

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 August 23, 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, a Motion for Leave to File Reply, along with the proposed Reply to Complainant's Response to Motion to Strike, copies of which are attached hereto and herewith served upon you.

Dated: August 23, 2011

Respectfully submitted,

HERITAGE COAL COMPANY LLC
Respondent

By: 

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CERTIFICATE OF SERVICE

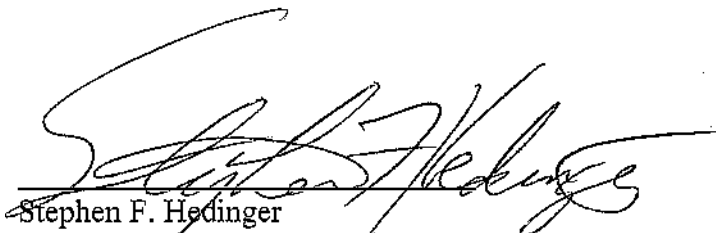
I hereby certify that I did on August 23, 2011, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following Motion for Leave to File Reply, and of the Reply to Complainant's Response to Motion to Strike, and the attached Notice of Electronic Filing, upon the following persons:

Bradley Halloran, Hearing Officer
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PCB No. 99-134

HERITAGE COAL COMPANY LLC,

Respondent.

MOTION FOR LEAVE TO FILE REPLY

Respondent, HERITAGE COAL COMPANY LLC ("HCC"), hereby seeks leave to file the attached proposed reply to Complainant's Response To Motion To Strike, filed by Complainant People of the State of Illinois ("State") in response to Respondent Heritage Coal Company's Objections To And Motion To Strike the State's Irrelevant Evidentiary Submissions. In support of this motion, HCC states:

1. HCC has filed a motion for partial summary judgment in this case, and the State has filed a response to that motion. With hearing officer leave, HCC filed a reply to the State's response. Contemporaneously with and as a part of that reply, on July 12, 2011 HCC filed with this Board a motion seeking to strike irrelevant evidentiary submissions made by the State in its response to the motion for partial summary judgment ("Motion To Strike").

2. On or about July 25, 2011, the State filed its Response, purporting to identify several reasons why this Board should not consider HCC's Motion To Strike.'

The proof of service accompanying the State's response indicates that it was served by mail. Pursuant to this Board's procedural rule 101.300(c), 35 Ill. Adm. Code 101.300(c), the presumptive date of service of the response was July 29, 2011.

3. The State's Response has raised several points urging this Board to deny or disregard HCC's Motion To Strike. None of these purported bases has merit, though.

4. 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 standards and/or argued irrelevant points as though they were controlling.

5. HCC seeks leave to file this motion for leave to file, which pursuant to Rule 101.500(e), 35 Ill. Adm. Code 101.500(e), was to have been filed on or before August 12, 2011. HCC was unable to meet that deadline due to numerous pre-scheduled matters intervening between the filing of the State's response, including but not limited to a number of court appearances, numerous depositions, and pre-scheduled family vacation time. HCC has finalized and is filing this motion and the proposed reply as expeditiously as it has reasonably been able to do so; and the short six business day delay in filing should be no prejudice to the State. Denial of leave to file, however, 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 the further analysis, explanation, and clarification provided by the proposed reply.

6. HCC also requests this Board's leave to file the attached proposed reply to address the arguments raised by the State, shown in the reply to be without merit, in order to avoid material prejudice. HCC could not have anticipated that the State would raise such arguments, and so could not have addressed those arguments in its initial motion.

7. Allowance of this motion, and the consequent allowance of the filing and consideration of HCC's 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.

8. Denial of this motion for leave to file the reply could materially prejudice both HCC and the Board in its administration of justice, though, by depriving HCC of the opportunity to provide the additional information and argument necessary to clarify, and correct the inaccurate statements of the State in its response.

9. The proposed reply is attached hereto and suitable for immediate filing and consideration by this Board.

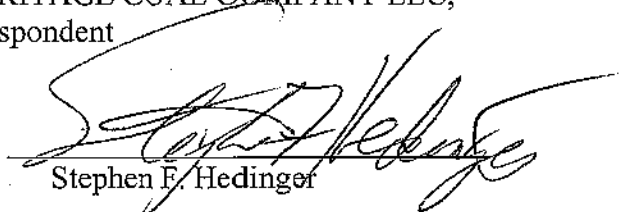
WHEREFORE Respondent, HERITAGE COAL COMPANY LLC, requests this Board, either through its own determination or through its Hearing Officer, to grant HCC leave to file this motion for leave to file and to grant HCC leave to file instanter the attached proposed reply to the response filed by the State to HCC's Motion To Strike.

Dated: August 23, 2011

Respectfully submitted,

HERITAGE COAL COMPANY LLC,
Respondent

By:


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REPLY TO COMPLAINANT'S RESPONSE TO MOTION TO STRIKE

NOW COMES Respondent, HERITAGE COAL COMPANY LLC ("HCC"), and hereby replies to Complainant's Response To Motion To Strike ("Response"), filed by Complainant PEOPLE OF THE STATE OF ILLINOIS ("State") in this matter. For its reply, HCC states:

Introduction

1. The State's Response contains a number of arguments directed to Respondent Heritage Coal Company LLC's Objections To And Motion To Strike The State's Irrelevant Evidentiary Submission ("Motion To Strike"), which was filed contemporaneously with HCC's reply to the State's response to HCC's motion for partial summary judgment. Like the State's response to HCC's motion for partial summary judgment, to which HCC's motion to strike was directed, the State's Response argues a number of matters that are not relevant to any issue now before this Board. Moreover, this Response relies upon authorities which have been reversed and misstates and misidentifies controlling legal authorities.

There Is No Requirement That the Reply Be Directed to the Hearing Officer

2. The State first argues that HCC's Motion To Strike was misdirected to the Board, rather than the Hearing Officer. (Response, at 1-2, para. 2). Citing this Board's procedural rule 101.610(1), 35 Ill. Adm. Code 101.610(1), the State argues that "the Hearing Officer is to rule upon objections and evidentiary questions." The State also cites procedural rule 101.626, 35 Ill. Adm. Code 101.626, for the proposition that this Board "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.'" (Response, at 2, para. 2). Apparently the State contends that the motion should be ignored since it was directed to the Board rather than to the Hearing Officer.

3. The State's argument is without merit. The subsections it cites concern the conduct of hearings. In fact, Section 101.626 is entitled "Information Produced at Hearing" and Subpart F, of which both of the cited procedural rules are a part, is entitled "'Hearings, Evidence, and Discovery.'" At issue before this Board, though, are neither hearings nor discovery. Rather, the Motion To Strike addresses pleadings relating to HCC's motion for partial summary judgment. Such matters are addressed in Subpart E of this Board's procedural rules, entitled "Motions." Section 101.502(a), 35 Ill. Adm. Code 101.502(a), provides that "The Hearing Officer has the authority to rule on all motions that are not dispositive of the proceeding" (emphasis added). The rule does not require the Hearing Officer to consider such motions, but instead grants only the authority to do so. Moreover, the Hearing Officer has authority only to hear motions which are "not dispositive." HCC's Motion To Strike is dispositive in nature, as it is integrally related to HCC's pending motion for partial summary judgment; and, therefore, the Hearing Officer lacks authority to rule on the motion. In any event, the State does not cite any authority for its assertion that, even if the Hearing Officer has authority to consider the Motion

To Strike, somehow the motion should be disregarded as being misdirected.

4. The State extends this argument by suggesting that the Motion To Strike, although purporting to focus on evidentiary issues, is actually additional substantive argument in support of the motion for partial summary judgment, and as such it should not be considered by this Board. (Response, at 2, para. 2). However, in support of its contention that the Board should not consider the motion, the State makes a number of assertions unsupported by any authority or logic. For instance, the State asserts: "[t]he Respondent's reliance upon its own perspective of relevance is insufficient to justify the drastic relief it seeks." (Response, at 2, para. 2). This curious statement is unadorned with any further explanation and ignores the fact that the Motion To Strike discusses in detail the issues addressed by the motion for partial summary judgment and the reason why the State's challenged factual materials are not relevant to any issue raised in that motion. See, e.g., Motion To Strike, pp. 2-4, discussing in detail the allegations of the pending motion; see also Motion To Strike, pp. 5-10 (comparing each challenged factual matter with the issues raised in the pending motion for partial summary judgment).

5. In contrast to HCC's comprehensive approach, the State's Response contains no explanation for the irrelevant and inaccurate assertions it makes, such as the claim that the challenged materials "discussed the recent codification of the Illinois Rules of Evidence in support of our evidentiary submissions (and in objection to the Respondent's submissions)." (Response, at 2, para. 2). The entire point of HCC's Motion To Strike, though, are matters of relevance, not foundational issues. Moreover, the only discussion of the Illinois Rules of Evidence cited in the State's summary judgment response were in the context of its challenges about evidentiary submissions made by HCC in support of its motion. Contrary to the State's

current assertion, at no place in its motion for partial summary judgment response did the State discuss the relevance of its own evidentiary submissions in the context of the Illinois Rules of Evidence (See Complainant's Response To Motion For Partial Summary Judgment, at 9-10, which is the only citation in that pleading to the Illinois Rules of Evidence of which HCC is aware).

Rule 191(a) Compliance Is Not Relevant to HCC's Motion to Strike

6. The State's next argument is equally unfounded. Citing Section 101.100(b) of this Board's procedural rules, 35 Ill. Adm. Code 101.100(b), the State argues that the Motion To Strike should be denied because the State's affidavits at issue meet the technical requirements for affidavits set forth in Illinois Supreme Court Rule 191(a). (Response, at 2-3, para. 3). However, HCC has not contended that the affidavits should be stricken due to technical non-compliance with foundational requirements. Rather, HCC has moved for these materials to be stricken because they have no bearing upon any issue raised in HCC's motion for partial summary judgment, and at best should be wholly disregarded by this Board in its decisions on the legal issues presented by HCC's motion for partial summary judgment. Thus, the Rule 191(a) requirements, like the affidavits themselves, are not relevant to any issue before this Board.

Liberal Construing the State's Evidentiary Submissions Does Not Render Them Relevant

7. The State's next argument is that the "facts" set forth in the challenged affidavits were not controverted, and should be taken as true both as unchallenged and because, coming from the party opposing the motion for partial summary judgment, this Board should construe the affidavits liberally. The State then asserts that, with these principles in mind, the Board should resolve the disagreement about relevance in the State's favor. (Response, at 3, para. 4).

8. Conspicuously absent from the State's Response, including this portion of its

Response, is any explanation of the relevance of the challenged materials. Indeed, the State makes no effort in either its Response or its response to HCC's motion for partial summary judgment to identify any issue raised by that dispositive motion that was purportedly addressed in the documents challenged by the Motion To Strike. Instead, the substance of the State's argument is that this Board should deny HCC's motion merely because the State is entitled to a liberal interpretation of its response to the motion for partial summary judgment and because HCC has not disputed the irrelevant facts.

9. The State's argument is specious. The irrelevancy of the material sought to be stricken makes irrelevant both any substantive response to that material and any burden of proof considerations giving the State the benefit of any doubt as to the merits of HCC's motion for partial summary judgment.

10. The sole authority cited by the State for this portion of its Response is Morris v. Margulis, 307 Ill. App. 3d 1024, 718 N.E.2d 709 (5th Dist. 1999). (Response, at 3, para. 4, fin 2). The State has failed to advise this Board, though, that the cited case has been reversed. Morris v. Margulis, 197 Ill. 2d 28, 754 N.E.2d 314 (2001).

The Motion to Strike Is Not Untimely

11. The State next argues that the Motion To Strike should be denied as untimely. Citing Section 101.506 of the Board's procedural rules, 35 Ill. Adm. Code 101.506, the State argues that the motion seeks to strike a pleading filed with the Board, but was filed more than 30 days after the filing of the affidavits, and so was untimely. (Response, at 3-4, para. 5).

12. Once again the State's effort to avoid a ruling on the merits of HCC's Motion To Strike is misplaced. Significantly, the State cites no case authority to support its assertion that the motion was untimely. Most significantly, the affidavits addressed by the Motion To Strike

are not "pleadings" within the meaning of the Board's procedural rule. In United City of Yorkville v. Hamman Farms, PCB 08-96, slip op. at 7-8 (Nov. 4, 2010), this Board made clear that affidavits supporting motions do not constitute pleadings subject to Rule 101.506. There, in addressing a party's argument that a motion to strike was "a procedural nullity," the Board noted as follows: "Case law from Illinois is replete with instances of the courts entertaining motions to strike filings that may not technically be 'pleadings.' See, e.g., McWilliams v. Detorre, 387 Ill. App. 3d 833, 841-42, 851-52, 901 N.E.2d 1023, 1030, 1037-38 (1st Dist. 2009) (affirming grant of motion to strike affidavit to post-trial motion)." (Additional citation omitted; underscoring in original). The Board followed that by noting its own historical practice of entertaining "such motions to strike. See, e.g., MDI Ltd. P'Ship # 42 v. Regional Board of Trustees, PCB 00-181, slip op. at 2-3, 7 May 2, 2002) (granting motion to strike affidavit. to motion for summary judgment)." (Additional citation omitted).

13. Thus, because the affidavits (in addition to documents attached to the affidavits, which HCC has also sought to strike) are not "pleadings," the State's assertion that HCC had only 30 days following their submittal in which to move to strike them fails.

14. Moreover, the Motion To Strike accompanied, and was part and parcel of, HCC's reply to the response filed by the State to the motion for partial summary judgment. In accordance with Board rules, the reply was filed only with leave of the Board (granted through Hearing Officer order), and was filed in accordance with the extensions of time granted by the Hearing Officer within which to file the reply. Accordingly, the motion was timely filed for that reason, as well.

15. Finally, Procedural Rule 101.506 does allow for even untimely motions made in the event "material prejudice" would occur absent the filing of the motion. 35 Ill. Adm. Code

101.506. In Brazas 'v. Magnussen, PCB 06-131, slip op. at 2-3 (May 4, 2006), this Board considered a request by the Illinois Environmental Protection Agency ("IEPA") for leave to file an untimely motion to dismiss based upon the "material prejudice" exception. The IEPA argued "that forcing the Board to hear issues that are barred by statute would constitute material prejudice, under Section 101.506 of the Board's procedural rules." Id., slip op. at 3. This Board agreed, finding "that material prejudice to both the Board and parties would result from proceeding to hearing on issues not within the Board's jurisdiction." Id. The same is true here. The materials which HCC seeks to have stricken are not relevant to any issue now pending before the Board, and material prejudice would accrue both to the Board and to the parties were the Board to improperly consider these materials in ruling upon HCC's pending motion for partial summary judgment. As noted in HCC's Motion To Strike, it is axiomatic that only issues raised by HCC's motion for partial summary judgment should be considered and ruled upon; and only facts relating to those issues are relevant to the determination. (See Motion To Strike, at 1-5). Hence, as in Brazas, material prejudice would accrue were the Board not to consider the Motion To Strike solely upon the ground that the motion was untimely (particularly since the motion accompanied HCC's reply, which was filed in accordance with Hearing Officer extensions).

**Immaterial Facts Are Not Relevant to a Motion for Summary Judgment, and So
Should Be Stricken**

16. The State's final argument, although not entirely clear, appears to assert that because the State responded to the substance of HCC's motion for partial summary judgment and purported to provide factual support for that response by reference to its complaint allegations that were denied by HCC, the irrelevant "counter-affidavits and documents now subject to this motion to strike" for some unstated reason should not be stricken. "Unless [HCC] may show

that these counter-affidavits and documents are somehow inadmissible, and this [HCC] fails to do, then the motion to strike ought to be denied." (Response, at 5, para. 6).

17. The reasoning supporting this assertion is not at all clear. As noted above, it is correct that HCC has not challenged the technical foundational compliance of the affidavits and other materials sought to be stricken, but the conclusion apparently reached by the State from that agreed circumstance does not follow. Technical compliance with foundation requirements is not the only factor pertaining to whether materials should be allowed in the record supporting a motion for summary judgment or a response to such a motion. Rather, as the State's own cited authority acknowledges, the relevance and materiality of such material are dispositive criteria as to whether those documents are properly before a decision maker.

18. The State has cited City of Quincy v. IEPA, PCB 08-86, slip op. at 28 (June 17, 2010), as support for its position.¹ However, City of Quincy explicitly acknowledges that materiality of asserted facts is a pre-requisite for consideration of those facts with respect to a motion for summary judgment. In that case, the Board considered the IEPA's motion for reconsideration and supported its original ruling by noting that "whether a fact is material depends on whether it bears upon Quincy's particular claims." *Id.*, slip op. at 29. Following that, the Board affirmed its earlier finding, noting that the facts identified by the IEPA were not material to any issue in the case. Quoting Connor v. Merrill Lynch Realty, Inc., 220 Ill. App. 3d 522, 528, 581 N.E.2d 196, 200 (1st Dist. 1991), the Board observed, "Facts which are unrelated to the essential elements of a plaintiffs cause of action are immaterial, and no matter how sharply controverted, their presence in the record will not warrant denial of a motion for summary judgment."

19. First of America Bank, Rockford, N.A. v. Netsch, 166 Ill. 2d 165, 178, 651

¹The jump cite utilized by the State is incorrect. The cited language is actually at page 29 of that opinion.

N.E.2d 1105, 1111 (1995), also cited by the State (Response, at 4, para. 6, fin 4), confirms the Board's understanding of the nature of materiality: "An issue of fact is not material, even if disputed, unless it has legal probative force as to the controlling issue." Other cases, available through shepherding the cases cited by the State, are in accord. See Alexander v. Standard Oil Co., 97 Ill. App. 3d 809, 814, 423 N.E.2d 578, 582 (5th Dist. 1981) ("While a plaintiff against whom a motion for summary judgment has been filed need not prove his case at this preliminary stage, he is required to present some factual basis that would arguably entitle him to a judgment under the applicable law. If only the complaint and answer purport to raise issues of material fact, and these issues are not supported by the evidentiary facts and affidavits, summary judgment is proper. Only material facts are to be considered. Facts unrelated to the essential elements of the plaintiffs' cause of action are immaterial and regardless of how sharply controverted, their presence in the record will not warrant denial of a motion for summary judgment" (citations omitted)); Westbank v. Maurer, 276 Ill. App. 3d 553, 562, 658 N.E.2d 1381, 1388 (2d Dist. 1995) ("[I]n reviewing the grant of summary judgment, we are required to construe the evidence strictly against the movant and liberally in favor of respondent. However, not every question of fact is sufficient to defeat a motion for summary judgment. The factual issue must be material, and facts which would not affect the outcome of a party's case, regardless of how sharply those facts are controverted, will not warrant the denial of a motion for summary judgment" (citations omitted)); Amalgamated Trust & Savings Bank v. Silha, 121 Ill. App. 3d 1033, 1041, 460 N.E.2d 372, 378 (1st Dist. 1984) ("Facts unrelated to the essential elements of a plaintiff's cause of action are not material, and regardless of how sharply controverted, their presence in the record will not warrant denial of a motion for summary judgment" (citation omitted)).

20. Despite having had ample opportunity to do so, the State has not even attempted to demonstrate any materiality of the State's evidence sought to be stricken by HCC's Motion To Strike. Accordingly, as the case law unequivocally shows, because the State's evidentiary materials are not material, and therefore not relevant, to any issue presented by HCC's pending motion for partial summary judgment, they are subject to being stricken, which is the request HCC has made.

Conclusion

21. For the reasons discussed in HCC's Motion To Strike and above, the materials submitted by the State that are the subject of HCC's Motion To Strike are immaterial to any issue now pending before this Board, and therefore should have no bearing upon HCC's motion for partial summary judgment. Therefore, HCC's Motion To Strike should be granted.

WHEREFORE Respondent, HERITAGE COAL COMPANY LLC, respectfully requests this Board to grant HCC's motion to strike the State's irrelevant evidentiary submissions, and accordingly strike from the record in this case the State's evidentiary material to which that motion is directed; to disregard both that evidentiary material and the arguments in the State's response to HCC's motion for partial summary judgment based upon that material; and to grant HCC all further appropriate relief.

Dated: August 23, 2011

Respectfully submitted,

HERITAGE COAL COMPANY LLC,
Respondent

By:


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