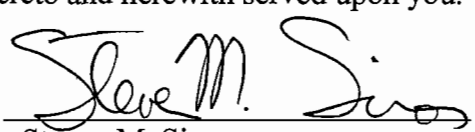
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
Complainant,	)	
ENVIRONMENTAL LAW AND POLICY CENTER, on behalf of PRAIRIE RIVERS NETWORK and SIERRA CLUB, ILLINOIS CHAPTER,	)	**PCB 2010-061 and 2011-002 (Consolidated – Water – Enforcement)**
Intervenor,	)	
v.	)	
FREEMAN UNITED COAL MINING COMPANY, L.L.C., and SPRINGFIELD COAL COMPANY, L.L.C.,	)	
Respondents.	)	

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on July 10, 2012, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois Freeman United Coal Mining Company, LLC's Reply to the People of the State of Illinois' Response to Freeman United's Motion for Summary Judgment, a copy of which is attached hereto and herewith served upon you.

By: 
Steven M. Siros

E. Lynn Grayson
Steven M. Siros
Allison A. Torrence
Jenner & Block LLP
Attorneys for Respondent
Freeman United Coal Mining Company, LLC,
a Delaware limited liability company
353 N. Clark Street
Chicago, IL 60654-3456
312-923-8347

CERTIFICATE OF SERVICE

NOW COMES Steven M. Siros, counsel for Respondent, Freeman United Coal Mining Company, LLC, a Delaware limited liability company and provides proof of service of the attached Freeman United Coal Mining Company, LLC's Reply to the People of the State of Illinois' Response to Freeman United's Motion for Summary Judgment and Notice of Electronic Filing upon the parties listed on the attached Service List, by having a true and correct copy affixed with proper postage placed in the U.S. Mail at Jenner & Block LLP, 353 North Clark Street, Chicago, IL 60654-3456, on July 10, 2012.

Steven M. Siros

E. Lynn Grayson
Steven M. Siros
Allison A. Torrence
Jenner & Block LLP
Attorneys for Respondent
Freeman United Coal Mining Company, LLC,
a Delaware limited liability company
353 N. Clark Street
Chicago, IL 60654-3456
312-923-8347

Dated: July 10, 2012

This document was filed electronically.

SERVICE LIST

Thomas Davis
Assistant Attorney General
Environmental Bureau
500 South Second Street
Springfield, IL 62706

Dale A. Guariglia
John R. Kindschuh
Bryan Cave LLP
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, MO 63102-2750

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Springfield, IL 62794

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

Jessica Dexter
Environmental Law & Policy Center
35 E. Wacker Dr., Ste. 1600
Chicago, IL 60601

This document was filed electronically.

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FREEMAN UNITED COAL MINING COMPANY, L.L.C., and SPRINGFIELD COAL COMPANY, L.L.C.,	)	
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FREEMAN UNITED COAL MINING COMPANY, LLC'S REPLY TO THE PEOPLE OF THE STATE OF ILLINOIS' RESPONSE TO FREEMAN UNITED'S MOTION FOR SUMMARY JUDGMENT

Respondent Freeman United Coal Mining Company, LLC ("Freeman United"), by its attorneys, hereby files its reply to the People of the State of Illinois' Response to Freeman United's Motion for Summary Judgment ("State Response").

In its response, the State makes little effort to dispute that the Illinois Environmental Protection Agency ("IEPA") failed to comply with the requirements of Section 31 of the Illinois Environmental Protection Act (the "Act"). Instead, the State argues that, notwithstanding IEPA's failure to follow the procedures of Section 31(a) of the Act or to act diligently to prosecute the claims now pending before the Board, because the complaint was brought on behalf of the Illinois Attorney General, the actions of IEPA should have no bearing on the matters now pending before the Board. Freeman United respectfully submits that the actions of

IEPA are very relevant to the matter now pending before the Board, and where, as occurred here, IEPA ignores the procedural mandate established by the Illinois Legislature in Section 31 of the Act, summary judgment should be entered in favor of Freeman United.

Alternatively, summary judgment in favor of the State clearly is inappropriate. Although Freeman United submits that there are no genuine issues of material fact that would preclude summary judgment in its favor on its affirmative defenses, if the Board disagrees, Freeman United should be entitled to obtain discovery with respect to the State's knowledge regarding the Industry Mine's NPDES compliance history and the circumstances surrounding the initiation of the present action, which the State has put directly at issue in its response.[1]

ARGUMENT

I. Section 31(a) of the Act Bars the Pending Enforcement Proceeding Against Freeman United

Notwithstanding the State's efforts to muddy the waters, the facts surrounding IEPA's compliance with Section 31(a) of the Act are not in dispute. On March 11, 2005, IEPA issued a single NOV with respect to manganese discharges from Outfall 19. (Affidavit of Thomas J. Austin, attached to Freeman United's Motion for Summary Judgment ("Freeman United Motion") as Exhibit 1 ("Austin Aff."), ¶5.) Shortly thereafter, Freeman United submitted a compliance commitment agreement ("CCA") that was accepted by IEPA. The State concedes that Freeman United complied with its 2005 CCA. (People's Response to Affirmative Defenses by Freeman United Coal Mining Company, LLC ("State Answer"), ¶8.) Then, on March 30, 2007, shortly prior to the expiration of the 2005 CCA, Freeman United submitted a proposed CCA extension to IEPA. (State Answer, ¶8; Austin Aff., ¶12.) On August 30, 2007, in response

[1] In addition, as discussed in Freeman United's response to the State's summary judgment motion, there are disputed issues of fact with respect to the underlying violations in the State's complaint. (*See* Freeman United Motion at 18-21.)

to a July 13, 2007, response from IEPA, Freeman United submitted a revised CCA (although we acknowledge that the State disputes that Freeman United's August 30, 2007 submission constituted a CCA as defined by the Act). (Austin Aff., ¶15.) The State never provided a written response to Freeman United's August 30, 2007 submission. (State Answer, ¶8.) In fact, other than the March 2005 NOV, the State (both IEPA and the Illinois Attorney General) made no further efforts to comply with the procedural mandates required by Section 31(a) of the Act (at least with respect to Freeman United).[2]

The State does not dispute these facts. Instead, the State argues that compliance with Section 31(a) of the Act isn't required because the Illinois Attorney General apparently learned of the alleged violations independently of IEPA's ongoing enforcement proceeding against Springfield Coal. (State Response at 20.) According to Thomas Davis' affidavit, the Illinois Attorney General was advised of certain alleged violations of the Act upon receipt of the Sierra Club's notice of intent to sue in December 2009. (State Response at 20; Affidavit of Thomas Davis ("Davis Aff."), ¶2.) Of course, prior to the Illinois Attorney General's receipt of the Sierra Club's notice, IEPA had already issued its NOV to Springfield Coal and was engaged in ongoing enforcement efforts against Springfield Coal with respect to the Industry Mine. However, according to Mr. Davis' affidavit, the Illinois Attorney General was not involved in IEPA's ongoing enforcement actions with respect to Springfield Coal (notwithstanding that the Sierra

[2] The State makes a half-hearted effort to argue partial compliance with Section 31 by citing to IEPA's October 8, 2009 NOV. (State Response at 20.) Although the NOV was addressed to "Freeman United", the State didn't send the NOV to Freeman United's registered agent; instead, the NOV was sent to the Industry Mine's post office box with a salutation that read "Facility Owner" (which at the time was Springfield Coal). Indeed, it was Springfield Coal which responded to the 2009 NOV and engaged in subsequent interactions with IEPA regarding the alleged violations – all of which dated from 2009 – as described therein. The State's effort to argue that the October 2009 NOV somehow satisfied IEPA's obligations under Section 31 of the Act is disingenuous.

Club's notice of intent to sue was sent to both IEPA and the Illinois Attorney General). (Davis Aff., ¶2,4.)

This Board has previously held that IEPA's compliance with Section 31 of the Act is a mandatory precondition to the filing of a complaint by the Illinois Attorney General. *See People v. Chiquita Processed Foods, LLC*, PCB 02-56 (Nov. 21, 2002). The State apparently disagrees with the Board's decision in *Chiquita*, and instead cites to the Board's decision in *People v. Waste Hauling Landfill, Inc. et al.*, PCB 10-9 (Dec. 3, 2009), to argue that the Illinois Attorney General is free to institute civil actions on her own behalf, regardless of whether IEPA makes any effort to comply with the requirements of Section 31 of the Act.[3] (State Response at 18-21.)

We acknowledged in our summary judgment motion that the Illinois Attorney General has the authority, on her own motion, to institute civil actions for violations of the Act, especially in circumstances where there is substantial danger posed to human health or the environment.[4] (Freeman United Motion, at 11.) We would respectfully submit, however, that the State should

[3] The State also attempts to distinguish the Board's holdings in *People v. John Crane, Inc.*, PCB 01-76 (May 17, 2001), and *People v. Chicago Heights Refuse Depot, Inc.*, PCB 90-112 (Oct. 10, 1991), which were both cases relied upon by Freeman United in which the Board agreed that the Section 31 procedural requirements were mandatory pre-requisites to IEPA's ability to refer cases to the Illinois Attorney General. (State Response at 17.) For example, in *Crane*, the Board found that the IEPA's failure to issue a NOV within 180 days of notice of the alleged violation did not bar IEPA from ultimately referring the matter to the Illinois Attorney General. (State Response at 17.) An important distinction, however, is that in *Crane*, IEPA ultimately complied with its Section 31 obligations (albeit not within the 180 days provided for by the Act). (*Crane*, PCB 01-76, at 7). Here, following IEPA's issuance of the March 2005 NOV, IEPA made no further efforts to comply with its Section 31 obligations. Had the Board been faced with similar facts in *Crane*, the Board's discussion of the mandatory nature of Section 31 (in its totality) strongly suggests that the Board would have dismissed the State's claims.

[4] Of course, here the State has made no effort to argue that the actions of Freeman United pose a substantial danger to human health or the environment, nor could it in good faith do so, having waited almost three years after sale of the Industry Mine to file its complaint before the Board.

not be entitled to do an end run around Section 31(a) of the Act merely by including language that the complaint is brought both on behalf of the Illinois Attorney General and the State. Presumably in *Chiquita*, the Board was not convinced that the Illinois Attorney General learned of the underlying violations by means other than information provided to him by IEPA and it therefore rejected such an end run around the Section 31 requirements.

Here, notwithstanding the carefully worded affidavit from Mr. Davis, the State has not provided adequate information regarding the circumstances under which the Illinois Attorney General first became aware of the underlying facts upon which the allegations in its complaint were based and made the determination as to whether and in what manner to proceed. For example, Mr. Davis states that the referral from IEPA was received by the Illinois Attorney General's office on January 25, 2010 (Davis Aff., ¶4), and that the State's complaint had already been drafted prior to receipt of the referral from IEPA (Davis Aff., ¶2).[5] However, the State filed its complaint on behalf of both the Illinois Attorney General and IEPA, which raises the issue of precisely when the State made the decision to add IEPA to the complaint and the nature of its discussions with IEPA with respect to its ongoing enforcement proceeding.

[5] Although Mr. Davis makes a number of factual statements concerning the contents of the IEPA referral, he claims that the referral itself is privileged. (Davis Aff., ¶3.) Because the State has elected to rely on the timing and content of the IEPA referral in an effort to defeat Freeman United's summary judgment motion, the State has waived any privilege that might have attached to the referral. *See Fox Moraine v. United City of Yorkville*, 2011 Ill. App. 2d 100017, ¶65 (2d Dist. 2011) (stating that "the [attorney-client] privilege may be impliedly waived when the client asserts claims or defenses that put his or her communications with the legal advisor at issue in the litigation . . . [I]n other words, an implied waiver occurs 'where a party voluntarily injects either a factual or legal issue into the case, the truthful resolution of which requires an examination of the confidential communications'" (quoting *Lama v. Preskill*, 353 Ill. App. 3d 300, 305 (3d Dist. 2004)).) In the event that the State continues to refuse to produce the IEPA referral, Freeman United respectfully requests that the Board disregard those portions of Mr. Davis' affidavit that discuss the IEPA referral.

The State should not be able to have it both ways; either the complaint was drafted without the involvement of IEPA (in which case it would have been brought on behalf of the Illinois Attorney General only) or the complaint was drafted in cooperation with IEPA (in which case it runs afoul of the Section 31(a) requirements).[6] Having elected to file its complaint on behalf of both the Illinois Attorney General and IEPA, the State must now live with that election. Notwithstanding Mr. Davis' affidavit, IEPA's failure to comply with its obligations under Section 31(a) should bar the State's action in its entirety against Freeman United.

In addition, there is an independent basis upon which at least a portion of the State's claims are barred. More specifically, the 2005 CCA should bar the State from seeking to enforce any alleged manganese discharge limits against Freeman United. Although the State acknowledges both the existence of the 2005 CCA and that Freeman United fully complied with the CCA, the State cites to a recent amendment to Section 31 that it argues provides it free reign to initiate enforcement proceedings against parties that in good faith enter into and comply with CCAs.[7] (State Response at 27.)

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[6] In the event that the Board were to conclude that there was an issue of material fact with respect to the circumstances under which the Illinois Attorney General first became aware of the underlying facts that formed the basis for its complaint against Freeman United and made the determination as to whether and in what manner to proceed, Freeman United should be entitled to discovery from the State concerning all communications between the Illinois Attorney General and IEPA prior to the date that this complaint was filed. *See Fox Moraine*, 2011 Ill. App. 2d 100017, ¶65 (2d Dist. 2011) (stating that "the [attorney-client] privilege may be impliedly waived when the client asserts claims or defenses that put his or her communications with the legal advisor at issue in the litigation . . . ." (quoting *Lama v. Preskill*, 353 Ill. App. 3d 300, 305 (3d Dist. 2004)).)

[7] Although the State disputes whether the 2005 CCA was automatically extended as a matter of law, resolution of that issue has little bearing on Freeman United's summary judgment motion in that the State has not alleged any violations of the Industry Mine's manganese limits for the period from June 1, 2007 (expiration of the 2005 CCA) through August 31, 2007 (the date the Industry Mine was sold to Springfield Coal).

In particular, the State relies on Section 31(a)(7.6) of the Act, that it interprets to provide that "even where a violator successfully completes a CCA, the statute does not limit the Attorney General's authority to take enforcement and seek penalties, but merely directs that such conduct be considered a mitigating factor." (State Response at 27.) Conveniently, the State ignores the discussion in the notes at pages 12-13 of Freeman United's summary judgment brief where we discussed why these recent amendments could not have retroactive application to a CCA approved by the State in 2005. (Freeman United Motion, at 12-13, n.12.) The State also ignores Freeman United's discussion of the legislative history of the 2011 amendments that evidence an intent by the State legislature to maintain and enhance protection for entities who cooperate with IEPA through CCAs and to punish those who break those agreements. (*Id.* at 25, n.21.) As discussed in Freeman United's summary judgment brief, this interpretation is supported by Sen. Wilhelmi's statement that "[I]f there is, in fact, a negotiated CCA, then the agency is prohibited from sending that on to the Attorney General. It's only when there's a violation of the CCA that the Attorney General's Office can come in and file a lawsuit . . ."; he went on to explain that a new penalty had also been added for violations of CCAs. (Sen. Transcr. 4/13/11 at 89, 87.) Sen. Wilhelmi also stated, "So what this does is it modifies the Act so that CCAs are actually more meaningful, so that they have more of an impact." (Sen. Transcr. 4/13/11 at 90.) The bottom line remains, though, that Section 31(a)(10) of the Act – which existed before and after the 2011 amendments – prohibits referral by IEPA where a person has complied with the terms of a CCA. Freeman United complied with its CCA; the State should therefore be barred from seeking to enforce the manganese effluent limitations against Freeman United.

II. The State's Claims Against Freeman Are Barred by Laches

To establish a laches defense, Freeman United must demonstrate (i) lack of diligence by the State, and (ii) prejudice to Freeman United. *See e.g., Van Milligan v. Bd. of Fire & Police Comm'rs*, 158 Ill. 2d 85, 89 (1994). The State admits that IEPA was aware of Freeman United's alleged non-compliance and that IEPA made no effort to enforce these alleged violations until IEPA's January 2010 referral.[8] However, in an effort to avoid having its claims barred by laches, the State now argues (without citation to authority) that IEPA's lack of diligence cannot be imputed to the Illinois Attorney General. (State Response at 13.) Again, having elected to bring this action on behalf of both the State and IEPA, the State should not now be free to argue that the Board can ignore the actions of IEPA when evaluating whether laches bars the State's claims against Freeman United.[9]

Under certain circumstances, even the United States has been treated as a single party with respect to actions taken by its agencies. For example, in *Colton v. Am. Promotional Events, Inc.*, a district court rejected the United States' contention that the "United States on behalf of the EPA" was a different party than "United States on behalf of the DOD," and determined that it was appropriate to "[treat] the United States as a single party under both CERCLA and the Federal Rules of Procedure." *Colton*, No. ED CV 09-1864, 2010 U.S. Dist. LEXIS 109354, *19-

[8] In an effort to minimize the State's unreasonable delay in initiating this enforcement proceeding, the State again argues that IEPA took action in October 2009 when it issued an NOV for alleged discharge violations at the Industry Mine. (State Response at 15.) Even if one were to concede that the October 2009 NOV was properly issued to Freeman United (which we do not), a 53-month enforcement delay (as opposed to a 56-month delay) still constitutes a lack of diligence on the part of the State. Furthermore, the 2009 NOV related to violations that occurred in 2009; the 2009 NOV made no reference to the historical violations that are now the subject of the State's complaint.

[9] The claims being asserted against Freeman United are being asserted jointly by both the State and IEPA. The complaint makes no distinction between claims that might have been asserted separately on behalf of the State or IEPA.

20 (C.D. Cal. 2010). In the bankruptcy context, the federal government is generally considered to be a single entity for the purposes of setoff; *i.e.*, when money is owed by an individual to one agency, and the individual has debts to another, the different agencies can set off the debts owed by one agency against claims of another agency. *See In re Shortt*, 277 B.R. 683, 690 (Bankr. N.D.Tex. 2002); *Amoco Corp. v. C.I.R.*, 138 F.3d 1139, 1149 (7th Cir. 1998); *U.S. v. Maxwell*, 157 F.3d 1099, 1102 (7th Cir. 1998). In *Paradyne Corp. v. U.S. Dept. of Justice*, the Social Security Administration and the Department of Justice were evaluated as a single entity in the court's consideration of the appropriateness of the government's conduct with respect to a contract. *Paradyne Corp. v. U.S. Dept. of Justice*, 647 F. Supp. 1228, 1235-36 (D.D.C. 1986).[10] Simply put, the State should also be treated as a single entity and be bound by the action (or inaction) of its agents; here, the inaction of IEPA can and should be imputed to the Illinois Attorney General.

With respect to the prejudice element of laches, the State appears not to have grasped Freeman United's argument. First, as set forth in the uncontroverted affidavit of Mr. Austin, Freeman United had a good faith belief that its 2005 CCA addressed all outstanding discharge violations at the time of its acceptance by IEPA. (Austin Aff., ¶9.) After issuance of the 2005 NOV, the State took no further enforcement action against Freeman United but now seeks substantial civil penalties for violations that occurred during the pendency of the 2005 CCA. Clearly, under any definition of the term, Freeman United has been prejudiced by the State's

[10] The *Paradyne* court stated, "[A]n important issue raised by this case is whether two or more agencies of the Executive Branch of government may be viewed as a single entity and held jointly responsible for the kind of consistent decision-making required in intra-agency action. The Court holds that such a fiction may be imposed in at least the circumstance where two or more government agencies have actual knowledge that their actions will be inconsistent and the consequence of these actions entails placing an individual in a position wherein vulnerability will follow regardless of what reasonable course of action is taken." *Paradyne Corp. v. U.S. Dept. of Justice*, 647 F. Supp. 1228, 1235-36 (D.D.C. 1986).

unreasonable delay. Freeman United submits that the totality of the circumstances is sufficient for this Board to find that the State's claims are barred by laches.

III. The State Waived Its Right to Enforce the Alleged Violations Against Freeman United

These same facts that establish a lack of diligence on the part of the State also demonstrate that the State has waived its right to seek enforcement for the violations alleged in its complaint. Where a party intentionally relinquishes a known right or where a party's conduct warrants an inference that the party has relinquished a known right, that party is deemed to have waived its rights. *People v. John Crane, Inc.*, PCB 01-76, slip op. at 8 (May 17, 2001); *People v. QC Finishers, Inc.*, PCB 01-7 (July 8, 2004).

Again, the State points to the October NOV 2009 as evidence that the State did not knowingly relinquish its right to initiate future enforcement proceedings against Freeman United. (State Response at 29.) Even if we were to concede that the October 2009 NOV was properly served on Freeman United (which we do not), the State's failure to take action during the period that Freeman United owned and operated the Industry Mine at the very least warrants an inference by the Board that the State relinquished its right to take enforcement action against Freeman United. Accepting the State's argument would lead to the absurd result that the State could never be found to have waived its enforcement rights so long as at some point in the future (no matter how distant) the State files a complaint or issues an NOV.

Since the State took no enforcement action with respect to Freeman United from May 2005 through February 2010, we respectfully submit that this almost five year delay constituted a knowing relinquishment of the State's known enforcement rights (or at least warrants an inference that the State knowingly relinquished its rights). As such, this Board should find that

the State waived its enforcement rights against Freeman United for events that occurred during its operation of the Industry Mine.

IV. The Equitable Doctrine of Estoppel Bars the State's Enforcement Action

Freeman United agrees that in order to succeed with its estoppel claim, it must show the following six elements: (1) words or conduct by the State constituting either a misrepresentation or concealment of material facts; (2) knowledge on the part of the State that the representations made were untrue; (3) that Freeman United did not know the representations to be false either at the time they were made or at the time they were acted upon; (4) that the State either intended or expected that the conduct or representation would be acted upon by Freeman United; (5) that Freeman United relied upon or acted upon the representations; and (6) that Freeman United has been prejudiced. *See City of Mendota v. Pollution Control Bd.*, 161 Ill. App. 3d 203 (3d Dist. 1987) (outlining the requisite elements for estoppel). The facts which demonstrate each of these six elements are set forth at pages 16-18 of Freeman United's summary judgment brief. (Freeman United Motion, at 16-18.)

The State's response is simply that Freeman United (i) did not show that IEPA made a misrepresentation with knowledge that the misrepresentation was untrue; (ii) did not rely on IEPA's misrepresentation; and (iii) was not prejudiced. (State Response at 32.) In fact, however, Freeman United presented admissible evidence on each of these points that has not been rebutted by the State. With respect to the first element, the undisputed facts demonstrate that (1) in 2005, IEPA issued an NOV that identified only manganese violations at a single outfall notwithstanding that the State acknowledges that it was aware of other alleged violations

at the Industry Mine;[11] (2) IEPA accepted Freeman United's CCA; and (3) at no point in time during the pendency of the 2005 CCA did the State ever advise Freeman United that the State intended to initiate enforcement proceedings with respect to other effluent discharges from the Industry Mine. With respect to the second element, the uncontroverted affidavit of Thomas Austin demonstrates that Freeman United relied on the fact that the 2005 NOV was limited to manganese discharges from a single outfall in crafting its 2005 CCA. (Austin Aff., ¶5-6.) With respect to the third element, the fact that the State now seeks penalties for alleged violations that occurred years ago during the period that Freeman United owned and operated the Industry Mine is clear evidence that Freeman United has been prejudiced.[12]

Because the undisputed facts establish each of the six elements necessary for estoppel, Freeman United respectfully requests that the Board find that the State is estopped from asserting its claims against Freeman United.

[11] In its response, the State acknowledges that "Illinois EPA was indeed aware of permit noncompliance continuing through and beyond the sale of the mine in September 2007." (State Response at 13.)

[12] In its response, the State makes the nonsensical statement that because Freeman United sold the Industry Mine, it incurred no detriment. (State Response at 32.) The only way that statement would make any sense would be if the State were to dismiss its claims against Freeman United.

CONCLUSION

For the reasons set forth above, the undisputed facts require that the Board enter summary judgment in Freeman United's favor on Counts I and III of the State's complaint.

Respectfully submitted,

FREEMAN UNITED COAL MINING COMPANY, LLC

By: _____
Steven M. Siros

E. Lynn Grayson
Steven M. Siros
Allison Torrence
Jenner & Block LLP
Attorneys for Respondent
Freeman United Coal Mining Company, LLC,
a Delaware limited liability company
353 N. Clark Street
Chicago, IL 60654-3456
312/923-2836

Dated: July 10, 2012

This document was filed electronically.