

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
 vs.) PCB No. 99-134
)
 HERITAGE COAL COMPANY LLC,)
)
 Respondent.)

NOTICE OF ELECTRONIC FILING

To: Bradley Halloran, Hearing Officer
 Illinois Pollution Control Board
 James R. Thompson Center
 100 West Randolph St., Suite 11-500
 Chicago, IL 60601

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

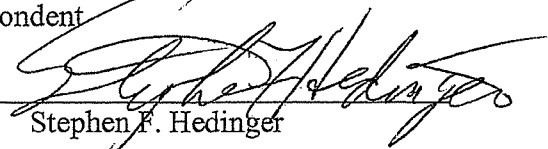
W.C. Blanton
 Husch Blackwell LLP
 4801 Main Street, Suite 1000
 Kansas City, MO 64112

PLEASE NOTE NOTICE that on September 7, 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 West Randolph St., Suite 11-500, Chicago, IL 60601, the Respondent's Motion For Leave To File Instanter Its Supplement To Motion For Partial Summary Judgment and Respondent Heritage Coal Company LLC's Supplement In Support Of Motion For Partial Summary Judgment, copies of which are attached hereto and herewith served upon you.

Dated: September 8, 2011

Respectfully submitted,

HERITAGE COAL COMPANY LLC
 Respondent

By: 
 Stephen F. Hedinger

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CERTIFICATE OF SERVICE

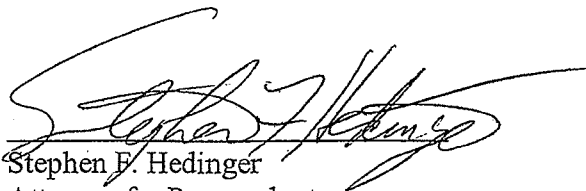
I hereby certify that I did on September 8, 2011, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following Respondent's Motion For Leave To File Instantly Its Supplement To Motion For Partial Summary Judgment and Respondent Heritage Coal Company LLC's Supplement In Support Of Motion For Partial Summary Judgment, and the attached Notice of Electronic Filing, upon the following persons:

Bradley Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph St., Suite 11-500
Chicago, IL 60601
halloranb@ipcb.state.il.us

Thomas Davis
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Stephen F. Hedinger
Attorney for Respondent

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
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Complainant,)	
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vs.)	PCB No. 99-134
)	
HERITAGE COAL COMPANY LLC,)	
)	
Respondent.)	

RESPONDENT'S MOTION FOR LEAVE TO FILE INSTANTER ITS SUPPLEMENT TO MOTION FOR PARTIAL SUMMARY JUDGMENT

NOW COMES Respondent, HERITAGE COAL COMPANY LLC ("HCC"), through its undersigned attorneys, and moves this Board for leave to file instanter Respondent Heritage Coal Company LLC's Supplement In Support Of Motion For Partial Summary Judgment ("HCC's Supplement"), which is tendered herewith. In support of this motion, HCC states:

1. In this case Complainant, People of the State of Illinois ("the State"), has alleged that HCC has been violating and continues to violate certain provisions of the Environmental Protection Act and this Board's regulations as a result of alleged groundwater conditions at HCC's Eagle #2 closed surface coal mine (the "Mine"), allegedly resulting from HCC's operation of coal refuse disposal areas ("Disposal Areas") at that facility. The State's Third Amended Complaint is the most recent iteration of the State's allegations against HCC, and Count III of that pleading alleges, among other things, that HCC's operation of the Disposal Areas resulted in exceedances of groundwater quality standards ("GWQS") for certain inorganic constituents set forth at Section 620.410(a) of this Board's groundwater quality regulations, 35 Ill. Adm. Code §620.410(a).

2. On December 20, 2010, HCC filed its Respondent Heritage Coal Company LLC's Motion For Partial Summary Judgment ("Motion For Partial Summary Judgment") in this case. Among other things, that motion noted that, contrary to the State's allegations of violation in Count III noted above, HCC's operation of the Disposal Areas is not subject to Section 620.410(a), because (a) reclamation has not yet been completed at the Mine; and (b) the regulation relied upon by the State does not apply to mines still under reclamation by virtue of Section 620.450(b)(2), which in pertinent part states that, "[p]rior to completion of reclamation at a coal mine," the GWQS "as specified in Sections 620.410(a) and (d), 620.420(a) and (d), 620.430 and 620.440 are not applicable to inorganic constituents and pH" (emphasis added). See Respondent Heritage Coal Company LLC's Opening Brief In Support Of Motion For Partial Summary Judgment ("HCC's Opening Brief"), at 11-19.

3. The reclamation status of the Mine is a matter of public record, easily identifiable by any member of the public or agent of the State interested in learning that status. Materials relating to the reclamation status are available for copy and review in public places in Gallatin County (the county where the Mine is located) and at the offices of the Illinois Department of Natural Resources ("IDNR"), and are available in an easily accessible manner from the IDNR website, which includes databases that publish a large number of facts and materials concerning coal mines located within Illinois. Moreover, the fact that the Mine has been in an ongoing reclamation status now and at all times relevant to the dates of violation alleged in the Third Amended Complaint is not controverted by the State in this case, nor controversial in any way.

4. As factual support for the unremarkable proposition that the Mine remains in reclamation status, HCC submitted the affidavit of Michael L. Munday, who is responsible for permitting records regarding the Mine. Mr. Munday indicated that the Mine's operative permit,

Permit 34, requires maintenance of a reclamation bond covering facility conditions after active mining operations are concluded, and Mr. Munday stated that “[t]o date, HCC has not sought to be released from the reclamation bonding obligations under Surface Mining Permit 34.”

5. HCC also submitted the affidavit of HCC’s counsel, W.C. Blanton ("Blanton Affidavit"), attesting to information viewed upon and retrieved from the IDNR website on December 17, 2010 (just prior to the filing of the Motion For Partial Summary Judgment). The website screenshot attached as Ex. 1 to the Blanton Affidavit ("IDNR Exhibit") identified the reclamation status for the Mine as: “In reclamation, has outstanding bond.”

6. HCC’s Opening Brief identified twenty facts which HCC believed to be undisputed. Included were several relevant to the fact that the Mine remains in reclamation status, with no released bond. Among these were the following:

#12: “All activities carried out in the Disposal Areas pursuant to the relevant provisions of Permit 34 were subject to bonding requirements to ensure reclamation of those areas. Those bonding requirements remained in full force and effect through the cessation of coal mining refuse disposal activities at the Mine. Brown at ¶6.”

#18: “Since November 2007, ongoing activities at the Mine have been undertaken pursuant to Permit 34. This permit presently addresses and establishes the terms and conditions of, among other things, HCC’s maintenance of the Disposal Areas at the Mine, including the bonding requirements relating to reclamation following the cessation of active operations at the facility. Munday at ¶5.”

#19: “HCC has not sought to be released from the reclamation bonding obligations under Permit 34. Munday at ¶6.”

#20: “The IDNR website material that provides information regarding the status

of active permits issued pursuant to the [Surface Coal Mining Land Conservation and Reclamation Act] describes the current status of the Mine under Permit 34 to be: 'In reclamation, has outstanding bond.' Blanton at ¶3, Ex.1."

7. On April 11, 2011, the State submitted Complainant's Response To Motion For Partial Summary Judgment ("Response Brief"), which was filed by Hearing Officer order on April 27, 2011. That Response Brief admitted all but three of the undisputed facts identified by HCC's Motion For Partial Summary Judgment, including those numbered 12, 18 and 19, set forth above. One of the three denied by the State, though, was undisputed fact number 20, set forth above. Indeed, the State devoted four pages of its Response Brief to arguing that the Blanton Affidavit and the IDNR Exhibit attached thereto do not meet technical rules of evidence and so should not be considered. Ignoring the fact that it was admitting undisputed facts numbered 12, 18 and 19, the State asserted that "[t]he factual issues relating to reclamation must be supported, if at all, by competent and admissible evidence." (Response Brief at 8). The State argued that the IDNR website screenshot was not a business record under Rule 802 of the Illinois Rules of Evidence, that the screenshot constituted hearsay, and that the affidavit did not provide sufficient foundation to overcome the evidentiary objections being raised. However, the State did not actually dispute the asserted reclamation status of the Mine.

8. In response to the purely procedural argument mounted in the State's Response Brief to undisputed fact number 20 and its supporting documents, HCC served the State with Respondent Heritage Coal Company, LLC's Second Set Of Requests For Admission To Complainant ("HCC's Second Request For Admissions"), which requested the State to admit: (1) that the Office of Mines and Minerals ("OMM") within IDNR maintains the ArcIMS Illinois Coal Mine Permit Viewer, the web-based mapping application from which the IDNR Exhibit

was printed; (2) that the ArcIMS Illinois Coal Mine Permit Viewer is the means by which OMM communicates to the public information regarding Illinois coal mines subject to the Surface Coal Mining Land Conservation and Reclamation Act and the associated regulations; (3) that OMM intends that the public rely on information contained in the ArcIMS Illinois Coal Mine Permit Viewer; (4) that the information contained in the ArcIMS Illinois Coal Mine Permit Viewer for Permit 34 is based on OMM data reflecting the current status of the Eagle #2 Mine; and (5) that the OMM Exhibit is a true and accurate printout of a screen from the ArcIMS Illinois Coal Mine Permit Viewer for Permit 34 as of December 17, 2010. In other words, HCC simply requested the State to admit the statements in the Blanton Affidavit challenged by the State.

9. The State has now responded to HCC's Second Request For Admissions by admitting each of the requests made by HCC — thereby itself establishing precisely the facts stated in the Blanton Affidavit but “disputed” by the State in its Response Brief.

10. Moreover, the State has filed its response with this Board on August 2, 2011, as Complainant's Response To Second Set Of Requests For Admission ("State's Admissions") — thereby itself placing those now indisputably undisputed facts before the Board for its consideration in ruling on HCC's Motion for Partial Summary Judgment. Pursuant to this Board's procedural rule 101.516(b), 35 Ill. Adm. Code 101.516(b), this Board will enter summary judgment "[i]f the record, including pleadings, depositions and admissions on file together with any affidavits, show that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law" (emphasis added). Accordingly, the attached proposed HCC's Supplement restates and supplements HCC's Opening Brief by adding as further factual authority the State's Admissions.

11. The Board's guiding principles, in ruling on motions to supplement and the like, is

to avoid material prejudice to either party and to avoid undue delay. 35 Ill. Adm. Code 101.246; see People v. Chicago Heights Refuce Depot, Inc., PCB 90-112, 1991 WL273772 (Dec. 6, 1991); Mobil Oil Corp. v. Illinois Environmental Protection Agency, PCB 96-60, 1994 WL98967 (March 17, 1994). Both principles will be advanced here by allowing the proposed supplement.

12. For the foregoing reasons, HCC respectfully suggests that it would be appropriate and just for this Board to grant HCC leave to file instanter the attached proposed HCC's Supplement.

WHEREFORE Respondent, HERITAGE COAL COMPANY LLC, requests this Board's leave to file instanter Respondent Heritage Coal Company LLC's Supplement In Support Of Motion For Partial Summary Judgment, which is being tendered to the Board for electronic filing herewith on this same date.

Dated: September 8, 2011

Respectfully submitted,

HERITAGE COAL COMPANY LLC,
Respondent

By: 

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RESPONDENT HERITAGE COAL COMPANY LLC'S SUPPLEMENT
IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

NOW COMES Respondent, HERITAGE COAL COMPANY LLC ("HCC"), through its undersigned attorneys, and for its Supplement In Support Of Motion For Partial Summary Judgment states:

1. Fact #20 of the undisputed facts material to the issues raised by HCC's Motion for Partial Summary Judgment, set forth at page 7 of Respondent Heritage Coal Company LLC's Opening Brief In Support Of Motion For Partial Summary Judgment, is modified by addition of the following underscored material:

20. The IDNR website material that provides information regarding the status of active permits issued pursuant to the Mining Law describes the current status of the Mine under Permit 34 to be: "In reclamation, has outstanding bond." Blanton at ¶3, Ex. 1; Complainant's Response To Second Set Of Requests For Admission, filed with this Board in this case on August 2, 2011.

WHEREFORE Respondent, HERITAGE COAL COMPANY LLC, requests the Board to grant HCC's Motion For Partial Summary Judgment, to enter summary judgment in HCC's favor

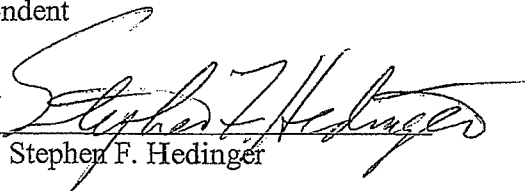
and against the State with respect to all allegations of violations asserted by the State in Count III of its Complaint, and to grant HCC all other such relief this Board deems just and appropriate.

Dated: September 8, 2011

Respectfully submitted,

HERITAGE COAL COMPANY LLC,
Respondent

By: _____


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