

RECEIVED
CLERK'S OFFICE

JUN 4 2003

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
Complainant,)	
v.)	PCB 99-134
)	
PEABODY COAL COMPANY, a Delaware)	
corporation,)	
Respondent.)	

NOTICE OF FILING AND PROOF OF SERVICE

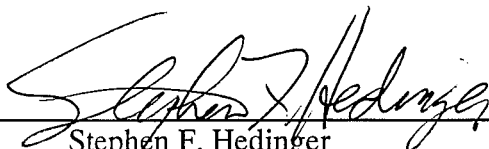
To: Jane E. McBride (via FedEx)
Environmental Bureau
Attorney General's Office
500 S. Second St.
Springfield, IL 62706

David Joest (via U.S. mail)
Peabody Coal Company
1951 Barrett Court
P.O. Box 1990
Henderson, KY 42419-1990

W.C. Blanton (via U.S. mail)
Blackwell Sanders Peper Martin LLP
Two Pershing Square
2300 Main St., Suite 1000
Kansas City, MO 64108

Bradley Halloran, Hearing Officer (via FedEx)
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

The undersigned certifies that an original and nine copies of Respondent's Renewed Motion for Leave to File Surreply, Respondent's Tender of Surreply, and the tendered Respondent's Surreply In Opposition To State's Motion To Strike Respondent's Affirmative Defenses, were served upon the Clerk of the Illinois Pollution Control Board via Federal Express, and one copy was served upon the above-identified individuals as indicated above by enclosing the same in envelopes properly addressed, with postage fully prepaid, and by depositing said envelopes in a Federal Express or U.S. Post Office mail box, on the 3d day of June, 2003.


Stephen F. Hedinger

Hedinger Law Office
2601 S. Fifth St.
Springfield, IL 62703
(217) 523-2753 phone
(217) 523-4366 fax

THIS FILING IS SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

JUN 4 2003

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.)
)
PEABODY COAL COMPANY, a Delaware)
corporation,)
)
Respondent.)

PCB 99-134

RESPONDENT'S RENEWED MOTION FOR LEAVE TO FILE SURREPLY

Respondent, Peabody Coal Company ("PCC"), hereby respectfully renews its motion for leave to file a surreply in opposition to Complainant's Motion To Strike Affirmative Defenses filed on or about February 3, 2003 ("State's Motion"), on the grounds (1) that it appears from the terms of Hearing Officer Order dated May 20, 2003 that PCC's initial motion in this regard was deficient in its effort to clearly articulate why it is appropriate — and in no way an extraordinary proposition — for PCC to file a surreply directed to the State's Motion; (2) that PCC's initial motion in this regard also apparently was deficient in its effort to articulate the prejudice to PCC that will result if it is not granted leave to file a surreply directed to the State's Motion; and (3) that denying PCC leave to file a surreply directed to the State's Motion denies PCC the even handed treatment of the parties with respect to procedural matters to which every litigant in proceedings before this Board is entitled, as more fully discussed below.

First, the parties' handling of the State's Motion has proceeded in an unusual manner to some extent. PCC believes that all of its affirmative defenses as set forth in its Answer to the State's Third Amended Complaint ("Complaint") pled sufficient facts with sufficient specificity

and clarity to satisfy the requirements of 35 Ill. Adm. Code § 103.204(d) and that the State's repeated assertions that it has no idea what aspects of the parties' extremely close regulatory relationship in connection with PCC's Eagle No. 2 Mine over the past 45 years have given rise to PCC's affirmative defenses is bogus. Nonetheless PCC opted in its initial response to the State's Complaint¹ to elaborate upon the factual bases for those defenses in an effort (1) to advance the process of settling the pleadings in this case by providing a more complete factual background against which the Board can evaluate the parties' legal contentions; (2) to avoid or at least limit the possibilities either (a) that the Board would require PCC to plead the factual bases for certain of its affirmative defenses in greater detail before considering the State's legal contentions, or (b) that the Board would rule that certain PCC affirmative defenses might theoretically be available to it but require PCC to plead additional facts to see if the elements of such defenses are claimed to exist here; and (3) to obtain some guidance from the Board as to what greater degree, if any, of detailed factual allegations would be required of PCC to support those affirmative defenses that the Board might find to be available to PCC if the elements of those defenses can be proven, rather than creating a situation in which the Board might determine certain defenses to be available to PCC under certain circumstances but in which PCC would be required to guess for a second time what degree of specificity of factual allegations would be required of it in order to maintain the defenses.

In its reply to PCC's Response,² the State acknowledged both (1) that PCC's approach to this situation would contribute to the ultimate resolution of the issues raised by the State's Motion in a judicially economic manner, in that PCC's response has effectively consolidated

¹ Respondent's Brief In Opposition To The State's Motion To Strike PCC's Affirmative Defenses (Response), filed on or about April 11, 2003.

² Complainant's Reply To Respondent's Brief In Opposition To Complainant's Motion To Strike Respondent's Affirmative Defenses (Reply), filed on or about April 28, 2003.

what otherwise well could have been a two-step process of settling the pleadings into one initial step that will enable the Board to fully resolve at least some of these issues more quickly and with less effort on its part and that of the parties than would otherwise have been the case; and (2) that, as a result, certain of its arguments set forth in its Reply were being asserted for the first time in support of the State's Motion in light of PCC's exposition of additional facts upon which it in part bases certain of its affirmative defenses. Thus, this is not a situation in which PCC simply wants to have the last word (or at least a second word) on the State's Motion; rather, it is a situation in which PCC seeks an opportunity to have some word on certain of the State's arguments.

Second, as PCC noted in its initial motion for leave to file a surreply, it has a due process right to respond to all of the State's arguments asserted in support of the State's Motion. However, as perhaps not sufficiently explicitly stated by PCC earlier, this is not a matter of mere formality. Rather, PCC indeed will be substantially prejudiced if it is denied any opportunity to respond to the attacks on its affirmative defenses asserted for the very first time by the State in its Reply. Most obviously, of course, the Board otherwise will be presented without so much as a PCC contention that the State's new arguments are without merit, much less a demonstration as to why that is so. Furthermore, if PCC is not allowed to articulate its counterarguments to the State's new arguments at this time, a court reviewing these proceedings might erroneously conclude that PCC has waived its arguments against the State's new contentions because they were not presented in connection with the disposition of the State's Motion. In short, PCC would be fundamentally and substantially prejudiced if the State were to be allowed the only word with respect to those arguments in support of the State's Motion asserted for the first time in its Reply.

Third, it would seem to be a matter of fundamental fairness for PCC to be afforded the same degree of consideration that the State has received with respect to settling the pleadings in this case. The State filed its initial complaint on March 25, 1999. Its Amended Complaint, Second Amended Complaint, Third Amended Complaint, and a revised version of the Third Amended Complaint (i.e., a fourth amended complaint) followed, with the last of these not being filed until October 24, 2002, three years and eight months later. In contrast, PCC has to date filed a single answer that included 16 affirmative defenses, one of which PCC has now voluntarily withdrawn, and a single brief that includes some further explanation of the factual bases for certain of its fifteen remaining affirmative defenses.

It would be significantly disparate treatment of the parties for PCC to be allowed no further effort to state the bases for its affirmative defenses in light of the parties' handling of the State's Motion to date. That is, on the one hand, the State has been afforded five opportunities to plead its case. On the other hand, PCC has had one opportunity to plead its case, one opportunity to respond to the State's Motion setting forth the State's initial attacks upon that pleading — and no opportunity to respond to the State's attacks on that pleading presented for the first time in its Reply.

In summary, by this motion, PCC seeks nothing more than fair treatment. It will be severely prejudiced in its ability to defend the State's case against it if it is denied any opportunity to respond to those attacks upon its affirmative defenses asserted by the State for the first time in its Reply. For the reasons discussed above, the Board should grant this motion and accept PCC's surreply for filing, as tendered herewith.

Date: June 3, 2003

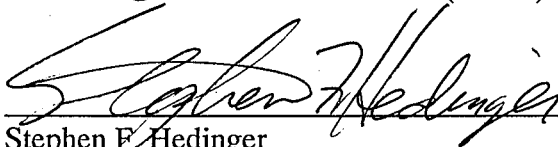
Respectfully submitted,

PEABODY COAL COMPANY

By its attorneys



W. C. Blanton
BLACKWELL SANDERS PEPER MARTIN LLP
Two Pershing Square, Suite 1000
2300 Main Street
Post Office Box 419777
Kansas City, Missouri 64141-6777
(816) 983-8000 (phone)
(816) 983-8080 (fax)
wblanton@blackwellsanders.com (e-mail)




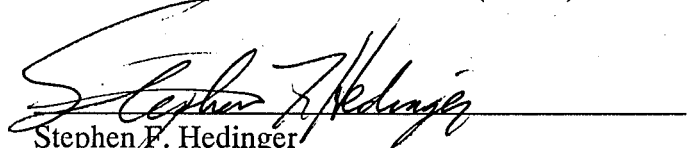
Stephen F. Hedinger
HEDINGER LAW OFFICE
2601 South Fifth Street
Springfield, IL 62703
(217) 523-2753 (phone)
(217) 523-4366 (fax)
hedinger@cityscape.net (e-mail)

Respectfully submitted,

PEABODY COAL COMPANY

By its attorneys


W. C. Blanton
BLACKWELL SANDERS PEPER MARTIN LLP
Two Pershing Square, Suite 1000
2300 Main Street
Post Office Box 419777
Kansas City, Missouri 64141-6777
(816) 983-8000 (phone)
(816) 983-8080 (fax)
wblanton@blackwellsanders.com (e-mail)


Stephen F. Hedinger
HEDINGER LAW OFFICE
2601 South Fifth Street
Springfield, IL 62703
(217) 523-2753 (phone)
(217) 523-4366 (fax)
hedinger@cityscape.net (e-mail)

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

JUN 4 2003

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.)
)
PEABODY COAL COMPANY, a Delaware)
corporation,)
)
Respondent.)

PCB 99-134

**RESPONDENT'S SURREPLY IN OPPOSITION TO STATE'S
MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES**

Respondent, Peabody Coal Company ("PCC"), hereby submits its surreply in opposition to the State's Motion To Strike Respondent's Affirmative Defenses ("State's Motion"), filed on or about February 3, 2003. This surreply addresses only those arguments in support of the State's Motion first articulated in the State's Reply To Respondent's Brief In Opposition To Complainant's Motion To Strike Respondent's Affirmative Defenses ("Reply"), filed on or about April 28, 2003. Some of those new arguments have been directed to more than one of PCC's affirmative defenses and will be addressed first below. The other new arguments then will be addressed in connection with the single affirmative defense to which each is directed.

DISCUSSION¹

A. As to Disputed Facts.

In response to PCC's exposition of additional facts upon which certain of its affirmative defenses are based in part, the State has in its Reply in several instances² either disputed PCC's

¹ All acronyms and shortened terms used in this surreply have the same meaning as used in Respondent's Brief In Opposition To Complainant's Motion To Strike Respondent's Affirmative Defenses, filed by PCC on or about April 11, 2003, unless specifically stated otherwise.

statements of fact or set forth statements of alleged fact to support arguments denigrating statements of fact by PCC. All such factual assertions by the State must be disregarded at this stage of the proceedings, as PCC's allegations of fact from which its affirmative defenses arise must be taken as true for the purpose of evaluating the legal sufficiency of those defenses. See Cole Taylor Bank v. Rowe Industries, Inc., PCB 001-173, 2002 Ill. ENV > LEXIS 330, at *6-7 (June 6, 2002). There will be time enough later for the determination of whose version of the facts is accurate.

B. As To The Nature Of The State

In its discussion of several of PCC's affirmative defenses,³ the State contends that PCC's pleading of its defenses is legally inadequate because PCC has pled its defenses on the basis of the State constituting a single entity. According to the State, PCC should be required to plead with specificity just which state agency (or probably even better yet, which state employee) did or said what when with respect to the conduct from which a given defense arises in part. Furthermore, the State contends that since it has chosen to base its claims against PCC in this case on two statutes and their respective implementing regulations for which the Illinois Environmental Protection Agency ("IEPA") has primary responsibility within the State's executive branch that it is only the conduct of IEPA that may give rise to a PCC affirmative defense. Neither contention has merit.

The Complainant in this case is identified in the State's current version of its Third Amended Complaint ("Complaint") as the "People of the State of Illinois," which PCC understands to be the conventional characterization of the State of Illinois in an enforcement

² See Reply arguments directed to PCC's Fourth, Seventh, Eighth, Tenth, Eleventh, Twelfth, and Fourteenth Affirmative Defenses.

³ See Reply arguments directed to PCC's Fourth, Fifth, Eleventh and Twelfth Affirmative Defenses.

proceeding like this one, not IEPA. Furthermore, only Count I of the Complaint has ostensibly been brought by the Attorney General of Illinois (“AG”) on behalf of IEPA; Counts II and III purportedly are being prosecuted by the AG at her own instance on behalf of the People of the State of Illinois, i.e., the State of Illinois. Therefore it is the State of Illinois and all of its agencies and other political and administrative structures having some responsibility for the matters that are the subject of this case whose conduct may be examined and evaluated in the context of PCC’s affirmative defenses.

Furthermore, it has been the State’s decisions alone that have divided the responsibilities for regulating coal mining operations in Illinois among various agencies at various times relevant to the issues in this case. It has been the State’s choices as to which agencies have what responsibilities with respect to PCC’s mining, coal mining refuse disposal, and other activities that are at issue in this case. Similarly, it is the State that has constructed the various mechanisms by which its agencies responsible for regulating various aspects of PCC’s conduct at issue in this case share information in this regard.

Accordingly, for the State to insist that PCC explain to the State its own regulatory structures applicable to coal mining operations in Illinois on a detailed level as they have existed from time to time throughout the entire 45-year period under which PCC’s conduct in question has been scrutinized by various state agencies (usually more than one at a time) on more than 80 occasions is preposterous. But not more so than the State’s claimed inability to understand which of its own agencies had which responsibilities at various times for evaluating Peabody’s proposed, ongoing, and past mining activities, administering the permit programs applicable to those activities, evaluating those activities in the context of the agencies’ respective enforcement authorities, and otherwise carrying out their regulatory responsibilities vis-a-vis those activities.

Nevertheless, in order to help the State out in analyzing how its own regulatory structures have functioned over the years, PCC notes that the regulation of its mining activities generally has been the responsibility of the Office of Mines and Minerals within the Department of Natural Resources and its predecessor agency, the former Department of Mine and Minerals; while responsibility for regulating PCC's coal mining refuse disposal activities and other activities that have the potential to result in the discharge of pollutants into surface water or their release into groundwater has been the responsibility of IEPA and its predecessor agency.⁴ For more details as to how these agencies have interacted with PCC over the years, PCC suggests that the State review its own files relating to its ongoing permitting, inspection and other review of, and evaluation of PCC's mining activities and interview its own employees who carried out these tasks.

C. As To Possible Re-Pleading

In its Reply, the State repeatedly urges the Board to deny PCC leave to re-plead any of its affirmative defenses.⁵ By doing so, the State seeks an uneven playing field in this case.

⁴ Not so incidentally, the State's repeated contention in association with these attacks — that PCC's statement that the State authorized the coal mining refuse disposal and other activities complained of by the State in this case constitutes a legal conclusion rather than an allegation of fact — requires two responses. First, when (a) the State's statutes and regulations prohibit the disposal of coal mining refuse on or in the ground without a permit and prohibit the discharge of pollutants into surface waters of the State without a permit, but (b) IEPA has issued PCC a series of permits that allow it to do both of those things for many years, then (c) it does not seem unreasonable to state that the State has authorized those activities as a matter of fact. In any event, the State's apparent contention that an affirmative defense may not contain any conclusion of law is fundamentally unsound. PCC is unaware of any pleading system in which affirmative defenses do not include a statement (however brief) of the legal theories upon which the pleader contends liability in a case is avoided, including an explicit legal conclusion in that regard. The Illinois pleading system merely expressly requires in addition a statement of facts that justify the application of a given legal principle of avoidance in a given case, stated in sufficient detail to fairly place the prosecuting party on notice of the issues to be resolved at trial, not constitute an initial statement of proposed findings of detailed facts. There is nothing in 35 Ill. Adm. Code / 103.204(d) that prohibits the pleading of ultimate facts, which the State inaccurately characterizes as legal conclusions.

⁵ See Reply argument directed to PCC's Tenth Affirmative Defenses and the State's request for relief stated at the end thereof.

It would seem to be a matter of fundamental fairness for PCC to be afforded the same degree of consideration that the State has received with respect to settling the pleadings in this case. The State filed its initial complaint on March 25, 1999. Its Amended Complaint, Second Amended Complaint, Third Amended Complaint, and a revised version of the Third Amended Complaint (i.e., a fourth amended complaint) followed, with the last of these not being filed until October 24, 2002, filed three years and eight months later. In contrast, PCC has to date filed a single answer that included 16 affirmative defenses, one of which PCC has now voluntarily withdrawn, and a single brief that includes some further explanation of the factual bases for certain of its fifteen remaining affirmative defenses.

It would be significantly disparate treatment of the parties for PCC to be allowed no further effort to state the bases for its affirmative defenses in light of the parties' handling of the State's Motion to date. That is, on the one hand, the State has been afforded five opportunities to plead its case. On the other hand, PCC has had one opportunity to plead its case, one opportunity to respond to the State's Motion setting forth the State's initial attacks upon that pleading — and no opportunity to respond to the State's attacks on that pleading presented for the first time in its Reply.

In summary, by this motion, PCC seeks nothing more than fair treatment. It will be severely prejudiced in its ability to defend the State's case against it if it is denied any opportunity to respond to those attacks upon its affirmative defenses asserted by the State for the first time in its Reply.

D. As To Individual Defenses

First and Second Affirmative Defenses

Contrary to the State's contention, PCC does not contend that the 180-day notice requirement of Section 31 should be applied retroactively here. Rather, PCC contends that applying Section 31 prospectively means that IEPA is by the express terms of Section 31 barred from prosecuting claims of violations of the Act that occurred more than 180 days before the effective date of Section 31.

PCC acknowledges that this Board has ruled contrary to PCC's position with respect to this issue in the cases cited by the State. However, PCC respectfully requests the Board to reconsider its position on this issue; and PCC nevertheless adheres to its contentions in this regard in order to preserve this issue for review in the event of future review of certain aspects of this case by the courts.

Fourth Affirmative Defense

First, the State's assertion that IDNR (and by implication) no state agency could regulate PCC's disposal practices at the Mine prior to August 1, 1985 is categorically inaccurate. Chapter Four of this Board's Rules established regulations applicable to PCC's coal mining refuse disposal practices, as well as PCC's discharge of water accumulated at the Mine into the waters of Illinois, at all times prior to the Chapter Four rules either being superseded by other regulatory programs or simply being re-codified. Specifically, DMM issued permits to PCC authorizing the coal mining refuse disposal practices and discharges to surface water at issue in this case in accordance with the Chapter Four regulations, and DMM inspectors conducted periodic inspections of those PCC activities to determine whether they were being carried out in accordance with the terms of PCC's Chapter Four permits and confirmed that to be the case.

More specifically, as a result of its inspectors' reports, DMM was well aware of PCC's disposal of coal mining refuse in trenches and at no time took any action either directed to PCC or within the agency that suggested that DMM considered this to be either non-compliance with the provisions of PCC's Chapter Four permits or an environmental problem generally.

Second, the State's suggestion in its Reply that there is some significance in DMM prohibiting PCC from continuing to dispose of coal mining refuse in trenches at the Mine in 1985 is interesting. It is PCC's understanding that the State complains in this case of PCC disposing of coal mining refuse on or in the ground at the Mine generally. If the State has now determined that its claims against PCC are based only upon the disposal of coal mining refuse in trenches, the State should clarify its present contentions in that regard forthwith (perhaps by seeking leave to file a Fourth Amended Complaint — or maybe just a third version of its Third Amended Complaint).

Seventh and Eighth Affirmative Defenses

First, the State's suspicion that PCC knowingly reversed the order of its Seventh and Eighth Defenses in its discussion of those defenses in its Response is not accurate. The reversal of order was inadvertent; and it is in no way affected PCC's substantive discussion of those defenses in its Response. However, PCC's counsel apologizes to the Board and the State's counsel for any inconvenience this occurrence may have caused them.

Second, contrary to the State's assertion, the settlement agreement between PCC and the Saline Valley Conservancy District ("District") is not subject to the jurisdiction of any federal court. As PCC has provided a copy of that settlement agreement to the State, and the State has access to the court files pertaining to the District's lawsuit against PCC, the State's comments in this regard are inexplicable.

Third, the State's comments regarding this Board's Subtitle D regulations is⁶ totally irrelevant to any issue in this case. Those regulations were duly promulgated by this Board and have been in effect for more than 20 years. There is currently no proceeding in any administrative or judicial forum by which any legal challenge to those regulations has been initiated. Although disagreements regarding the propriety of the Subtitle D regulations among certain state and federal regulators, members of the coal industry, and environmental groups have arisen in the context of an NPDES permit case and are ongoing, the Subtitle D regulations are currently a part of Illinois law and may not simply be disregarded by the State.

Ninth Affirmative Defense

The State's assertions in its Reply regarding PCC's Ninth Affirmative Defense are puzzling. Has the State abandoned its claims as set forth in Counts I and II of its Complaint that PCC has violated Section 12(a) and (d) of the Act? Is the State generally still basing its claims against PCC in this case on the theories asserted in its Complaint or is it now basing them on those stated in its Reply, which are clearly contrary to those stated in the Complaint?

Tenth Affirmative Defense

In light of the many coal mining operations in Illinois conducted during the 45-year period covered by this case, the State's ability to point to one other enforcement case purportedly similar to this one hardly defeats PCC's Tenth Affirmative Defense as a matter of law.

Eleventh Affirmative Defense

The State does not dispute the fact that the NOV IEPA issued to PCC do not contain any allegation that PCC has caused "water pollution" or deposited contaminants upon the land so as to create a water pollution hazard." Nor does the State assert that any such contention was ever

⁶ 35 Ill. Adm. Code, Subtitle D.

articulated to PCC in any correspondence, conversation, or meeting between IEPA and PCC representatives at any time prior to this case being referred by IEPA to the AG. Nor does the State contend that it ever articulated the legal theories that PCC's conduct complained of in this case threatened and caused "water pollution" prior to the filing of the original complaint in this case.⁷

The purpose of the Section 31 notice provision is to give the recipient of an NOV a statement of IEPA's factual and legal contentions as to an alleged violation of the Act. It is not merely an announcement that the agency is unhappy and an invitation for the recipient to ask "Why?"

Fifteenth Affirmative Defense

The State should re-read its Complaint, which clearly identifies which of the water quality standards allegedly applicable at various locations at various times allegedly have been violated by PCC. The State's meticulous presentation in this regard shows on its face which of those groundwater standards have been superseded and no longer were in effect by the time the Complaint case was filed.

CONCLUSION

For the reasons discussed above and in PCC's Response, the State's Motion should be denied or, in the alternative, PCC should be granted leave to file an amended answer to address any pleading deficiencies in its original answer determined by the Board to exist in connection with its disposition of the State's Motion.

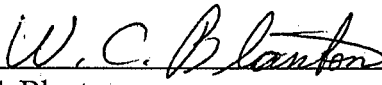
⁷ Of course, if the State truly is now contending by all Counts of its Complaint only that PCC's conduct has caused exceedances of various groundwater standards allegedly applicable at certain places at certain times, as suggested by its Reply comments directed to PCC's Ninth Affirmative defense, that may or may not have some significance as to this defense.

Date: June 3, 2003

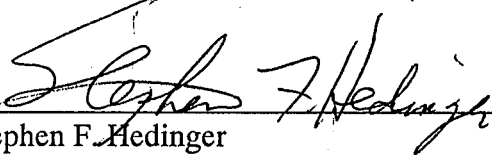
Respectfully submitted,

PEABODY COAL COMPANY

By its attorneys



W. C. Blanton *by 52H*
BLACKWELL SANDERS PEPER MARTIN LLP
Two Pershing Square, Suite 1000
2300 Main Street
Post Office Box 419777
Kansas City, Missouri 64141-6777
(816) 983-8000 (phone)
(816) 983-8080 (fax)
wblanton@blackwellsanders.com (e-mail)



Stephen F. Hedinger
HEDINGER LAW OFFICE
2601 South Fifth Street
Springfield, IL 62703
(217) 523-2753 (phone)
(217) 523-4366 (fax)
hedinger@cityscape.net (e-mail)