BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	**PCB NO. 99-134**
	)	**(Enforcement - Water)**
HERITAGE COAL COMPANY, L.L.C. (f/k/a PEABODY COAL COMPANY L.L.C.),	)	
	)	
	)	
Respondent.	)	

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on August 31, 2011, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, c/o John T. Therriault, Assistant Clerk, James R. Thompson Center, 100 W. Randolph St., Ste. 11-500, Chicago, IL 60601, COMPLAINANT'S OBJECTIONS TO RESPONDENT'S UNTIMELY MOTION FOR LEAVE TO FILE REPLY, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY:_____
THOMAS DAVIS, Chief
Assistant Attorney General
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500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: August 31, 2011

CERTIFICATE OF SERVICE

I hereby certify that I did on August 31, 2011, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING and COMPLAINANT'S OBJECTIONS TO RESPONDENT'S UNTIMELY MOTION FOR LEAVE TO FILE REPLY upon the persons listed on the Service List.

THOMAS DAVIS, Chief
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PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
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v.	)	**PCB NO. 99-134**
	)	**(Enforcement)**
	)	
HERITAGE COAL COMPANY LLC, f/k/a PEABODY COAL COMPANY, LLC,	)	
	)	
Respondent.	)	

COMPLAINANT'S OBJECTIONS TO RESPONDENT'S UNTIMELY MOTION FOR LEAVE TO FILE REPLY

NOW COMES the Complainant, PEOPLE OF THE STATE OF ILLINOIS, and responds to the Respondent's Motion for Leave to Reply, and states as follows:

1. On December 27, 2010 the Respondent filed its Motion for Partial Summary Judgment supported by a brief and several affidavits. On April 11, 2011 the Complainant filed our Response and counter-affidavits. On April 22, 2011 the Respondent timely requested leave to file a reply and the Complainant did not object. The Respondent's Reply was filed on July 12, 2011 along with a Motion to Strike the State's "Irrelevant" Evidentiary Submissions.

2. The Complainant timely filed a response to this motion to strike on July 25, 2011. The Respondent filed the present motion on August 23, 2011, requesting leave to reply to the Complainant's Response to the Motion to Strike the State's "Irrelevant" Evidentiary Submissions.

3. Section 101.500(e) of the Board's Procedural Rules governs the Respondent's request for leave to submit a reply: "The moving person will not have the right to reply, except as

permitted by the Board or the hearing officer to prevent material prejudice. A motion for leave to file a reply must be filed with the Board within 14 days after service of the response." 35 Ill. Adm. Code 101.500(e).

4. The Respondent does not state when it actually received by U.S. Mail service of the Complainant's response, which was electronically filed on July 25, 2011. Instead, the Respondent relies upon Section 101.300(c): "In the case of service by U.S. Mail, service is presumed complete four days after mailing. The presumption can be rebutted by proper proof." 35 Ill. Adm. Code 101.300(c). Using this "presumptive" date, the Respondent concedes that any reply ought to have been filed by August 12, 2011 at the latest. Respondent's motion at ¶ 5.

5. As to the present motion, requesting leave to file a reply, which was electronically filed on August 23, 2011, the Complainant represents that we received service via the mail on August 29, 2011.

6. The Board has previously denied this Respondent's untimely request for leave to file a responsive pleading in this pending enforcement proceeding. See June 5, 2003 order.[1]

7. The Board properly exercises its discretion in considering whether a movant has demonstrated that "material prejudice" might result if leave to file is withheld. However, the Board has limited its discretion by mandating that this particular request be filed timely: "A

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[1] "On December 20, 2002, Peabody filed an answer in this matter along with 16 affirmative defenses. On February 5, 2003, the People filed a motion to strike all 16 of Peabody's affirmative defenses (mot. to strike). On April 14, 2003, Peabody filed a response to the People's motion to strike (response). On April 29, 2003, the People filed a motion for leave to reply to Peabody's response, attaching the reply. On May 12, 2003, Peabody objected to the People's motion for leave to reply and also filed a motion to file a surreply. In an order dated May 20, 2003, the hearing officer assigned to this matter granted the People's motion for leave to file a reply and denied Peabody's motion to file a surreply. Peabody filed a renewed motion to file a surreply on June 4, 2003. Section 101.500(e) of the Board's procedural rules provides that the moving party "will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice." 35 Ill. Adm. Code 101.500(e). Peabody's motion is untimely and Peabody has not sufficiently demonstrated it will suffer material prejudice if the Board does not accept this surreply. The Board denies Peabody's renewed motion." Slip op. at 1.

motion for leave to file a reply *must* be filed with the Board within 14 days after service of the response." In ruling upon requests pursuant to Section 101.500(e), the Board cites as precedent its decision in *In The Matter Of: Petition of Ford Motor Company for Adjusted Standard*, PCB AS 91-2, slip op. at 3 (Feb. 28, 1991) (stating that where a filing is late, the Board may "justifiably find that any prejudice . . . is self imposed. . . .").

8. The Respondent conflates the timeliness and prejudice requirements by contending that the Board's denial of leave to file the reply "would materially prejudice HCC by depriving it of the opportunity to address the matters discussed in the proposed reply, and would prejudice this Board by depriving it of further analysis, explanation and clarification provided by the proposed reply." Respondent's motion at ¶ 5. The first part of this conclusory statement ignores the Board's position that an untimely Section 101.500(e) request for leave to file a reply justifies the Board in finding that any prejudice is "self-imposed" and that if HCC is denied this opportunity to make further argument, it is because HCC failed to file a timely request. It would seem obvious that the drafting of the ten-page proposed reply consumed more time and effort than the preparation and filing of the three-page motion for leave; perhaps the Respondent should have timely sought leave to file a reply before waiting until the proposed reply was ready. The second part of the above-quoted statement is that the Board would deprive itself of further argument by denying leave to file and that such action by the Board "would prejudice this Board. . . ." The Respondent thereby contends that prejudice to the Board would be "self-imposed" as well. This contention is reiterated: "Denial of this motion for leave to file the reply could materially prejudice both HCC and the Board in its administration of justice . . . by depriving HCC of the opportunity . . . to clarify and correct the inaccurate statements of the State in its

response." Respondent's motion at ¶ 8.

9. The Respondent is essentially asking the Board to waive its own rule mandating that any motion for leave to file a reply *must* be filed with the Board within 14 days. While no party has the right to reply, a timely request for such leave should be granted where necessary to prevent material prejudice. The denial of an untimely request is not excused by a showing of prejudice because such prejudice is self-imposed. Despite the explicit language of Section 101.500(e) and despite Board precedent, the Complainant cannot rely upon a denial on the grounds of untimeliness and will now address the allegations in the motion for leave as to material prejudice.

10. The untimely request for leave provides very little of any substance to support the motion's conclusions that denial would prejudice both HCC and the Board. The Respondent contends that our Response to the Motion to Strike the State's "Irrelevant" Evidentiary Submissions "raised several points urging this Board to deny" the motion but none of these points has "merit." Respondent's motion at ¶ 3. Without providing a hint of detail, the Respondent makes the following accusations: "in some instances, the State has misidentified precedent and failed to acknowledge such matters as reversal of authorities it has relied upon, and in all instances the State has either mis-stated the relevant legal standard and/or argued irrelevant points as though they were controlling." Respondent's motion at ¶ 4. Lastly, while promising that all will be revealed in its proposed reply, HCC argues that it "could not have anticipated that the State would raise such arguments, and so could not have addressed those arguments in its initial motion." Respondent's motion at ¶ 6. These general allegations will be considered as presented.

11. The Complainant readily admits that our Response to the Motion to Strike the State's "Irrelevant" Evidentiary Submissions argued that the counter-affidavits of the Illinois EPA should not be excluded as somehow inadmissible. It would be absurd to believe that the Respondent and neither of its lawyers could not have anticipated that the State would *oppose* the motion to strike, so the Board will presumably have to review our Response to try and guess which arguments the Respondent might be referring to (since no examples are given). Our arguments included the following: the motion to strike is misdirected and may be more proper for the hearing officer to decide; the Complainant discussed (in the Response to the Motion for Partial Summary Judgment) the recent codification of the Illinois Rules of Evidence in support of our evidentiary submissions but the Respondent fails to address the Rules of Evidence in the motion to strike; the Board should look to the Code of Civil Procedure and the Supreme Court Rules for guidance regarding the legal and factual sufficiency of affidavits; any motion for summary judgment and its supporting documents must be *strictly* construed and must leave no question as to the movant's right to judgment and, conversely, in considering the motion, the Complainant's counter-affidavits and supporting documents must be *liberally* construed; any authority for the motion to strike is not stated within the motion; the motion to strike is untimely under Section 101.506 of the Board's procedural rules ("All motions to strike, dismiss, or challenge the sufficiency of any pleading filed with the Board must be filed within 30 days after the service of the challenged document. . . ."); the Board's rules do not otherwise allow a movant to seek to strike the summary judgment counter-affidavits or other evidentiary submissions filed in response to a motion for summary judgment; the motion does not cite Section 2-1005(f) of the Code of Civil Procedure and does not allege that any affidavit was not in good faith; the

Respondent's objections go merely to the weight of the Complainant's evidentiary submissions and not to admissibility; in its prior decisions the Board has noted that, "in determining the genuineness of a fact for summary judgment, a court should consider only facts admissible in evidence;" the Respondent cites neither Board precedent nor any Illinois case law, and the motion does not address the standards of review; and the Respondent fails to show that our counter-affidavits and documents are somehow inadmissible. In pleading these arguments, the Complainant cited certain provisions of Board rules, Supreme Court Rule 191(a), and Section 2-1005(f) of the Code of Civil Procedure. We also cited a few cases in the footnotes of our Response in support of the applicable standards of review. For instance, the contention that counter-affidavits and supporting documents must be *liberally* construed in summary judgment proceedings is supported by the citation in footnote 2 of the Response.[2] In another instance, the Response quoted from a prior Board decision.[3] The Board is certainly capable of determining whether the points of law supported by these various authorities are applicable as rules of procedure, standards of review, and pleading requirements. Since the untimely request for leave to file a reply does not provide any example of a purportedly "misidentified precedent" or any mis-statement of legal standards, the Respondent fails to support its contention that material prejudice would result in the absence of a reply.

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[2] See *Morris v. Margulis*, 307 Ill. App. 3d 1024, 1032 (5th Dist. 1999). The Supreme Court reversed the judgment of the appellate court on other grounds at 197 Ill. 2d 28 (2001). The Fifth District had quoted from the Second District's opinion in *Littrell v. Coats Co.*, 62 Ill. App. 3d 516, 519-20 (2nd Dist. 1978): "In the interpretation of the pleadings, the movant's motion for summary judgment and its supporting documents must be strictly construed and must leave no question as to the movant's right to judgment; conversely, in considering the motion, the respondent's counteraffidavits and supporting documents must be liberally construed.*Doran v. Pullman Standard Car Manufacturing Co.* ([1st Dist.] 1977), 45 Ill. App. 3d 981, 4 Ill. Dec. 504, 360 N.E.2d 440."

[3] *City of Quincy v. IEPA*, PCB 08-86 (June 17, 2010), slip op. at 28, quoting *Gardner v. Navistar International Transportation Corp.*, 213 Ill. App. 3d 242, 247 (4th Dist. 1991), and *First America Bank, Rockford, N.A. v. Netsch* (1995), 166 Ill.2d 165, 178.

12. The motion for leave does not indicate which of Complainant's arguments it could not have been anticipated. Each of the arguments involves matters of legal procedure and practice. Section 101.610(l) of the Board's procedural rules provides that the hearing officer is to rule upon objections and evidentiary questions, and it is upon this basis that Complainant suggests the motion to strike ought to be decided by the hearing officer. Similarly, no specific authority for the motion to strike is stated within the motion and the motion to strike is untimely under Section 101.506. These contentions might have been anticipated if the proper application of the Board's procedural rules were to be given sufficient consideration. Likewise, in the absence of a procedural rule on the issue of the legal sufficiency of summary judgment affidavits, the applicability of the pertinent provisions of the Code of Civil Procedure and the Supreme Court Rules regarding summary judgment affidavits might have been anticipated since Section 101.100(b) indicates that "the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent." In an effort to exclude evidentiary exhibits, the reference in Section 101.626 regarding the admission of "evidence that is admissible under the rules of evidence as applied in the civil courts of Illinois" might reasonably lead to a discussion of the newly effective Illinois Code of Evidence, and an argument regarding the applicability of this Code to the Respondent's motion might have been anticipated (especially since the Complainant discussed the pertinent Code provisions in our Response to the Motion for Partial Summary Judgment filed on April 11, 2011). Lastly, most lawyers filing a motion for summary judgment would reasonably anticipate some discussion by the non-movant of the standards of review applicable to summary judgment motions in general and the existence of a genuine issue of material fact in particular. Moreover, it would be misleading to suggest (as

the Respondent does in fact suggest at paragraph 4 of its motion) that the reversal of a judgment on appeal somehow constitutes a "reversal of authorities" being relied upon. The viability of any of these legal standards, such as that counter-affidavits and supporting documents must be *liberally* construed in summary judgment proceedings, does not depend upon whether a court's decision is upheld or reversed on appeal. In other words, where the court holds the application or applicability of a particular legal standard to be error, such holding does not invalidate the particular standard itself. In any event, the Respondent's motion fails to explain how it allegedly could not have anticipated any of the above arguments.

13. The issue of what constitutes "material prejudice" in the context of Section 101.500(e) should be considered in the context of the specific case. The Board has considered material prejudice in conjunction with "undue delay" in regards to the allowance of untimely *responses* subsequent to the 14 day *response* period set forth in Section 101.500(d) although the latter term does not appear in Section 101.500(e) in regards to any *reply*. Therefore, any suggestion that the Complainant should not be prejudiced because no meaningful delay would result from allowing an untimely request reply has no basis in the procedural rules. In other words, any purported lack of delay is not relevant.

14. The Respondent asserts that the allowance of the request for leave and the filing of its proposed reply "should cause no prejudice to the State or the administration of justice, because the reply is addressed to correcting misinformation and illuminating erroneous information." Respondent's motion at ¶ 7. The Complainant objects to this assertion. The Board's rules mandate that any motion for leave to file a reply *must* be filed with the Board within 14 days after service of the response. The allowance of an untimely request would

contravene Section 101.500(e). When an administrative agency has adopted rules and regulations under its statutory authority for carrying out its duties, the agency is bound by those rules and regulations and cannot arbitrarily disregard them. See *Union Electric v. Department of Revenue* (1990), 136 Ill.2d 385, 391. Generally, administrative agencies are bound to follow their own rules as written, without making ad hoc exceptions or departures. See *Provena Health v. Illinois Health Facilities Planning Bd.*, 382 Ill. App. 3d 34, 42 (1st Dist. 2008); *Springwood Associates v. Health Facilities Planning Board*, 269 Ill. App. 3d 944, 948 (4th Dist. 1995). The Pollution Control Board *must* comply with its own procedural rules. Even if the Board were to disregard the plain meaning of the timeliness mandate of this rule, the Complainant objects because of the lack of any showing of material prejudice within the motion itself. The allowance of an untimely request for leave to file a reply without a showing of material prejudice would also contravene Section 101.500(e). A request for leave must be both timely and supported with a showing of material prejudice, and the Respondent's motion is neither.

15. Despite Respondent's hopeful assertion that the Board's allowance of leave to file the reply "should cause no prejudice to the State or the administration of justice," the Complainant insists that prejudice would result to both the State and the administration of justice. The Respondent seeks to file a Reply in support of its Motion to Strike the State's "Irrelevant" Evidentiary Submissions. These evidentiary submissions were made by the State on April 11, 2011 and the motion to strike was not filed until three months later. The State timely objected to the motion to strike on that basis, i.e. untimeliness. Now, the Respondent is again untimely in its motion practice before the Board. In fact, this is the second untimely Section

101.500(e) motion by the Respondent in this proceeding.[4] Allowance of the present untimely motion for leave in light of the Board's denial of the previous untimely motion for leave would certainly appear to be an ad hoc exception or departure, or an arbitrary disregard of a generally applicable deadline, on the Board's part. The grant of this motion under these circumstances would prejudice the State and the administration of justice simply because it would be an arbitrary action. The Board ought to decline this invitation to ignore its procedural rules. The Respondent's promise of clarification and illumination through its proposed reply ought to be rejected. Any prejudice resulting from the denial of the motion may certainly be justified as being self-imposed.

WHEREFORE, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully objects to this Motion for Leave to File Reply.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
LISA MADIGAN,
Attorney General of the State of Illinois

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[4] See footnote 1, *supra.*