

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.)
)
 HERITAGE COAL COMPANY, L.L.C.)
 (f/k/a PEABODY COAL COMPANY)
 L.L.C.),)
)
 Respondent.)

PCB NO. 99-134
(Enforcement - Water)

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SEP 20 2011

STATE OF ILLINOIS
Pollution Control Board

ORIGINAL

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on September 16, 2011, I 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 RESPONSE TO RESPONDENT'S MOTION FOR LEAVE TO FILE ITS SUPPLEMENT TO THE MOTION FOR PARTIAL SUMMARY JUDGMENT, 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
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: September 16, 2011

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
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v.)
)
HERITAGE COAL COMPANY LLC, f/k/a)
PEABODY COAL COMPANY, LLC,)
)
Respondent.)

PCB NO. 99-134
(Enforcement)

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**COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION FOR LEAVE TO FILE
ITS SUPPLEMENT TO THE MOTION FOR PARTIAL SUMMARY JUDGMENT**

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. The Respondent's Reply was filed on July 12, 2011. The Respondent's most recent motion for leave pertains to a factual matter represented in its summary judgment motion to be undisputed.

2. The Complainant's Response noted that the admissions and denials in the Respondent's Answer (filed on December 23, 2002) are relevant to any consideration of its Motion for Summary Judgment. In its Answer, the Respondent denied many allegations of fact and included within these denials a statement that "reclamation activities at the Mine have been ongoing" since July 1993. Answer at ¶ 5. However, the complaint does not allege that reclamation activities at the Mine have been ongoing. This factual claim regarding reclamation

activities is also not pleaded in any of the Respondent's sixteen affirmative defenses. Answer at ¶s 74 - 89. The record exclusive of the Motion for Summary Judgment is devoid of any information regarding reclamation.

3. In an effort to support this factual contention regarding reclamation, designated as undisputed fact #20, the Respondent did not submit any affidavits regarding the direct proof of the contention. Supreme Court Rule 191(a) requires an evidentiary affidavit for summary judgment to consist of facts admissible in evidence, and not merely conclusions, to be made on the personal knowledge of the affiant, and to affirmatively show that the affiant, if sworn as a witness, can testify competently to such facts. The Respondent could have provided affidavits from present or past employees with direct personal knowledge of reclamation activities, and could have tendered admissible business records regarding the status of reclamation from either corporate records or documents required by and filed with the Illinois Department of Natural Resources, Office of Mines and Minerals. Instead, the Respondent elected to file an affidavit from one of its attorneys to verify that the attached document was a true and accurate copy printed by the attorney from information posted by the Department in an electronic database.

4. The Complainant's Response objected to this factual contention and its manner of attempted proof:

The Respondent's factual statement #15, which cites to paragraphs 4 and 5 of the McGarvie affidavit, represents the following: "As of early 1993, land reclamation so as to establish the approved post-mining land uses for most of the Disposal Areas had not yet begun. Land reclamation of the Disposal Areas in this regard was not completed until a number of years later." The first sentence is not disputed and is based upon Mr McGarvie's review of records "from the time active mining began at that facility through the cessation of active mining at that facility." McGarvie at ¶ 4. However, while the second sentence appears verbatim in paragraph 5 of his affidavit, Mr McGarvie does not indicate when the suggested reclamation of the refuse disposal areas has been completed.

In fact, none of Respondent's proffered facts indicates when reclamation actually did commence and when any such activities might have been completed.

The Complainant objects to factual statement #20, which is based upon an exhibit described in the affidavit of W.C. Blanton, one of the attorneys for HCC, as a printout of the IDNR website. Blanton affidavit at ¶ 3. This statement of fact improperly relies on the IDNR website for a description of the "current status" of Eagle No. 2 under Permit #34 as "In reclamation, has outstanding bond." The factual issues relating to reclamation must be supported, if at all, by competent and admissible evidence. First of all, this printout summary does not necessarily qualify as a business record and the affidavit provides no foundational showing. The Board's procedural rule at 35 Ill. Adm. Code 101.626 requires the admission of "evidence that is admissible under the rules of evidence as applied in the civil courts of Illinois, except as otherwise provided in this Part." In particular, Section 101.626(e) governs the admission of business records. The Complainant does not dispute that the regulation of coal mining is the "business" of IDNR's Office of Mines and Minerals. The problem is the manner in which the Respondent is tendering this hearsay information. The lack of foundation precludes consideration of exhibit 1 to the Blanton affidavit.

Response to Motion for Summary Judgment at pages 8-9. Despite what the Respondent may indicate in its motion, the State's objection was the lack of foundation for the IDNR/OMM website printout. In order to assist the Board in considering the potential admissibility of hearsay evidence, our Response discussed applicability of the newly codified rules of evidence to the Blanton Affidavit and its website printout.

5. The Respondent has attempted to fix this problem – not by providing testimonial affidavits by persons who could testify to facts relating to the reclamation contentions – but rather by "establishing precisely the facts stated in the Blanton Affidavit" through requests to admit facts. While the Board may well accept this information, the record upon which the Board must decide the summary judgment request still does not indicate what reclamation activities are ongoing, when such activities actually commenced, and whether any such activities have addressed the refuse disposal areas which are the sources of the polluttional discharges. Now that the Respondent has provided a proper foundation for the admissibility of the IDNR/OMM

website printout – with the factual admissions by the State providing such foundation – the record upon which the Board must decide the summary judgment request now includes “those now indisputably undisputed facts” [motion at ¶ 10] that reclamation is ongoing. The probative value of this evidence is much less than a testimonial affidavit from any of the Respondent’s employees whose knowledge of the actual reclamation activities is personal and direct. The *weight* of the Blanton Affidavit and its website printout is also much less than the Respondent’s own “business records” regarding the Mine and documenting the commencement of reclamation at some unknown point in time after the Mine ceased operations in July 1993.

6. In any event, the Complainant responds to this most recent Motion for Leave by acknowledging that the Respondent has now provided some foundation to support the introduction of the Blanton Affidavit and its website printout. However, the Board must be skeptical of the Respondent’s substantive assertion: “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.” Motion at ¶ 3; emphasis added. This assertion is not supported by the record. For instance, the affidavit of Michael Munday, an employee of the Respondent who is responsible for the Mine’s permitting records, merely indicates that the Respondent has not yet sought to be released from the reclamation bond, but does not explain why.

7. It is certainly one *reasonable inference* that the regulatory status of the Mine (“In reclamation, has outstanding bond.”) is due to some unexplained ongoing activities at the Mine pursuant to the reclamation plan approved by IDNR/OMM permits. However, since there are no facts regarding the nature of any such activities and the extent to which such activities are


actually ongoing, another *reasonable inference* may be that the Respondent will not seek to be released from the IDNR/OMM bond until some more advantageous point in time. In other words, the Respondent is seeking to avoid further liability for the groundwater contamination now subject to a GMZ because the Mine is in reclamation and the Mine will (according to the Respondent) remain in reclamation until any bond release. The Respondent may choose to keep this Mine in reclamation until this enforcement action may be adjudicated by the Board. While this course of action may be acceptable for mining regulatory purposes, the Board may certainly consider that a more objective and fact-based determination may be necessary in the context of groundwater protection.

WHEREFORE, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully responds to this most recent Motion for Leave to File its Supplement to the Motion for Partial Summary Judgment.

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
Environmental Bureau
Assistant Attorney General

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: 9/15/11

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STATE OF ILLINOIS
Pollution Control Board

CERTIFICATE OF SERVICE

I hereby certify that I did on September 16, 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 FILING and COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION FOR LEAVE TO FILE ITS SUPPLEMENT TO THE MOTION FOR PARTIAL SUMMARY JUDGMENT upon the persons listed on the Service List.

ORIGINAL



THOMAS DAVIS, Chief
Assistant Attorney General

This filing is submitted on recycled paper.

SERVICE LIST

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Brad Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, #11-500
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OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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STATE OF ILLINOIS
Pollution Control Board

Lisa Madigan
ATTORNEY GENERAL

September 16, 2011

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601-3286

ORIGINAL

Re: People v. Heritage Coal Company, f/k/a Peabody Coal Co.
PCB 99-134

Dear Clerk Therriault:

Enclosed for filing please find the original and ten copies of a NOTICE OF FILING and COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION FOR LEAVE TO FILE ITS SUPPLEMENT TO THE MOTION FOR PARTIAL SUMMARY JUDGMENT in regard to the above captioned matter. Please file the originals and return a file-stamped copy to our office in the enclosed self-addressed stamped envelope.

Thank you for your cooperation and consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read "Thomas Davis", is written over a horizontal line.

Thomas Davis
Assistant Attorney General
500 South Second Street
Springfield, Illinois 62706

TD:lh
Enclosures