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Pollution Control Board

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Jim Ryan
ATTORNEY GENERAL

May 2, 2002

The Honorable Dorothy Gunn
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph
Chicago, Illinois 60601

Re: ***People v. Peabody Coal Company***
PCB No. 99-134

Dear Clerk Gunn:

Enclosed for filing please find the original and ten copies of a NOTICE OF FILING and COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS OR STRIKE in regard to the above-captioned matter. Please file the original and return a file-stamped copy of the document to our office in the enclosed, self-addressed, stamped envelope.

Thank you for your cooperation and consideration.

Very truly yours,

Jane E. McBride
Environmental Bureau
500 South Second Street
Springfield, Illinois 62706
(217) 782-9031

JEM/pp
Enclosures

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	**PCB NO. 99-134**
	)	**(Enforcement)**
PEABODY COAL COMPANY,	)	
a Delaware corporation,	)	
	)	
Respondent.	)	

NOTICE OF FILING

To: David R. Joest, Esq.
Peabody Coal Company
1951 Barrett Court
P.O. Box 1990
Henderson, KY 42420-1990

Stephen F. Hedinger
Attorney at Law
1225 South Sixth Street
Springfield, IL 62703-2407

W. C. Blanton
Blackwell Sanders Peper Martin LLP
2300 Main Street, Suite 1000
Kansas City, MO 64108

PLEASE TAKE NOTICE that on this date I mailed for filing with the Clerk of the Pollution Control Board of the State of Illinois, COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS OR STRIKE.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

JAMES E. RYAN
Attorney General of the
State of Illinois

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

BY: _____
JANE E. McBRIDE
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: May 2, 2002

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	**PCB NO. 99-134**
	)	**(Enforcement)**
	)	
PEABODY COAL COMPANY, a Delaware corporation,	)	
	)	
	)	
Respondent.	)	

COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS OR STRIKE

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, and responds to Respondent's Motion to Dismiss or Strike the Amended Complaint, respectfully requesting that Respondent's motion be denied on the following grounds:

Applicable Standard - Motion to Dismiss

Section 103.204(c) of the Illinois Pollution Control Board's procedural rules, 35 Ill. Adm. Code 103.204(c), provides as follows

> Section 103.204. Notice, Complaint, and Answer
>
> * * *
>
> c) The compliant must be captioned in accordance with 35 Ill. Adm. Code 101.Appendix A, Illustration A and contain:
>
> 1) A reference to the provision of the Act and regulations that the respondents are alleged to be violating;
>
> 2) The dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations. The complaint must advise respondents of the extent and nature of the alleged violations to reasonably allow preparation of a defense; and
>
> 3) A concise statement of the relief that the complainant seeks.

When ruling upon a motion to dismiss, the Board relies upon the same principles as

applied in the Illinois Code of Civil Procedure 2-615 and 2-619 (735 ILCS 5/2-615 and 5/2-619). The Board will take all well-plead allegations in the complaint as true. *Miehle v. Chicago Bridge and Iron Co.*, PCB 93-150, at 10 (Nov. 4, 1993); *Krautsack v. Patel*, PCB 95-143, at 2 (June 15, 1995). The complaint should not be dismissed unless no set of facts could be proven that would entitle complainant to relief. *Id.*

Plaintiff should plead ultimate rather than evidentiary facts in his complaint. *People ex rel Scott v. Carriage Way West, Inc.* 1980, 88 Ill. App. 3d 297, 410 N.E. 2d 384, reversed on other grounds, 88 Ill.2d 300, 430 N.E.2d 1005. All plaintiff is required to do in a complaint is set forth such information as reasonably informs opposite party of nature of claim or defense which he is called upon to meet; he is not required in his complaint to evidence or prove anything; rather, except to extent a plaintiff is required to or wishes to attach a written document relied upon to his complaint, the plaintiff is expected to plead ultimate, not evidentiary facts. *Shugan v. Colonial View Manor*, 1982, 107 Ill. App.3d 458, 437 N.E.2d 731.

The question presented by a motion to dismiss under Section 2-615 is whether sufficient facts are contained in the pleadings which, if proved, would entitle the plaintiff to relief. *Barber-Colman Company v. A and K Midwest Insulation Company*, 236 Ill. App. 3d 1065, 1069, 603 N.E.2d 1215, 1219; *Urbaitis v. Commonwealth Edison*, 143 Ill. 2d 458, 475 (1991), 575 N.E.2d 548, 555. To survive a motion to dismiss, a complaint must present a legally recognizable claim as its basis for recovery, and it must plead sufficient fact which, if proved, would demonstrate a right to relief. *People ex rel Fahrner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 308 (1981), 430 N.E.2d 1005. In ruling on a motion to dismiss, a court must accept as true all well pleaded facts alleged in the complaint, as well as all reasonable inferences which can be drawn from those facts. *Robbins v. City of Madison*, 193 Ill. App. 3d 379, 381 (5th Dist. 1990), 549 N.E.2d 947; *Hinthorn v. Roland's of Bloomington, Inc.*, 119 Ill. 2d 526, 529 (1988), 519

N.E.2d 909, 911; *Estate of Johnson v. Condell Memorial Hospital*, 119 Ill. 2d 496, 499 (1988), 520 N.E.2d 37. A cause of action should not be dismissed unless it clearly appears that no set of facts can be alleged and proven which would entitle the plaintiff to relief. *Robbins*, 193 Ill. App. 3d at 381; *Northrop Corp. v. Crouch-Walker, Inc.*, 175 Ill. App. 3d 203, 212 (1988), 529 N.E.2d 784, 789.

Applicable Standard - Motion to Strike

In a ruling on a motion to strike in the case of People v. State Oil Company, et al., PCB 97-103, May 18, 2000, the Board order stated: A motion to strike is an appropriate vehicle to address immaterial matter in a complaint. *Browning v. Heritage Ins. Co.*, 33 Ill. App. 3d 943, 948, 338 N.E. 2d 912, 916-17 (2d Dist. 1975) ("If the necessary facts appear in the complaint but are encumbered with unnecessary matter . . . the motion should ask for a correction of the leading by striking out specified immaterial matter[.]") "A fact is material to the claim in issue when the success of the claim is dependent upon the existence of that fact." *Lindenmier v. City of Rockford*, 156 Ill. App.3d 76, 88, 508 N.E. 2d 1201, 1209 (2d Dist. 1987).

Count I.

Count I

1. Respondent identifies the fact that there is no reference to Saline Valley Well No. 2 in Paragraph 7 of the first count of the Amended Complaint. It is a typographical error that the Number 2 well was not included with the information set forth in this paragraph. The paragraph correctly alleges that there were five wells in the well field at the time the Amended Complaint was filed, and correctly identified the wells as Wells No. 1 through 5. Construction dates are available for Well No. 2. This data is in the possession and control of the Complainant and it has been provided to Respondent in response to discovery requests. It is Complainant's position is that this typographical error by no means prejudices Respondent, nor

does it by any means cause Respondent to be misinformed as to the nature of the allegation. Nonetheless, Complainant respectfully requests leave to amend the Amended Complaint so as to correct the typographical error.

Respondent further claims in Paragraph 1 of its Motion that SVCD and its public water supply activities bear no apparent relevance to the substantive allegations of Count I. SVCD and the public water supply activities are relevant because data from the SVCD wells have been made available to both the Complainant and the Respondent as evidence and a factual basis for the allegation that inorganic chemicals from Eagle No. 2 have contaminated the groundwater on-site and off-site of the Eagle No. 2 mine and threaten the SVCD well field. The combination of paragraphs 6, 7, 8 and 9 of the Amended Complaint set forth the factual basis and the relevancy of the SVCD wells and the public water supply activities by establishing the presence and dates of existence of the SVCD and its wells, the SVCD's wells location relative to the mine, and the impact on the SVCD wells, specifically indicated by the sulfate concentration levels recorded at Well 5. The SVCD well sampling data provides specific information as to elevated levels of contamination. Complainant is not under an obligation to plead evidence. The complete set of data from the SVCD wells indicates the levels of inorganics detected in the wells, and as indicated in Count I, this contamination is alleged to have migrated from the Eagle No. 2 mine. The complete set of data in the possession and control of Complainant has been provided to Respondent in discovery upon its request for all data that serve as the factual basis for the allegations set forth in the complaint. Complainant has met its burden to plead ultimate fact and reasonably inform the Respondent of the nature of the allegations so that it might prepare its defense. Complainant included sample data available for the mine itself in the Amended Complaint due to the manner in which the State's groundwater regulations are applied to mine refuse disposal sites. The tabular format was

most conducive to setting forth which standard applied to a particular set of circumstances. Some of the data regarding impacts of the SVCD well field are also set forth in the complaint. Complainant pled this matter so as to meet the Board's pleading requirements that it provide the dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations of the Act and regulations. The information as presented not only provides a basis for the allegation of migration of contamination, but also as to the specific levels of contamination at the source. The SVCD data were not available in tabular form to the Complainant at the time of the filing of the complaint; these data were only available as provided by SVCD on separate reporting forms. The SVCD data have since been included in various studies done on the site and may now exist in compiled form within the data provided as a result of these studies. Any such information in the possession and control of the Complainant has been provided to the Respondent in response to discovery requests. All information relevant to SVCD, the SVCD wells and the public water supply activities are relevant to the allegations of the complaint. Therefore, there is no basis for Respondent's claim that Paragraph 7 should be stricken.

2. In response to Paragraph 2 of Respondent's Motion, as the Respondent is well aware, a portion of the wells listed in Paragraph 15 of Count I of the Amended Complaint as wells that are not located within the outermost edge of the coal refuse disposal areas are wells that are located off-site. Further, as stated in detail in response to Paragraph 1 of the Respondent's Motion, sampling data regarding the level of inorganic concentrations occurring in the SVCD wells have been readily available to the Complainant and the Respondent, and allegations of rising inorganic levels occurring in the SVCD wells are set forth in the Amended Complaint. Complainant has pled a factual basis that certainly reasonably informs the Respondent of the nature of the allegations. By identifying the wells themselves, the location of

which is certainly known to the Respondent in that the wells are owned and controlled by the Respondent, the Complainant has met its pleading burden. Complainant again states, here in response to the claims of Respondent's Paragraph 2 of its Motion, that the Complainant is not under an obligation to plead evidence. Complainant has made the factual allegation that inorganic chemicals have leached from the mine refuse at the Eagle No. 2 mine into the groundwater on-site and have migrated off-site. This is evidenced by the sample results obtained at the various wells, located on-site and off-site. As such, there is no basis for Respondent's claim that the last sentence of Paragraph 8 should be stricken.

3. In response to Paragraph 3(a), (b) and (c) of Respondent's Motion, Complainant reiterates and incorporates the arguments and explanations provided in response to Paragraphs 1 and 2 of Respondent's Motion.

The allegations that inorganic chemicals other than sulfates have potentially contaminated groundwater are supported by factual detail provided in the complaint as well as other sampling results that have been provided to the Respondent. In that the allegations are supported in the complaint and by evidence produced in discovery, this is no basis for Respondents' claim that the allegation should be stricken.

Respondent's next claim is that Complainant must include the SVCD sample results in its Amended Complaint. Complainant takes the position that it need not include all sampling results. Sampling results are evidence, and as such they have been produced in response to discovery requests, and will be presented as evidence at hearing.

With regard to Paragraph 9 of the Amended Complaint, Respondent identifies use of the terms "well fields". At the time of the filing of the Amended Complaint, SVCD had five wells, which constituted a well field. The term should indeed be used in its singular form. Use of the term "well fields" in the Amended Complaint is a typographical error. Complainant's position is

that this typographical error by no means prejudices Respondent, nor does it by any means cause Respondent to be misinformed as to the nature of the allegation. Nonetheless, Complainant respectfully requests leave to amend the Amended Complaint so as to correct the typographical error. Within the paragraph in which Respondent identifies the use of the term "well fields", Respondent again claims that the Amended Complaint contends no factual support for the allegation that the groundwater drawn by the SVCD wells is "threatened" and that the constituent levels are relevant to the Eagle No. 2 mine. In Paragraph 6 of the Amended Complaint, it is alleged the SVCD wells are southwest and hydraulically down-gradient of the Eagle No. 2 mines. The sampling data provided in the Amended Complaint from the mine itself indicate contaminant levels coming from the source. There is specific ultimate fact allegations that the contamination is coming from the mine set forth in paragraphs 6, 7, 8, 9 and 15 and 20. Both the upgradient and downgradient well sampling data is either set forth in the complaint or is evidence provided in response to discovery requests. Data that has become available subsequent to the filing of the Amended Complaint, including modeling data, studies and reports, and modeling done by the Respondent itself in 1984 that has only recently been made available in response to discovery requests, provide an evidentiary factual basis for these allegations and have been made available to both parties. Complainant has met its pleading burden by setting forth ultimate facts in the Amended Complaint, and is not under an obligation to plead evidence.

Respondent next claims that Complainant did not define the term "deteriorating" and that the Complainant's allegation of deteriorating water quality is unsupported. Complainant's position is that it did provide a sufficient factual basis in the Amended Complainant for the allegations set forth in Paragraph 9 of the Amended Complaint. It specifically listed sample results from SVCD's Well 5 which presented solid data as to the levels of sulfate occurring at

this well. These data were provided as an indicator of the inorganic levels experienced at the SVCD wells, and presented as such. Otherwise, in this paragraph, Complainant's allegation consists of a statement of ultimate fact.

In the next paragraph of Respondent's Motion, on page 5, that begins with the word "Fifth", now able to find a dictionary definition, Respondent chooses to pursue an argument regarding the facts alleged. Respondent in this paragraph is arguing the merits of the case. Respondent is providing counsel's own characterization of the data set forth in the Amended Complaint. The whole point of an evidentiary hearing is to allow the parties to present evidence, examine the evidence, to cross-examine and argue the facts. It is Complainant's factual claim that the data as presented represented a deteriorating condition, a condition that represented a threat to water quality. Respondent's argument regarding the facts is not a proper basis for its claim that the allegations of Paragraph 9 should be struck.

Again, in its paragraph on page 5 of its Motion beginning with the word "sixth", Respondent claims that Complainant is obligated to plead evidence. Complainant has made an allegation of ultimate fact. The data upon which it based this allegation show contaminant level trends that threatened the public water supply. The trends reflected by the data are not something that would be expected in a case of natural variation, the trends indicated contamination migration. In that the presence of sulfates result in a laxative effect, particularly hazardous to young children and the elderly, ultimate facts have been pled that support the allegation that given the rate at which the sulfate levels are increasing, SVCD would soon be in a position where it would have to provide treatment. The term "significant" is used to reflect the relatively rapid rate at which increases are occurring and the resultant level of concentration. The use of the words "significant increase" is an appropriate allegation in the context of the claim and the alleged violation of the Illinois Environmental Protection Act. As such,

Respondent has been put on notice as to the nature of the allegation. It has requested the documentation and the factual basis of this claim in the discovery process, and that information has been provided by the Complainant.

Contrary to Respondent's argument set forth in the paragraph which begins with the words "Paragraph 9" on page 5 of its Motion, the allegations set forth in Paragraph 9 of the Amended Complaint do support Complainant's allegations that groundwater standards have been exceeded by discharges from the mine and that the contamination has migrated off-site. The exceedence of standards and the levels of contaminants that are significantly increasing is a sufficient factual basis for the allegation of violation of Section 12(a) and 12(d) of the Illinois Environmental Protection Act, 415 ILCS 5/12(a) and 12(d). Water pollution is defined as a discharge of any contaminant into any waters of the State as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious. Violation of regulations or standards also is the basis of a Section 12(a) violation. Sulfates are known to have a laxative effect. The introduction of sulfates in significantly increasing levels is detrimental to a water supply and a Class 1 groundwater resource. The introduction of sulfates in significantly increasing levels could also be considered a nuisance condition. As such, the conditions occurring at the SVCD wells, as alleged in the Amended Complaint, are relevant to the allegation of violation of Section 12(a) and 12(d) as set forth in the Amended Complaint.

4. a. Respondent identifies an incorrect citation to the regulations. Respondent is correct in noting that the citation must be in error. The applicable regulation is 35 Ill. Adm. Code 620.410 pursuant to 35 Ill. Adm. Code 620.450(b)(5)(B). Complainant respectfully requests leave to amend the Amended Complaint so as to correct the typographical error.

4. b. In response to the question raised by Respondent, Complainant states that, pursuant to the applicable regulation, the standard is "existing concentrations". Therefore, no

violations are alleged. The information regarding Slurry No. 2 is included to set forth exactly how the groundwater regulations are being applied to this site. Further, sampling data are available for these wells and serve as evidence of contamination at the source. These data show levels of contamination that have occurred at these locations at various times relevant to the complaint. As such, the sampling data from these wells are relevant to an allegation of violation of Section 12(a) and 12(d) of the Act. As such, this information is relevant to the allegations and should not be struck.

4. c. In response to the question raised by Respondent, Complainant states that the applicable regulations direct the reader to 35 Ill. Adm. 302.208 and 302.304. A reading of 35 Ill. Adm. Code 302.208 renders it inapplicable to the subject site and situation. Therefore, 35 Ill. Adm. Code 302.304 is the applicable standard. The reference to 35 Ill. Adm. Code 302.208 was included for the sake of completeness.

4. d. Complainant's response to this paragraph 4.d is the same as its response for paragraph 4.c.

4. e. Complainant's response to this paragraph 4.e is the same as its response for paragraph 4.b.

4. f. Complainant's response to this paragraph 4.f is the same as its response for paragraphs 4.b and 4.e. Complainant again emphasizes that sampling data are available for all of the wells. Such data indicate the levels of contaminants occurring at these wells at times relevant to the allegations of violation of Section 12(a) and 12(d) contained within the Complaint.

Contrary to Respondent's argument that Count I is "confusing and misleading", in fact the allegations of Count I are set forth in exacting detail. The paragraphs describe in detail how the groundwater regulations have been applied to this site. There is sufficient detail to fully

explain how the regulations have been applied. As such, Count 1 is not misleading and there is not basis to strike any portion of it. Complainant has identified instances of typographical error and respectfully requested leave to amend.

5. In response to Respondent's question as to the propriety of including the definition of "Release", Complainant states that the definition has been included to specifically set forth that the term discharge is included within the definition of release. Therefore, a "release" is considered a "discharge" and a "discharge" is a "release". The term "discharge" itself is not defined in the Act. Both terms are relevant to violations of the Act and the regulations.

6. In response to the question raised in paragraph 6 of Respondent's motion, Complainant reiterates and incorporates the response provide for paragraph 5 of Respondent's Motion.

For the reasons and on the grounds stated above in paragraphs 1 through 6, numbered to mirror and respond to those of Respondent's Motion, Respondent has failed to establish that Count I does not meet pleading requirements. In fact, Count 1 meets pleading requirements in exacting detail, necessary due to the complex nature of the facts of this case and the precision with which the groundwater regulations must be applied to those facts. None of the information set forth is surplusage. It is all relevant. Therefore, Complainant respectfully requests that the Board deny Respondent's motion to dismiss or strike. Further, Complainant respectfully requests leave to amend typographical errors, pursuant to such requests as have been specifically set forth in the preceding paragraphs.

Count II

7. Paragraph 7 of Respondent's Motion is unintelligible. The numbers of 3, 4, 5, 6, 7, 8 and 9 do not make sense in light of Respondent's reference to paragraphs 2-14. However,

it is apparent Respondent is seeking to strike paragraphs that exist in Count 1, and, for the reasons and on the grounds set forth above in the section of this response designated Count 1, Complainant states that Respondent has failed to established a basis for its request to dismiss or strike. Therefore, if Respondent is seeking to have incorporated paragraphs struck, Complainant responds, relying upon the reasons and grounds set forth in the preceding section of this response, that Respondent has not provided a sufficient basis for its request.

8. a. In response to the question raised by Respondent in paragraph 8.a of its Motion, Complainant refers the Board and the Respondent to the case law pertinent to the Board's interpretation of the applicability of Section 31 to actions brought at request of the Illinois EPA and on the Attorney General's own motion, most recently culminated in the case of *People v. John Crane*, PCB 01-76, May 17, 2001. The Amended Complaint filed in the instant matter was filed on May 26, 2000, almost a full year before the decision rendered on May 17, 2001 in the *Crane* case. Based on the Board's rulings regarding the applicability of Section 31 rendered to date at the time of the filing of the Amended Complaint, Complainant alleged the violations filed on request of the Illinois EPA in Count 1, and set forth the allegations brought on the Attorney General's own motion in a separate count, that being Count II. Therefore, the allegations set forth in Count I and Count II do not contradict each other nor are they inconsistent, but rather, the Count II allegations are to be read in conjunction with and added to the allegations of Count I.

8. b In Paragraph 8.b of Respondent's Motion, Respondent questions the applicability of 35 Ill. Adm. Code 203(f) and 204(b) given the language "at the point of withdrawal for treatment and distribution" within the contents of 35 Ill. Adm. Code 204(b). Rule 203 sets forth the general standards for waters of Illinois and Rule 204 sets forth standards applied to public and food processing water supply. Key to Complainant's allegations is the language of Rule

207, which was codified at 35 Ill. Adm. Code 303.203 in 1982, which provided, as set forth in paragraph 15 of Count II of the Amended Complaint:

> The underground waters of Illinois which are a present ***or a potential source*** of water for public and food processing supply ***shall meet*** the general use ***and*** public and food processing water supply standards of Subparts B and C. Part 302, except due to natural causes. (Emphasis added.)

As set forth in paragraph 23 of Count II of the Amended Complaint, Rule 204(b) was codified at 35 Ill. Adm. Code 302.304, and Rule 203(f) was codified at 35 Ill. Adm. Code 302.208. In that the Henry aquifer is, and has always been, what today would be considered a Class I resource and therefore a present or potential source of water for public and food processing supply, the Complainant has applied the standards as required pursuant to Rule 207. There is a typographic error in Paragraph 15 of Count II. The reference to 35 Ill. Adm. Code 303.203 should reference 1982 and not 1996. Complainant respectfully requests leave to amend the Amended Complaint so as to correct the typographical error.

9. In response to Respondent's question as to the propriety of including the definition of "Release", Complainant states that the definition has been included to specifically set forth that the term discharge is included within the definition of release. Therefore, a "release" is considered a "discharge" and a "discharge" is a "release". The term "discharge" itself is not defined in the Act. Both terms are relevant to violations of the Act and the regulations.

10. Complainant's response to paragraph 10 of Respondent's Motion is the same as its response to paragraph 9 of Respondent's Motion.

11. In response to paragraph 11, Complainant states that all factual information and evidence in the possession and control of the Complainant regarding the existence, discharge, release and migration of contaminants from the Eagle No. 2 mine site has been provided to the Respondent. Complainant has, in its discovery requests, asked for additional information

regarding inorganic chemicals that might have been used or disposed of at the mine site, utilizing the refuse disposal areas. In that Complainant has received very limited responses to its discovery requests, there still may be additional information forthcoming from the Respondent that might confirm the existence of other inorganic constituents in the refuse disposal areas. The factual evidence available to the Complainant is specific to the five inorganic chemicals listed in the Amended Complaint. This will be the extent of Complainant's information until such time as the Respondent fully responds to pending discovery requests.

12. As identified by the Respondent, the reference to paragraph 21 in paragraph 35 of Count II of the Amended Complaint is a typographical error. The reference should be to paragraph 27. Complainant's position that this typographical error by no means prejudices Respondent, nor does it by any means cause Respondent to be misinformed as to the nature of the allegation. Nonetheless, Complainant respectfully requests leave to amend the Amended Complaint so as to correct the typographical error.

For the reasons and on the grounds stated above in paragraphs 7 through 12, numbered to mirror and respond to those of Respondent's Motion, Respondent has failed to establish that Count II does not meet pleading requirements. In fact, Count II meets pleading requirements in exacting detail, necessary due to the complex nature of the facts of this case and the precision with which the groundwater regulations must be applied to those facts. None of the information set forth is surplusage. It is all relevant. Therefore, Complainant respectfully requests that the Board deny Respondent's motion to dismiss or strike. Further, Complainant respectfully requests leave to amend typographical errors, pursuant to such requests as have been specifically set forth in the preceding paragraphs within this section designated "Count II".

Count III

13. Paragraph 13 of Respondent's Motion is unintelligible. The numbers of 3, 4, 5,

6, 7, 8 and 9 do not make sense in light of Respondent's reference to paragraphs 2-14. However, it is apparent Respondent is seeking to strike paragraphs that exist in Count I, and, for the reasons and on the grounds set forth above in the section of this response designated Count I, Complainant states that Respondent has failed to established a basis for its request to dismiss or strike. Therefore, if Respondent is seeking to have the incorporated paragraphs struck, Complainant responds, relying upon the reasons and grounds set forth in the preceding section of this response, that Respondent has not provided a sufficient basis for its request.

14 Paragraph 14 of Respondent's Motion is unintelligible. The numbers of 22 and 26 do not make sense in light of Respondent's reference to paragraph 15. However, it is apparent Respondent is seeking to strike paragraphs that exist in Count I, and, for the reasons and on the grounds set forth above in the section of this response designated Count I, Complainant states that Respondent has failed to established a basis for its request to dismiss or strike. Therefore, if Respondent is seeking to have the incorporated paragraphs struck, Complainant responds, relying upon the reasons and grounds set forth in the preceding section of this response, that Respondent has not provided a sufficient basis for its request.

15. Paragraph 15 of Respondent's Motion is unintelligible. The number 27 does not make sense in light of Respondent's reference to paragraphs 16-18. However, it is apparent Respondent is seeking to strike a paragraph that exists in Count II, and, for the reasons and on the grounds set forth above in the section of this response designated Count II, Complainant states that Respondent has failed to established a basis for its request to dismiss or strike. Therefore, if Respondent is seeking to have the incorporated paragraph struck, Complainant responds, relying upon the reasons and grounds set forth in the preceding section of this response, that Respondent has not provided a sufficient basis for its request.

16. The citation and contention set forth in Paragraph 29 regarding the requirements

of 35 Ill. Adm. Code 601.101 are relevant to the non-degradation standard cited to in paragraph 31 of Count III of the Amended Complaint. The owners and official custodians of a public water supply must provide continuous operation and maintenance of public water supply facilities so that water shall be assuredly safe in quality, clean, adequate in quantity and of satisfactory mineral characteristics for ordinary domestic consumption. As alleged in previous paragraphs, elevated, increasing levels of sulfates occurred at the SVCD wells. Therefore, the owners and official custodians of the SVCD water supply were faced with increasing levels of sulfates, which are known to produce a laxative effect in drinking water, for which treatment or additional treatment would ne necessary due to the owners responsibility under 35 Ill. Adm. Code 601.101. Therefore, citation to 35 Ill. Adm Code 606.101 is relevant to the allegation that additional treatment would be necessary due to increasing levels of sulfates. Thereby, the Respondent is in violation of 35 Ill. Adm. Code 620.301. In that the citation to 35 Ill. Adm. Code 601.101 is relevant, there is no basis for Respondent's request that Paragraph 29 of Count III be struck.

17. In response to Respondent's question as to the propriety of including the definition of "Release", Complainant states that the definition has been included to specifically set forth that the term discharge is included within the definition of release. Therefore, a "release" is considered a "discharge" and a "discharge" is a "release". The term "discharge" itself is not defined in the Act. Both terms are relevant to violations of the Act and the regulations.

18. In response to Respondent's question as to the propriety of including the definition of "Release", Complainant states that the definition has been included to specifically set forth that the term discharge is included within the definition of release. Therefore, a "release" is considered a "discharge" and a "discharge" is a "release". The term "discharge"

itself is not defined in the Act. Both terms are relevant to violations of the Act and the regulations. Further, Respondent questions Complainant's reference to paragraph 10 in paragraph 43 of the Amended Complaint. The incorporations and numbering set forth in paragraphs 2 through 28 of Count III, results in paragraph 15 of Count 1 to be numbered as paragraph 10 of Count III.

19. In response to Respondent's question as to the propriety of including the definition of "Release", Complainant states that the definition has been included to specifically set forth that the term discharge is included within the definition of release. Therefore, a "release" is considered a "discharge" and a "discharge" is a "release". The term "discharge" itself is not defined in the Act. Both terms are relevant to violations of the Act and the regulations.

20. In paragraph 20 of Respondent's Motion, Respondent challenges the sufficiency of the pleading of a Section 12(a) violation. As stated in paragraph 3 herein, under the section of this response designated "Count I", the allegations set forth in the Amended Complaint do support Complainant's allegations that groundwater standards have been exceeded by discharges from the mine and that the contamination has migrated off-site. Violation of regulations or standards is sufficient basis in itself for allegation of a Section 12(a) violation. The exceedence of standards and levels of contaminants that are significantly increasing is a sufficient factual basis for an allegation of violation of Section 12(a) and 12(d) of the Illinois Environmental Protection Act, 415 ILCS 5/12(a) and 12(d). Water pollution is defined as a discharge of any contaminant into any waters of the State as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious. Sulfates are known to have a laxative effect. Such laxative effect can be particularly harmful to the elderly and young children. As stated, this is a known effect of sulfates. Complainant has also provided further

evidence regarding the potential harmful effects of contaminants migrating off-site of the Eagle No. 2 site in Complainant's discovery responses to the Respondent. The introduction of sulfates and other inorganic chemicals in significantly increasing levels is detrimental to a water supply and a Class 1 groundwater resource. The introduction of sulfates and other inorganic chemicals in significantly increasing levels could also be considered a nuisance condition. As such, the conditions occurring off-site from the mine site and at the SVCD wells, as alleged in the Amended Complaint, have been pled so as to provide a sufficient factual basis for the allegation of violation of Section 12(a) as set forth in the Amended Complaint.

Also in paragraph 20 of Respondent's Motion, Respondent claims that Complainant has failed to plead sufficient facts to support its allegation of violation of 35 Ill. Adm. Code 620.301. As set forth in paragraph 16 of this section designated "Count III", in paragraph 31 of the Amended Complaint, Complainant cited to 35 Ill. Adm. Code 601.101 in support of its allegation that operators of a public water supply are under a duty to operate and maintain their supplies so as to provide water of sufficient quality as to be satisfactory to ordinary domestic consumption. Complainant has also alleged significantly increasing levels of inorganics in sample results from wells on- and off-site at the Eagle No. 2 mine and at the SVCD wells. In consideration of a motion to dismiss or strike, all well pled facts are to be taken an true. Significantly increasing levels of sulfates were specifically set forth in the Amended Complaint. Since sulfates result in a laxative effect, particularly hazardous to young children and the elderly, ultimate facts have been pled that support the allegation that given the rate at which the sulfate levels are increasing, SVCD would soon be in a position where it would have to provide treatment. Even if SVCD would only have to start blending its water, such blending is a form of treatment and indicative that the raw supply is degraded and now requires some form of treatment to make it fit for ordinary domestic consumption. The rate of increase of the sulfate

levels set forth in the Amended Complaint is a rate that would not allow for ordinary consumption. Such significant increases would require treatment of some sort.

Further, Respondent objects to the use of the term "mineral content". Complainant's position is that this reference by no means prejudices Respondent, nor does it by any means cause Respondent to be misinformed as to the nature of the allegation. Nonetheless, Complainant respectfully requests leave to amend the Amended Complaint so as to eliminate the reference so as to avoid any unnecessary confusion.

For the reasons and on the grounds stated above in paragraphs 13 through 20, numbered to mirror and respond to those of Respondent's Motion, Respondent has failed to establish that Count III does not meet pleading requirements. In fact, Count III meets pleading requirements in exacting detail, necessary due to the complex nature of the facts of this case and the precision with which the groundwater regulations must be applied to those facts. None of the information set forth is surplusage. It is all relevant. Therefore, Complainant respectfully requests that the Board deny Respondent's motion to dismiss or strike. Further, Complainant respectfully requests leave to amend to correct typographical errors and remove any references that might result in unnecessary confusion, pursuant to such requests as have been specifically set forth in the preceding paragraphs.

WHEREFORE, based on the foregoing, Complainant respectfully requests that the Board deny Respondent's Motion to Dismiss or Strike. In the alternative, if the Board should

grant any portion of Respondent's Motion, Complainant respectfully requests leave to amend the Amended Complaint to address any portions of the Amended Complaint the Board may find deficient.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JAMES E. RYAN,
Attorney General of the State of Illinois

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BY: _____
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500 South Second Street
Springfield, Illinois 62706
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Dated: May 2, 2002

CERTIFICATE OF SERVICE

I hereby certify that I did on May 2, 2002, send by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the following instruments entitled NOTICE OF FILING and COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS OR STRIKE

To: David R. Joest, Esq.
Peabody Coal Company
1951 Barrett Court
P.O. Box 1990
Henderson, KY 42420-1990

Stephen F. Hedinger
Attorney at Law
1225 South Sixth Street
Springfield, IL 62703-2407

W. C. Blanton
Blackwell Sanders Peper Martin LLP
2300 Main Street, Suite 1000
Kansas City, MO 64108

and the original and ten copies by First Class Mail with postage thereon fully prepaid of the same foregoing instrument(s):

To: Dorothy Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

A copy was also sent by First Class Mail with postage thereon fully prepaid

To: Steve Langhoff
Hearing Officer
Pollution Control Board
600 South Second Street, Ste. 402
Springfield, Illinois 62704

Jane E. McBride
Assistant Attorney General

This filing is submitted on recycled paper.