of Moline*, PCB 82-154 (Sept 6, 1984) (“where a monthly average violation occurred, a penalty may be imposed for every day of that month.”); *Natural Res. Def. Council v. Texaco Ref. & Mktg.*, 800 F. Supp. 1, 21 (D. Del. 1992) (“Exceedance of a daily average limitation constitutes a violation for each day of the month ... The violation of such a limit reflects excessive discharges throughout a month-long period.”); and *Pub. Interest Research Group v. Star Enter.*, 771 F. Supp. 655, 668 (D.N.J. 1991) (“a violation of the monthly average limitation constitutes a violation for each day of the month”).

Finally, Respondents cite to lower penalties reported in prior Board cases as a reason not to assess substantial penalties against Respondents. However, “penalties assessed by the Board in other cases” is not one of the Section 33(c) or Section 42(h) factors the Board considers in determining appropriate penalties, and is irrelevant to the Board’s determination of penalties in this case. Furthermore, Respondents have accrued many more violations over a longer period of time than the cited cases. *See, e.g., People v. Onyx Env'tl. Servs., LLC.*, PCB 04-98 (Aug. 19, 2004) (Assessing \$125,000 for four counts of violations over a four-month period). Interestingly, the only case cited by Respondents that was not the result of a settlement was resolved on summary judgment, where the Board awarded Petitioners \$28,000 for an oil spill that occurred over several days. *People v. Ogoco Inc.*, PCB 06-16 (Sept. 21, 2006).

On the other hand, Respondents’ reference to minimal penalties assessed in other cases raises the question of whether Respondents calculated a low risk of a substantial penalty and chose to continue to violate the NPDES permit. The maximum penalty is necessary to discourage polluters from banking on a slap on the wrist for even extensive violations of effluent limitations.

Petitioners have appropriately calculated the maximum penalty for Respondents’ violations of the Industry Mine NPDES permit. Respondents have not raised any disputed facts relevant to the penalty determination.

CONCLUSION

For the reasons detailed above, the Board should find Respondents liable for 624 violations of the Illinois Environmental Protection Act, issue a cease and desist order against Springfield Coal and impose the maximum civil penalty against both Springfield Coal (\$38,500,000¹¹) and Freeman (\$26,320,000).

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, Ste. 1300
Chicago, IL 60601
312-795-3747

¹¹ This number has been adjusted to reflect 341 instead of 342 violations alleged against Springfield Coal.

CERTIFICATE OF SERVICE

I, Jessica Dexter, hereby certify that I have filed the attached MOTION FOR LEAVE TO REPLY AND PRAIRIE RIVERS NETWORK AND SIERRA CLUB'S REPLY REGARDING THEIR MOTION FOR SUMMARY JUDGMENT in PCB 2010-061 upon the attached service list by depositing said documents in the United States Mail, postage prepaid, in Chicago, Illinois on June 22, 2012.

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
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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.)
)
FREEMAN UNITED COAL)
MINING CO., L.L.C., and)
SPRINGFIELD COAL CO., L.L.C.)
)
Respondents.)

PCB 2010-061
(Enforcement-Water)

AFFIDAVIT OF JESSICA DEXTER IN SUPPORT OF SIERRA CLUB AND PRAIRIE RIVERS NETWORK'S MOTION FOR SUMMARY JUDGMENT

Jessica Dexter declares as follows under penalty of perjury:

1. I am the attorney representing Petitioners Prairie Rivers Network and Sierra Club, Illinois Chapter, in the above-captioned matter.
2. I make this declaration on personal knowledge of the facts contained herein and in support of Petitioners' Motion for Summary Judgment.
3. On April 27, 2012 Prairie Rivers Network and Sierra Club filed a Motion for Summary Judgment in the above-captioned case. The Motion included a number of attachments, as described below. To the best of my knowledge, the exhibits are true and accurate copies of documents and/or are accurate summaries based on those true and accurate documents.

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4. On November 28, 2011, I sent a discovery request to Springfield Coal on behalf of Prairie Rivers Network. Attachment 2 to the discovery request is a compilation of true and accurate copies of Discharge Monitoring Reports obtained from an Illinois Freedom of Information Act request to Illinois EPA. These DMRs were the subject of Request to Admit #19 that the documents represented results from Springfield Coal's monitoring effluent discharges. A true and accurate copy of the discovery request and attachment was filed as an attachment to Petitioners' Motion for Summary Judgment.

5. On January 31, 2012, I received Springfield Coal Mining Co LLC's Responses to Prairie Rivers Network's First Requests to Admit, Interrogatories, and Request for Production of Documents. Attached to the discovery response were DMRs produced in response to Request for Production of Documents #1. A true and correct copy of this discovery response (including the DMRs) was filed as an attachment to Petitioners' Motion for Summary Judgment.

6. Attached to Petitioner's Motion for Summary Judgment as Exhibit 1 is a true and correct copy of the NPDES permit issued to the Industry Mine in 2003, and is a true and correct copy of the NPDES permit Springfield Coal admitted applies to the Industry Mine in Request to Admit #1.

7. Attached to Petitioner's Motion for Summary Judgment as Exhibit 2 is a figure I created called "Log of Available Industry Mine DMRs." This exhibit shows which DMRs Petitioners were able to obtain and review for the Industry Mine since 2001. Each outfall permitted at the Industry Mine is listed across the top. Each month from January 2004-December 2011 is listed at the left side. Each cell marked "V" (yellow fill) shows a month where a DMR was reviewed for that outfall and a violation was discovered; Each cell

marked “x” (white fill) shows a month where a DMR was reviewed for that outfall and no violation was discovered; and Each cell with blue fill shows a month where no DMR was obtained for that outfall, so the violation status is unknown.

8. Attached to this affidavit as Attachment A is a corrected Exhibit 3, “Corrected Tables of Industry Mine NPDES Violations,” meant to replace Exhibit 3 to Petitioner’s Motion for Summary Judgment. I created this document based on true and accurate copies of the Discharge Monitoring Reports (DMRs). This document indicates each violation of the NPDES permit for the Industry Mine and cites to the DMR source that provides the sampling information. The DMR data shown in the tables are analyzed and organized as described in the two title pages to the exhibit.

9. Attached to Petitioner’s Motion for Summary Judgment as Exhibit 4 is a figure I created based on true and accurate DMRs called “Graphs Depicting Industry Mine Violations.” This document graphs the violations from Exhibit 3 (all outfalls) on a scatter plot to show the magnitude of violations and consistency over time. On each graph, the effluent limit is plotted as a horizontal dotted line and the August 2007 date (when ownership and liability transferred from Freeman to Springfield Coal) is plotted as a vertical dashed line.

10. Attached to Petitioner’s Motion for Summary Judgment as Exhibit 5 is a true and correct copy of 5 DMRs from the Industry Mine. I obtained these DMRs through an Illinois Freedom of Information Act request to Illinois EPA.

11. Attached to Petitioner’s Motion for Summary Judgment as Exhibit 6 is a true and correct copy of the document from the U.S. Department of Interior, Office of Surface

Mining found at

<http://www.mcrc.org/MCR/Oversight/Documents/Illinois/12IL.shtm>.

12. Attached to Petitioner's Motion for Summary Judgment as Exhibit 7 is a true and correct copy of data obtained from the Illinois Department of Commerce and Economic Opportunity.

I declare under penalty of perjury under the laws of the State of Illinois that the foregoing is true and correct to the best of my knowledge.

DATED this 22nd day of June, 6/22/12 at Chicago, Illinois.

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

Jessica Dexter
Attorney Registration #6298340

Attachment A

Corrected Exhibit 3: “Corrected Tables of Industry Mine
NPDES Violations”

(replaces Exhibit 3 to Petitioner’s Motion for Summary Judgment)

Exhibit 3 (corrected)

Tables of Industry Mine NPDES Violations

This document indicates each violation of the NPDES permit for the Industry Mine and cites to the DMR source that provides the sampling information.

A page is included for each applicable effluent limit (e.g. iron monthly average 3.0, iron monthly average 3.5, etc.). Each page includes across the top each of the outfalls that have violated that effluent limit, and each month for which there was a violation along the left side. A bold line separates the Freeman violations from the Springfield Coal violations (i.e. before and after August 31, 2007).

Under each Outfall heading there are three columns. In a month in which a violation took place, the cell in the "sample" column shows the sample that was reported on the Discharge Monitoring Report (DMR) for that month. In other words, this is the sample value that proves the violation of the NPDES permit effluent limits.

The second column under each outfall (marked "citation") indicates the reference to the DMR where the sample was reported. Copies of all DMRs supporting the violations have been provided to the IPCB. These DMRs are provided in three different sets of documents:

- A number alone (e.g. "43") refers to a page in Attachment 2 of Petitioner Prairie Rivers Network's First Requests to Admit, Interrogatories and Requests for Production of Documents from Springfield Coal. In its response to the discovery request, Springfield Coal admitted that the DMRs for 2009 and 2010 included in Attachment 2 represent results of Springfield Coal's monitoring of effluent discharges from the Industry Mine. (Resp. to Pet'r Discovery Request, Request to Admit #19.)
- A number preceded by "SC" (e.g. SC01572) refers to a page in Springfield Coal's response to Petitioner's discovery request, Document Request #1.
- A number preceded by "B" (e.g. B1) refers to a page in Exhibit 5 to this motion for summary judgment.

The third column under each outfall (marked "code") indicates that further explanation of the violation may help to clarify the violation. The codes are as follows:

- Code 1: The monthly average was not provided on DMRs. Here the average was calculated by adding together maximum and minimum sample values provided and dividing by two: $(\text{max}+\text{min})/2$.
- Code 2: Not all samples in violation of the daily maximum were provided, so sample value was calculated based on the average of 3 samples were taken. (If the number of samples is not indicated and the indicated average does not equal $(\text{max}+\text{min})/2$, then it is assumed that three

samples were taken). Calculation used to provide this missing value is as follows: (average*3) - maximum – minimum = third sample value.

- Code 3: Only one sample taken, which serves as both maximum and average value. *See, Natural Res. Def. Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 821 (N.D. Ill. 1988).

Finally, this exhibit also shows the civil penalty calculations for each effluent limit by outfall, showing the total number of violations and the violations apportioned to Freeman and Springfield Coal. As discussed in the motion for summary judgment, each violation of the daily maximum was multiplied by \$10,000 and each violation of the monthly average was multiplied by \$30,000.

	Outfall 003			Outfall 018		
	sample	citation	code	sample	citation	code
Feb-04	5.04	6	3			
Jan-05				4.425	40	1
Jun-07	11.8	SC0513	3			
Apr-08				12.41	SC0922	
Jun-08				3.58	SC0970	

# VIOLATIONS	2	3	
MAX PENALTY	\$600,000	\$900,000	VIOLATION TOTAL: 5

TOTAL MAXIMUM PENALTY: \$1,500,000

FREEMAN			
# VIOLATIONS	2	1	
MAX PENALTY	\$600,000	\$300,000	FREEMAN VIOLATION TOTAL: 3

TOTAL MAXIMUM PENALTY: \$900,000

SPRINGFIELD			
# VIOLATIONS	0	2	
MAX PENALTY	\$0	\$600,000	SPRINGFIELD VIOLATION TOTAL: 2

TOTAL MAXIMUM PENALTY: \$600,000

	Outfall 024W			Outfall 026			Outfall 029			Outfall 031			Outfall 032			Outfall 033			Outfall 035		
	sample	citation	code	sample	citation	code	sample	citation	code	sample	citation	code	sample	citation	code	sample	citation	code	sample	citation	code
May-04							13.09	18	1												
Jun-04				6.36	20	1	26.00	21													
Jul-04				6.47	24	3	13.90	B1	3												
Aug-04							7.23	29	3												
Oct-04							8.00	36	3												
Nov-04							5.59	SC025	3												
Jan-05	4.65	43	1	3.24	44	1	4.98	45	1												
Feb-05							3.08	49	3												
Oct-09				3.33	SC01572																
Nov-09										11.85	107										
Dec-09										5.24	106				8.133	109					
Jan-10										8.08	117				3.52	SC0241	1				
Apr-10													4.167	124							
Jun-10										4.39	131	1	12.18	134	1	4.905	135	1			
Jul-10													7.02	138	1						
Feb-11										4.30	SC01731	3				4.66	SC01733	3			
Mar-11										4.70	SC01763		4.29	SC01765							
Apr-11										4.04	SC01793										
May-11										24.10	SC01823	3						4.84	SC01829	3	
Jun-11										8.575	SC01866	1									

# VIOLATIONS	1	4	8	9	4	4	1	TOTAL VIOLATIONS	31
MAX PENALTY	\$300,000	\$1,200,000	\$2,400,000	\$2,700,000	\$1,200,000	\$1,200,000	\$300,000		
TOTAL MAXIMUM PENALTY:	\$9,300,000								
FREEMAN								FREEMAN VIOLATIONS	12
# VIOLATIONS	1	3	8	0	0	0	0		
MAX PENALTY	\$300,000	\$900,000	\$2,400,000	\$0	\$0	\$0	\$0		
TOTAL MAXIMUM PENALTY:	\$3,600,000								
SPRINGFIELD								SPRINGFIELD VIOLATIONS	19
# VIOLATIONS	0	1	0	9	4	4	1		
MAX PENALTY	\$0	\$300,000	\$0	\$2,700,000	\$1,200,000	\$1,200,000	\$300,000		
TOTAL MAXIMUM PENALTY:	\$5,700,000								

	Outfall 003		Outfall 017		Outfall 018	
	sample	citation	sample	citation	sample	citation
Nov-04			46.4	SC013		
Dec-04			25.4	SC013		
Feb-05					13.0	51
Nov-06					9.04	SC0214
Feb-07			47.9	SC0391		
Mar-07	15.4	SC0381				
Jun-07	11.8	SC0513				
Apr-08					36.2	SC0922
Jun-08					10.4	SC0970
Feb-11					7.88	SC01744

# VIOLATIONS	2	3	5	TOTAL VIOLATIONS	10
MAX PENALTY	\$20,000	\$30,000	\$50,000		

TOTAL MAXIMUM PENALTY: \$100,000

FREEMAN					
# VIOLATIONS	2	3	2	FREEMAN VIOLATIONS	7
MAX PENALTY	\$20,000	\$30,000	\$20,000		

TOTAL MAXIMUM PENALTY: \$70,000

SPRINGFIELD					
# VIOLATIONS	0	3	1	SPRINGFIELD VIOLATIONS	4
MAX PENALTY	\$0	\$30,000	\$10,000		

TOTAL MAXIMUM PENALTY: \$40,000

	Outfall 024W			Outfall 026			Outfall 029			Outfall 031			Outfall 032			Outfall 033		
	sample	citation	code	sample	citation	code	sample	citation	code	sample	citation	code	sample	citation	code	sample	citation	code
Feb-04							7.05	10										
							6.75	10										
Mar-04				22.9	15		8.65	16										
May-04							24.1	18										
Jun-04				6.91	20		29.6	21										
							27.3	21	2									
							21.1	21										
Jul-04				6.47	24		13.9	B1										
Aug-04				11.9	SC08		7.23	29										
Sep-04				13.9	SC08													
Oct-04							8.00	36										
Dec-04	10.6	SC038																
Jan-05	6.37	43					6.20	45										
Mar-07				21.10	SC0416													
Nov-09										15.4	107							
										6.76	107							
										13.39	107	2						
Dec-09																12.8	109	
																8.55	109	2
Jan-10										15.9	117							
Apr-10													11	124				
Jun-10										6.22	131					7.53	135	
Jul-10													8.66	138				
Mar-11													8.89	SC01765				
Apr-11										8.02	SC01793							
May-11										24.1	SC01823							
Jun-11				8.46	SC01857					9.69	SC01866							
										7.46	SC01866							

# VIOLATIONS	2	7	11	9	3	3	TOTAL VIOLATIONS	35
MAX PENALTY	\$20,000	\$70,000	\$110,000	\$90,000	\$30,000	\$30,000		
TOTAL MAXIMUM PENALTY:	\$350,000							
FREEMAN								
# VIOLATIONS	2	6	11	0	0	0	FREEMAN VIOLATIONS	19
MAX PENALTY	\$20,000	\$60,000	\$110,000	\$0	\$0	\$0		
TOTAL MAXIMUM PENALTY:	\$190,000							
SPRINGFIELD								
# VIOLATIONS	0	1	0	9	3	3	SPRINGFIELD VIOLATIONS	16
MAX PENALTY	\$0	\$10,000	\$0	\$90,000	\$30,000	\$30,000		
TOTAL MAXIMUM PENALTY:	\$160,000							

Outfall 019			Outfall 024W			Outfall 026		
sample	citation	code	sample	citation	code	sample	citation	code
13.85	8	1						
7.02	14	1						
4.73	19	1						
3.55	23	1						
3.16	28	3						
8.22	32	3						
9.15	35	3						
7.49	38	1						
18.45	SC034	1						
7.95	42							
11.3	48	3						
6.76	53	1	2.18	54	1			
			2.16	59	3			
5.78	61	1						
3.78	82	3	2.02	83	3			
						5.105	87	1
3.07	91					7.01	92	
4.93	97							
3.38	101	1						
2.46	SC0258	1						
7.95	SC0306							
15.2	SC0343							
3.02	SC0446	1				2.39	SC0459	1
5.66	SC0486	1						
12.9	SC0811	3						
7.617	SC0844							
6.95	SC0948	1						
3.79	SC01008	3						
3.43	SC01044	3						
3.47	SC01078	1						
18.633	SC01119							
34.2	SC01141							
10.7	SC01169							
18.5	SC01211							
18.5	SC01244							
			2.213	SC01294		2.725	SC01298	
						2.306	SC01335	
15.48	SC01356					3.04	SC01368	
39.27	SC01397							
59	SC01442					4.71	SC01454	
25.8	SC01475		2.22	SC01484				
23.27	SC01515		3.18	SC01529				

Oct-09							3.817	SC01557	
Nov-09							10.0	SC01591	
Dec-09				2.437	SC01626		13.63	108	
Jan-10				2.76	111	1			
Mar-10							2.39	120	1
May-10							2.13	126	1
Jun-10							2.32	130	1
Oct-10							2.23	144	
Dec-10							2.55	152	1
Jan-11	2.13	SC01700	1	2.91	SC01701	1	4.97	SC01702	1
Feb-11							2.78	SC01721	3
Mar-11				3.06	SC01741		2.92	SC01743	
Apr-11									
May-11							3.99	SC01808	1
Jun-11							3.18	SC01841	1
Jul-11							2.73	SC01885	1
Sep-11							2.13	SC01949	1

VIOLATIONS 7 9 41

MAX PENALTY \$2,100,000 \$2,700,000 \$12,300,000

TOTAL MAXIMUM PENALTY: \$38,400,000

FREEMAN # VIOLATIONS 6 2 16

MAX PENALTY \$1,800,000 \$600,000 \$4,800,000

TOTAL MAXIMUM PENALTY: \$15,600,000

SPRINGFIELD # VIOLATIONS 1 7 25

MAX PENALTY \$300,000 \$2,100,000 \$7,500,000

TOTAL MAXIMUM PENALTY: \$22,800,000

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20.87	SC01560		2.41	SC01569		2.41	SC01572	
29	SC01594							
						5.12	113	1
						2.695	127	1
						2.75	155	1
			2.47	SC01707	1	2.61	SC01708	1
2.75	SC01722	3	2.36	SC01726	3	2.73	SC01727	3
2.89	SC01745	1	2.38	SC01753		2.23	SC01755	
2.25	SC01780	3						
2.88	SC01810	3						
						2.09	SC01856	1
2.19	SC01887	3						
3.07	SC01951	1						

46	10	15	TOTAL VIOLATIONS	128
\$13,800,000	\$3,000,000	\$4,500,000		

22	3	3	FREEMAN VIOLATIONS	52
\$6,600,000	\$900,000	\$900,000		

24	7	12	SPRINGFIELD VIOLATIONS	76
\$7,200,000	\$2,100,000	\$3,600,000		

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	Outfall 003			Outfall 018			Outfall 019			Outfall 026		
	sample	citation	code	sample	citation	code	sample	citation	code	sample	citation	code
Jan-04	5.32	3					7.38	4				
Feb-04	9.39	5		4.37	7		13.4	8				
							14.3	8				
Mar-04							4.86	14				
							9.18	14				
Jun-04							6.15	19				
Jul-04							4.79	23				
Sep-04							8.22	32				
Oct-04							9.15	35				
Nov-04				5.51	37		5.73	38				
							9.25	38				
Dec-04				8.88	SC032		20.6	SC034				
				4.32	SC032		16.3	SC034				
Jan-05							4.69	42				
							11.2	42	2			
							11.9	42				
Feb-05				10.3	47		11.3	48				
Mar-05				11.8	52		7.83	53				
				11.6	52		5.70	53				
Apr-05				6.08	56							
May-05				7.60	58							
Jun-05				7.14	63		9.26	61				
				6.18	63							
Mar-06										6.68	87	
Apr-06							4.64	91		4.63	92	
										7.99	92	2
										8.42	92	
May-06							5.88	97				
							5.70	97	2			
Jul-06				5.65	SC062							
Jan-07							7.00	SC0306				
							8.89	SC0306				
Feb-07							16.9	SC0343				
							13.5	SC0343				
Mar-07							4.35	SC0394		5.80	SC0414	
Apr-07							4.26	SC0445				
May-07							6.94	SC0486				
							4.37	SC0486				
Jan-08							12.9	SC0811				
Feb-08							14	SC0844				
Apr-08										4.71	SC0933	
May-08							13.6	SC0948				
Oct-08				9.45	SC01117		26.2	SC01119				
							16.4	SC01119				
							13.3	SC01119				

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Nov-08							30.6	SC01141				
							31.6	SC01141	2			
							40.4	SC01141				
Dec-08							18.8	SC01169				
							12.8	SC01169	2			
Jan-09							13.5	SC01211				
							18.2	SC01211	2			
							23.8	SC01211				
Feb-09				5.68	SC01241		13.5	SC01244				
							18.2	SC01244	2			
							23.8	SC01244				
Mar-09				8.05	SC01277							
				5.61	SC01277	2						
May-09				9.5	SC01353		8.04	SC01356				
							8.6	SC01356	2			
							29.8	SC01356				
Jun-09				6.89	SC01392		14.4	SC01397				
				6.91	SC01392		49.61	SC01397	2			
				8.07	SC01392		53.80	SC01397				
Jul-09							57	SC01442		8.6	SC01454	
							61	SC01442				
Aug-09				4.8	SC01472		18	SC01475				
							19.2	SC01475	2			
							40.2	SC01475				
Sep-09							29.8	SC01515				
							24.81	SC01515	2			
							15.2	SC01515				
Oct-09				5.19	SC01557		35.4	SC01560				
				4.07	SC01557	2	16.91	SC01560	2			
							10.3	SC01560				
Nov-09				12.3	SC01591		32.7	SC01594				
				11.38	SC01591	2	28.7	SC01594	2			
				6.32	SC01591		25.6	SC01594				
Dec-09				14.1	SC02016							
				13.5	SC02016							
				13.3	SC02016							
Jan-10										6.84	133	
Jan-11				6.73	SC01702							
May-11				4.37	SC01808							

# VIOLATIONS	2	31	68	8	TOTAL VIOLATIONS	109
MAX PENALTY	\$20,000	\$310,000	\$680,000	\$80,000		
TOTAL MAX PENALTY:	\$1,090,000					
 FREEMAN						
# VIOLATIONS	2	12	31	5	FREEMAN VIOLATIONS	50
MAX PENALTY	\$20,000	\$120,000	\$310,000	\$50,000		

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TOTAL MAX PENALTY: \$500,000

SPRINGFIELD						
# VIOLATIONS	0	19	37	3	SPRINGFIELD VIOLATIONS	59
MAX PENALTY	\$0	\$190,000	\$370,000	\$30,000		

TOTAL MAX PENALTY: \$590,000

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	Outfall 018			Outfall 019		
	sample	citation	code	sample	citation	code
Feb-04	2000	7				
	1880	7				
Mar-04	1820	13				
Jun-05	2020	63				
	1900	63				
Jul-05	2020	67		1840	68	
	2050	67		1810	68	
Aug-05	2030	70		1910	71	
Dec-05	1920	76				
	1930	76				
Jun-06				1890	101	
Jul-06				1830	SC065	
Aug-06	1840	SC0100		1840	SC0103	
Oct-06	1850	SC0181		1810	SC0184	
Nov-06	1890	SC0214		1830	SC0217	
	1801	SC0214	2			
May-07	1870	SC0483		1830	SC0486	
Aug-07				2160	SC0617	
Sep-07	2100	SC0647		2180	SC0655	
	1980	SC0647	2			
Oct-07	2710	SC0695				
	2370	SC0695				
	2470	SC0695	2			
Nov-07	3080	SC0728		2940	SC0731	
	2720	SC0728	2			
	2420	SC0728				
Dec-07	2970	SC0765				
	2120	SC0765	2			
	2080	SC0765				
Nov-08				2190	SC01141	
Dec-08	2380	SC01165		2920	SC01169	
	2130	SC01165				
Feb-09	2570	SC01241				
Jun-09				2690	SC01397	
Jul-09	1940	SC01439		3290	SC01442	
	2091	SC01439	2			
	2200	SC01439				
Aug-09	1820	SC01472		2490	SC1475	
Sep-09	1920	SC01510		2020	SC01515	
Oct-09				1900	SC01560	
Dec-10				1810	153	
Apr-11				2460	SC01779	
Sep-11	2410	SC01947		2790	SC01950	
	2340	SC01947				
	2060	SC01947				

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# VIOLATIONS	37	22	TOTAL VIOLATIONS	59
MAX PENALTY	\$370,000	\$220,000		
TOTAL MAXIMUM PENALTY:	\$590,000			
FREEMAN				
# VIOLATIONS	15	10	FREEMAN VIOLATIONS	25
MAX PENALTY	\$150,000	\$100,000		
TOTAL MAXIMUM PENALTY:	\$250,000			
SPRINGFIELD				
# VIOLATIONS	22	12	SPRINGFIELD VIOLATIONS	34
MAX PENALTY	\$220,000	\$120,000		
TOTAL MAXIMUM PENALTY:	\$340,000			

	Outfall 003			Outfall 009			Outfall 030		
	sample	citation	code	sample	citation	code	sample	citation	code
Jan-04	1190	3							
Feb-04	1600	5							
May-04	1220	17							
	1120	17							
Jun-05				1230	62				
				1241	62	2			
				1330	62				
				1170	B5				
				1270	B5				
Jul-05				1440	66				
Aug-05				1430	69				
Sep-05				1380	72				
				1260	73				
Oct-05				1550	74				
				1540	74				
Nov-05				1270	75				
Dec-05				1350	77				
				1270	77				
Jan-06				1160	79				
				1200	79				
Feb-06				1220	84				
				1150	84				
Mar-06				1240	80				
Apr-06				1190	88				
May-06				1120	89				
				1110	96				
				1150	96				
Jun-06				1120	SC048				
Jul-06				1170	SC059				
				1180	SC059				
				1190	SC059				
Aug-06				1300	SC097				
				1269	SC097	2			
				1250	SC097				
Sep-06				1260	SC0133				
				1250	SC0133				
				1240	SC0133				
Oct-06				1320	SC0178				
				1299	SC0178				
				1290	SC0178				
Nov-06				1350	SC0211				
				1351	SC0211	2			
				1160	SC0211				
Dec-06				1230	SC0248				
				1123	SC0248				
Feb-07	1810	SC0332		1310	SC0337				
Jun-07				1240	SC046				
				1177	SC046				
				1140	SC046				

Jul-07				1400	SC0575				
				1170	SC0575				
Aug-07				1370	SC0611				
				1310	SC0611				
				1270	SC0611				
Sep-07				1620	SC0647				
				1410	SC0647				
				1280	SC0647				
Oct-07				2970	SC0692				
				2380	SC0692				
				2080	SC0692				
Nov-07				2230	SC0725				
				1950	SC0725	2			
				1610	SC0725				
Dec-07				2040	SC0761				
				1530	SC0761	2			
Feb-08				1150	SC0838				
Apr-08	1150	SC0918							
Dec-08				1400	SC01161				
Feb-09				1230	SC01238				
Jul-09				1310	SC01436				
				1381	SC01436	2			
				1470	SC01436				
Aug-09				1360	SC01469				
				1371	SC01469	2			
				1430	SC01469				
Sep-09				1350	SC01505				
				1291	SC01505	2			
				1220	SC01505				
Oct-09				1260	SC01554		1150	SC01579	
Sep-10				1120	140				
				1290	140				
Oct-10				1170	143				
				1180	143				
				1260	143				
Nov-10				1320	147		1170	150	
				1480	147				
				1500	147				
Dec-10				1360	151		1180	156	
				1700	151		1260	156	
Jan-11							1140	SC01711	
							1130	SC01711	
Apr-11				1360	SC01775				
Aug-11				1550	SC01912				
				1530	SC01912				
				1440	SC01912				
Sep-11				1590	SC01944				
				1470	SC01944				
				1380	SC01944				

VIOLATIONS 6

91

6

TOTAL VIOLATIONS 103

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MAX PENALTY	\$60,000	\$910,000	\$60,000		
TOTAL MAXIMUM PENALTY:	\$1,030,000				
FREEMAN					
# VIOLATIONS	5	50	0	FREEMAN VIOLATIONS	55
MAX PENALTY	\$50,000	\$500,000	\$0		
TOTAL MAXIMUM PENALTY:	\$550,000				
SPRINGFIELD					
# VIOLATIONS	1	41	6	SPRINGFIELD VIOLATIONS	48
MAX PENALTY	\$10,000	\$410,000	\$60,000		
TOTAL MAXIMUM PENALTY:	\$480,000				

	Outfall 24W			Outfall 026			Outfall 027		
	sample	citation	code	sample	citation	code	sample	citation	code
Feb-06	548	B2					516	85	
	600	B2							
Mar-06	506	86							
	520	86							
Apr-06	511	94		536	92				
	628	94							
	558	94	2						
May-06	552	99							
	562	99							
Jun-06	592	103	2						
	572	103							
	635	103							
Jul-06	578	SC075							
Dec-06	1090	SC0274							
	576	SC0274							
Jan-07	610	SC0316		514	SC0319		879	SC0321	
	596	SC0316		502	SC0319				
May-07	1080	SC0496							
	594	SC0496	2						
Jun-07	507	SC0547							
	519	SC0547	2						
	576	SC0547							
Jul-07	544	SC0600							
Jul-08	531	SC01017							
Mar-09	544	SC01294							
May-09				515	SC01368				
Jun-09				818	SC01416				
				641	SC01416	2			
				509	SC01416				
Jul-09				869	SC01454				
				904	SC01454	2			
				927	SC01454				
Sep-09				853	SC01534				
				759	SC01534	2			
				692	SC01534				
Oct-09				694	SC01572				
Jan-10				715	113				
Feb-10				517	115	2			
				566	115				
May-10				672	127				
Jun-10				693	133				
Jul-10				974	137				
				1120	137				
Aug-10				713	139				
				1500	139				

Sep-10				678	142				
				1050	142				
				1100	142				
Oct-10				884	145				
				1150	145				
				1170	145				
Nov-10	609	148		1160	149				
	612	148		1180	149				
				1240	149				
Dec-10	699	154		1400	155				
	730	154		1520	155				
Jan-11				620	SC01708				
				736	SC01708				
Apr-11	591	SC01784		1040	SC01786				

# VIOLATIONS	30	37	2	TOTAL VIOLATIONS	69
MAX PENALTY	\$300,000	\$370,000	\$20,000		

TOTAL
MAXIMUM
PENALTY:

FREEMAN				FREEMAN VIOLATIONS	28
# VIOLATIONS	23	3	2		
MAX PENALTY	\$230,000	\$30,000	\$20,000		

TOTAL
MAXIMUM
PENALTY:

SPRINGFIELD				SPRINGFIELD VIOLATIONS	41
# VIOLATIONS	7	34	0		
MAX PENALTY	\$70,000	\$340,000	\$0		

TOTAL
MAXIMUM
PENALTY:

	Outfall 002			Outfall 003			Outfall 009			Outfall 018			Outfall 019		
	sample	citation	code	sample	citation	code	sample	citation	code	sample	citation	code	sample	citation	code
Feb 2004															
May 2004															
July 2004															
Jan. 2005				48.5	46	1				38	40	1			
Apr. 2005													84	57	3
July 2006															
Jan. 2007				37.0	SC0296	1									
Feb. 2007							48.0	SC0336	1						
May 2007	46.0	SC0473								46.0	SC0482				
July 2007															
Feb. 2008				49.0	SC0834	3				47.7	SC0840				
Apr. 2008										160.0	SC0922				
June 2008				41.0	SC0964	3				38.7	SC0970				
Jan. 2009							44.3	SC01204							
Feb. 2010															
Mar. 2010															
April 2010															
May 2010															
June 2010										49.0	130	3			
July 2010										38.5	136	1			
Feb. 2011															
March2011															

VIOLATIONS 1
 MAX PENALTY \$300,000

4
 \$1,200,000

2
 \$600,000

7
 \$2,100,000

1
 \$300,000

TOTAL MAXIMUM PENALTY: \$11,400,000

FREEMAN
 # VIOLATIONS 1
 MAX PENALTY \$300,000

2
 \$600,000

1
 \$300,000

2
 \$600,000

1
 \$300,000

TOTAL MAXIMUM PENALTY: \$4,200,000

SPRINGFIELD
 # VIOLATIONS 0
 MAX PENALTY \$0

2
 \$600,000

1
 \$300,000

5
 \$1,500,000

0
 \$0

TOTAL MAXIMUM PENALTY: \$7,200,000

Outfall 026			Outfall 029			Outfall 031			Outfall 032			Outfall 033		
sample	citation	code	sample	citation	code	sample	citation	code	sample	citation	code	sample	citation	code
			44	10	1									
			39	18	1									
45	24	3	160	B1	3									
			55.5	45	1									
36	SC079	3												
<43	SC0589	1												
			64.0	SC0860										
						45.7	119					40.30	118	
						42.5	123					37.00	122	
												43.00	128	1
						44.0	131	1	45.5	134	1	36.00	135	1
									47.0	138	1			
												64.00	SC01733	1
						63.0	SC01763		42.0	SC01765				

3
\$900,000

5
\$1,500,000

4
\$1,200,000

3
\$900,000

5
\$1,500,000

3
\$900,000

4
\$1,200,000

0
\$0

0
\$0

0
\$0

0
\$0

1
\$300,000

4
\$1,200,000

3
\$900,000

5
\$1,500,000

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	Outfall 002			Outfall 003			Outfall 009			Outfall 018			Outfall 019			Outfall 026		
	sample	citation	code	sample	citation	code	sample	citation	code	sample	citation	code	sample	citation	code	sample	citation	code
Jul-04																		
Jan-05				81	46													
Apr-05													84	57				
Dec-05							99	B3										
Feb-07							87	SC0336										
May-07	96	SC0473								121	SC0482							
Jul-07																86	SC0589	
Feb-08										116	SC0840							
Apr-08										461	SC0922							
Jun-08										100	SC0970							
Jan-09							80	SC01204										
Feb-10																		
Mar-11																		

# VIOLATIONS	1		1		3		4		1		1		1
MAX PENALTY	\$10,000		\$10,000		\$30,000		\$40,000		\$10,000		\$10,000		\$10,000

TOTAL MAXIMUM PENALTY:
\$140,000

FREEMAN													
# VIOLATIONS	1		1		2		1		1		1		1
MAX PENALTY	\$10,000		\$10,000		\$20,000		\$10,000		\$10,000		\$10,000		\$10,000

TOTAL MAXIMUM PENALTY:
\$80,000

SPRINGFIELD													
# VIOLATIONS	0		0		1		3		0		0		0
MAX PENALTY	\$0		\$0		\$10,000		\$30,000		\$0		\$0		\$0

TOTAL MAXIMUM PENALTY:
\$60,000

	Outfall 002		Outfall 019		Outfall 021		Outfall 022		Outfall 24W		Outfall 026		Outfall 027		Outfall 030	
	sample	citation	sample	citation	sample	citation	sample	citation	sample	citation	sample	citation	sample	citation	sample	citation
Jul-04	4.82	22														
Apr-05			9.67	57												
Jun-05			9.76	64												
Jul-06											10.40	SC079				
May-07											9.74	SC0498				
Jun-07											9.43	SC0551				
											not specific	SC0553				
Jun-08									9.07	SC0981						
May-09			5.29	SC01355												
Jun-09			4.25	SC01396												
Jul-09			3.62	SC01441								9.40	SC01456			
Sep-09							9.58	SC01525								
Dec-09			9.15	SC01630										3.21	SC01662	
Jan-10			9.04	112												
Mar-10			9.04	121												
Jun-10					3.90	132										
Jul-10											9.38	137				

# VIOLATIONS	1	8	1	1	1	5	1	1		TOTAL VIOLATIONS	19
MAX PENALTY	\$10,000	\$80,000	\$10,000	\$10,000	\$10,000	\$50,000	\$10,000	\$10,000			

TOTAL MAXIMUM PENALTY: \$190,000

FREEMAN											
# VIOLATIONS	1	2	0	0	0	4	0	0		FREEMAN VIOLATIONS	7
MAX PENALTY	\$10,000	\$20,000	\$0	\$0	\$0	\$40,000	\$0	\$0			

TOTAL MAXIMUM PENALTY: \$70,000

SPRINGFIELD											
# VIOLATIONS	0	6	1	1	1	1	1	1		SPRINGFIELD VIOLATIONS	12
MAX PENALTY	\$0	\$60,000	\$10,000	\$10,000	\$10,000	\$10,000	\$10,000	\$10,000			

TOTAL MAXIMUM PENALTY: \$120,000

	Outfall 021			Outfall 030		
	sample	citation	code	sample	citation	code
Feb-04	0.8	B4	3			
Sep-04	0.7	33				
Apr-05				0.6	65	
Jun-10	0.8	132				

# VIOLATIONS	3	1	TOTAL VIOLATIONS	4
MAX PENALTY	\$30,000	\$10,000		
TOTAL MAXIMUM PENALTY:	\$40,000			
FREEMAN				
# VIOLATIONS	2	1	FREEMAN VIOLATIONS	3
MAX PENALTY	\$20,000	\$10,000		
TOTAL MAXIMUM PENALTY:	\$30,000			
SPRINGFIELD				
# VIOLATIONS	1	0	SPRINGFIELD VIOLATIONS	1
MAX PENALTY	\$10,000	\$0		
TOTAL MAXIMUM PENALTY:	\$10,000			

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		hard numbers
total violations at industry mine	624	625
total violations Freeman	283	283
total violations Springfield Coal	342	342
max penalty at industry mine	\$64,820,000	64830000
max penalty freeman	\$26,320,000	
max penalty springfield	\$38,510,000	

SERVICE LIST

June 22, 2012

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