

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

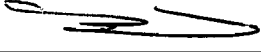
PLEASE TAKE NOTICE that on July 25, 2011, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, c/o John T. Therriault, Assistant Clerk, James R. Thompson Center, 100 W. Randolph St., Ste. 11-500, Chicago, IL 60601, COMPLAINANT'S RESPONSE TO MOTION TO STRIKE and COMPLAINANT'S RESPONSE TO MOTION REGARDING SECOND SET OF REQUESTS FOR ADMISSION, copies of which are 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: April 25, 2011

CERTIFICATE OF SERVICE

I hereby certify that I did on July 25, 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, COMPLAINANT'S RESPONSE TO MOTION TO STRIKE, and COMPLAINANT'S RESPONSE TO MOTION REGARDING SECOND SET OF REQUESTS FOR ADMISSION upon the persons listed on the Service List.



THOMAS DAVIS, Chief
Assistant Attorney General

This filing is submitted on recycled paper.

SERVICE LIST

Stephen F. Hedinger
Sorling, Northrup, Hannah, Cullen & Cochran
800 Illinois Building
Springfield, IL 62705

W. C. Blanton
Husch Blackwell LLP
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Kansas City, MO 64112

Brad Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, #11-500
100 West Randolph Street
Chicago, IL 60601

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HERITAGE COAL COMPANY, LLC, f/k/a)	
PEABODY COAL COMPANY, LLC,)	
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COMPLAINANT'S RESPONSE TO MOTION TO STRIKE

NOW COMES the Complainant, PEOPLE OF THE STATE OF ILLINOIS, and responds to the Respondent's Objections to and Motion to Strike the State's Irrelevant Evidentiary Submissions, and states as follows:

1. On April 11, 2011 the Complainant timely filed a comprehensive response to the Motion for Summary Judgment. This response incorporated evidentiary submissions consisting of counter-affidavits by Rick Cobb and Bill Buscher of the Illinois EPA, a document obtained from the Respondent in Discovery and admitted by the Respondent to be genuine ("Gastreich Memorandum"), and a permit document authenticated by Joseph Angleton of the Office of Mines and Minerals. The Respondent seeks to strike these documents on the grounds of a perceived lack of relevance.

2. First, this motion to strike is misdirected. Section 101.610(l) of the Board's procedural rules provides that the hearing officer is to rule upon objections and evidentiary questions. Yet, the Respondent has directed its Objections to and Motion to Strike the State's Irrelevant Evidentiary Submissions to the Board and not the hearing officer. The Complainant

requests that the hearing officer take up and rule upon these objections and evidentiary questions, especially since the ten page motion consists merely of additional substantive argument regarding the merits of the summary judgment request and does not cite *any* legal authority or case law as support to strike any of the Complainant's evidentiary submissions. 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." The Respondent's reliance upon its own perspective of relevance is insufficient to justify the drastic relief it seeks. In contrast, in the People's response to the motion for summary judgment, we set forth the specific legal bases for each of the submissions to which the Respondent now objects. For instance, the Complainant discussed the recent codification of the Illinois Rules of Evidence in support of our evidentiary submissions (and in objection to the Respondent's submissions); no mention of this or any other applicable law is made in the Respondent's motion. Whether intentional or not, the motion should not be considered as additional substantive argument¹ by the Board during its review and rulings upon summary judgment.

3. The legal and factual sufficiency of affidavits are not defined by the Board's rules, but pursuant to Section 101.100(b) "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." Supreme Court Rule 191(a) mandates that an affidavit must meet five requirements: (1) it must be made on the personal knowledge of the affiant; (2) it must consist of facts admissible in evidence; (3) it must state relevant facts, not conclusions; (4) it must have attached sworn or certified copies of

¹ E.g., the Respondent raises new arguments regarding interrogatory answers at page 9.

all documents on which the affiant relies; and (5) it must affirmatively show that the affiant, if sworn as a witness, can testify competently to its contents.

4. It is well settled that, where well-pleaded facts set forth in an affidavit in support of a motion for summary judgment are not contradicted by counter-affidavit, facts so averred must be taken as true; in other words, if a moving party's affidavits are uncontested, the material facts stated therein must be accepted as true. At the outset of our response to the summary judgment motion, we disputed many of the purported "undisputed facts" tendered by the Respondent and still contend that these matters are not well-pleaded; some of these factual allegations were based upon affidavits and are countered by our affidavits. Because the Respondent has the burden of proof to both show that there are no genuine issues of material fact and to affirmatively establish that it is legally entitled to summary judgment, the generally applicable law is that 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 Complainant's counter-affidavits and supporting documents must be *liberally* construed.² The Complainant respectfully suggests that liberal construction of our evidentiary submissions is clearly mandated, and with this proper review by the Board the dispute over relevance may be resolved. Of course, proper review for summary judgment purposes does not entail the resolution of factual disputes.

5. The authority for this motion to strike is not stated within the motion. Section 101.506 of the Board's procedural rules provides: "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

² See *Morris v. Margulis*, 307 Ill. App. 3d 1024, 1032 (5th Dist. 1999).

of the challenged document. . . .” The Respondent’s motion is therefore untimely under this rule. 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. Section 2-1005(f) of the Code of Civil Procedure, 735 ILCS 5/2-1005(f), only allows a remedy for affidavits “in bad faith.” The Respondent does not cite Section 2-1005(f) and does not allege that any affidavit was not in good faith. In determining whether the moving party is entitled to summary judgment and whether any genuine issue of material fact exists, the Board must construe the pleadings, admissions and affidavits strictly against the movant and liberally in favor of the opponent. In this context, the Respondent’s objections go merely to the weight of the Complainant’s evidentiary submissions and not to admissibility.

6. The Respondent also ignores the Board’s prior decisions regarding the application of evidentiary constraints in summary judgment proceedings, especially as to the materiality of facts. For instance, the Board has noted that, “in determining the genuineness of a fact for summary judgment, a court should consider only facts admissible in evidence.”³ “An issue of fact is not material, even if disputed, unless it has legal probative force as to the controlling issue.”⁴ Since the Respondent cites neither Board precedent nor any Illinois case law, the motion does not address these standards of review. The “controlling issue” (raised in seeking summary judgment on Count III) is, however, stated as follows: “whether the GWQS that the State contends were applicable to the groundwater in question actually as a matter of law applied to that groundwater

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).

⁴ *Ibid.*, quoting *First America Bank, Rockford, N.A. v. Netsch* (1995), 166 Ill.2d 165, 178.


at those specific locations and times.”⁵ The Respondent then posits numerous mixed questions of law and fact upon which the Board is requested to make findings of fact and conclusions of law. In our Response, we argued that the record for the summary judgment request, and particularly the denials in the Respondent’s Answer to the Third Amended Complaint, precluded the requisite determination that no genuine issue of material fact exists, and we provided the counter-affidavits and documents now subject to this motion to strike. Unless the Respondent may show that these counter-affidavits and documents are somehow inadmissible, and this the Respondent fails to do, then the motion to strike ought to be denied.

WHEREFORE, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully objects to this Motion to Strike.

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: 7/25/11

⁵ Motion to Strike at page 3.

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PEABODY COAL COMPANY, LLC,)	
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COMPLAINANT'S RESPONSE TO MOTION
REGARDING SECOND SET OF REQUESTS FOR ADMISSION

NOW COMES the Complainant, PEOPLE OF THE STATE OF ILLINOIS, and responds to the Respondent's Motion to Shorten Time for Complainant to Respond to Requests for Admission, and states as follows:

1. On April 11, 2011 the Complainant timely filed a comprehensive response to the Motion for Summary Judgment. We subsequently did not object to the Respondent's request for leave to file a reply, and to subsequent requests for extensions of time to file such a reply.
2. On July 12, 2011 the Respondent filed its reply brief as well as various other motions relating to our summary judgment response. The Respondent also filed a Second Set of Requests for Admission pursuant to Section 101.618 and this motion seeking an expedited answer from the Complainant. Each of the requests for admission appears to address evidentiary and technical objections raised by the Complainant in our response to the summary judgment motion, but the substance of the requests for admission is not relevant to the issues of diligence and timeliness.

3. It is noteworthy that Section 101.618(a) requires that all requests to admit must be served upon a party no later than 35 days before hearing. This procedural rule also requires that all answers or objections to requests to admit must be served upon the party requesting the admission within 28 days after the service of the request. These requirements ensure that any *timely* request for admission is responded to before the evidentiary hearing begins. Since any motion for summary judgment must be adjudicated upon the existing record as supplemented by any testimonial affidavits and evidentiary submissions, the movant has a responsibility to establish the record upon which it will rely prior to filing a motion for summary judgment. In this matter, the Complainant has objected to certain portions of the Respondent's supplementation of the record made with the filing of its motion on December 20, 2010; it is also noteworthy that the hearing officer's deadline for this filing had also been extended (without objection by the People) to allow leave for the December 20th filing. In this context, it certainly appears that the Second Set of Requests for Admission is untimely.

4. The Respondent has also not been diligent in seeking leave from the hearing officer. Sections 101.610 and 101.618(b) of the Board's procedural rules clearly indicate that the hearing officer has authority over discovery matters and may extend the time for filing any request for admission or answer thereto. This motion is directed to the Board instead. While the hearing officer has demonstrated his willingness to deal with timing issues and schedules for filing and responses, the Respondent did not seek leave from the hearing officer in filing the Second Set of Requests for Admission or in requesting an expedited response deadline.

5. The motion was served upon the Complainant on July 14, 2011. The requested relief was to force the complainant to respond by noon on Monday, July 18, 2011. This suggested

deadline has already passed and the motion is moot. The Complainant will answer the Second Set of Requests for Admission within the 28 days allowed by the Board's procedural rules.

WHEREFORE, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully objects to this Motion to Shorten Time for Complainant to Respond to Requests for Admission.

Respectfully submitted,

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

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
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