

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

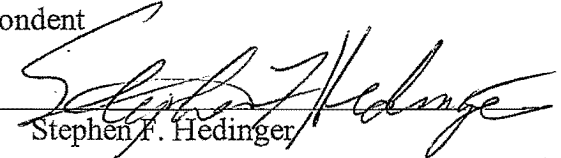
W.C. Blanton
 Husch Blackwell LLP
 4801 Main Street, Suite 1000
 Kansas City, MO 64112

PLEASE TAKE NOTICE that on October 3, 2011, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, c/o John T. Therriault, Assistant Clerk, James R. Thompson Center, 100 West Randolph St., Suite 11-500, Chicago, IL 60601, the Respondent's Motion For Leave To File Reply and Respondent Heritage Coal Company LLC's Reply to Complainant's Response To Motion For Leave To File Supplement In Support Of Motion For Partial Summary Judgment, copies of which are attached hereto and herewith served upon you.

Dated: October 3, 2011

Respectfully submitted,

HERITAGE COAL COMPANY LLC
Respondent

By: 
 Stephen F. Hedinger

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

MOTION FOR LEAVE TO FILE REPLY

Respondent, HERITAGE COAL COMPANY LLC (“HCC”), pursuant to this Board’s procedural rule 101.500(e), 35 Ill. Adm. Code 101.500(e), hereby seeks leave to file the attached proposed reply to Complainant’s Response To Respondent’s Motion For Leave To File Its Supplement To The Motion For Partial Summary Judgment, filed by Complainant People of the State of Illinois (“State”) in response to Respondent Heritage Coal Company’s Motion For Leave To File Instantly Its Supplement To Motion For Partial Summary Judgment (“Motion For Leave To File Supplement”). In support of this motion, HCC states:

1. On September 8, 2011, HCC filed with this Board its Motion For Leave To File Supplement, seeking leave to supplement the motion for partial summary judgment previously filed by HCC in this case.

2. On September 20, 2011, the State filed a response to that motion, entitled “Complainant’s Response To Respondent’s Motion For Leave To File Its Supplement To The Motion For Partial Summary Judgment” (“Response To Motion For Leave To Supplement”).

3. The State’s Response To Motion For Leave To Supplement has conceded that this Board may consider the specific additional material proposed for consideration by HCC’s

Motion For Leave To Supplement; however, the State's Response To Motion For Leave To Supplement also improperly addresses issues not raised by HCC's Motion For Leave To Supplement, but which were or should have been addressed in the State's earlier response to HCC's motion for partial summary judgment.

4. HCC has drafted a proposed reply to the State's Response To Motion For Leave To Supplement which identifies the State's concession that the proposed supplement should be considered by this Board, and also identifies the State's improper additional arguments which should have been raised, if at all, in previous pleadings.

5. HCC accordingly seeks leave to file its proposed reply, to identify and address the improper new material set forth in the State's response.

6 Denial of this motion for leave to file the reply would materially prejudice HCC by precluding it from the opportunity to identify material which should not be in this Board's consideration with respect to the motion at issue, and from the opportunity to seek leave to address arguments which this Board decides to entertain, if any, that are newly raised in the State's pleading. Denial of this motion would similarly prejudice this Board by depriving it of the analysis, explanation, and clarification provided by the proposed reply which could not have been previously provided, and will not otherwise be provided, due to the impropriety of the State's arguments.

7. HCC could not have anticipated that the State would raise such arguments as are made in the response, which are not directed to the motion at issue but instead to the previous motion, and so which HCC could not have addressed previously.

8. 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 argument made by the State which is not addressed to the motion made by HCC. The State has itself created the need for the proposed reply by its own improper argument.

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

10. The State's response was filed and served on September 20, 2011, and this motion, being filed on October 3, 2011, is therefore timely in accordance with this Board's procedural rule 101.500(e), 35 Ill. Adm. Code 101.500(e) (requiring a motion for leave to file a reply to be filed within 14 days of service of the response).

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 the attached proposed reply to the response filed by the State to HCC's Motion For Leave To Supplement.

Dated: October 3, 2011

Respectfully submitted,

HERITAGE COAL COMPANY LLC,
Respondent

By: 

Stephen F. Hedinger

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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HERITAGE COAL COMPANY LLC,)	
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**RESPONDENT HERITAGE COAL COMPANY LLC'S REPLY TO COMPLAINANT'S
RESPONSE TO MOTION FOR LEAVE TO FILE SUPPLEMENT
IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

NOW COMES Respondent, HERITAGE COAL COMPANY LLC ("HCC"); through its undersigned attorneys, and for its reply to Complainant's Response To Motion For Leave To File Supplement In Support Of Motion For Partial Summary Judgment ("Response To Motion For Leave To Supplement"), filed by Complainant, People of the State of Illinois ("State"), on September 20, 2011, states:

1. On September 8, 2011, HCC filed with this Board its "Respondent's Motion For Leave To File Instanter Its Supplement To Motion For Partial Summary Judgment" ("Motion For Leave To Supplement"). The full extent of relief sought by that motion is leave to supplement the "Respondent Heritage Coal Company LLC's Motion For Partial Summary Judgment" ("Motion For Partial Summary Judgment"), filed on December 20, 2010, by further supporting Undisputed Fact #20 set forth in that motion solely by citation to "Complainant's Response To Second Set Of Requests For Admission" ("Second Set Of Requests For Admission"), which was filed by the State with this Board on August 2, 2011.

2. As HCC demonstrated in its Motion For Leave To Supplement, even prior to

filing its Response To Motion For Leave To Supplement, the State never argued against the facts stated in Undisputed Fact #20, but rather complained only of an asserted lack of foundation as to one evidentiary item, i.e., Exhibit 1 to the Affidavit Of W.C. Blanton. The State now continues in this regard, by agreeing that this Board may now bypass the asserted foundational defect through consideration of the admissions which the State itself has placed into the record; specifically, the State concedes that “the Board may well accept this information.” (Response To Motion For Leave To Supplement, at 3, para. 5). The State further “acknowledge[es] that [HCC] has now provided some foundation to support the introduction of the Blanton Affidavit and its website printout” (id., at 4, para. 6), and also agrees that HCC “has provided a proper foundation for the admissibility of the IDNR/OMM website printout” (id., at 3–4, para. 5).

3. Accordingly, the State has no objection to this Board considering and accepting the proposed Respondent Heritage Coal Company LLC’s Supplement In Support Of Motion For Partial Summary Judgment, and that pleading should be deemed filed and part of the record for this Board’s consideration of the Motion For Partial Summary Judgment. The Motion For Leave To Supplement should be granted.

4. The balance of the State’s Response To Motion For Leave To Supplement, however, moves beyond proper response to the motion under consideration and improperly seeks to re-address issues raised and discussed substantively in the Motion For Partial Summary Judgment itself. Specifically, the State devotes the second half of paragraph 5 and all of paragraphs 6 and 7 of its Response To Motion For Leave To Supplement to making additional arguments as to why Undisputed Fact #20 should be considered disputed despite the admissions filed of record and allowance of the Motion For Leave To Supplement.

5. By way of reminder, HCC’s Undisputed Fact #20 is but one of four of the

undisputed facts identified in HCC's Motion For Partial Summary Judgment supporting the assertion that the closed coal mine in question has been in reclamation during the entire time period made relevant by the State's allegations. The other three asserted undisputed facts related to that issue were admitted by the State in its response to the Motion For Partial Summary Judgment, and #20 was disputed only on the ground that the evidence supporting that particular factual assertion was not proper for admission into evidence.

6. In crafting its response to HCC's Motion For Partial Summary Judgment, the State based its disagreement with HCC's Undisputed Fact #20 only on the asserted foundational problem. Now, though, having been forced to abandoned its "lack of foundation" objection to a single item of evidence, the State for the first time makes the substantive argument that despite HCC having overcome the asserted evidentiary issue, this Board should "be skeptical" of HCC's Undisputed Fact #20, even though it is neither controverted by the State nor controversial in any regard. (Response To Motion For Leave To Supplement, at 4, para. 6).

7. The attempt by the State to utilize its response to the Motion For Leave To Supplement as a vehicle to raise new arguments as to why this Board should not consider Undisputed Fact #20 to be undisputed is entirely improper. The Motion For Leave To Supplement, after all, makes no such alternative substantive arguments; and even the proposed Respondent Heritage Coal Company LLC's Supplement In Support Of Motion For Partial Summary Judgment is devoid of argument, being limited to supplementing the motion by reference and reliance on the additional evidence established by the State's response to the Second Set Of Requests For Admission.

8. Ultimately the State will bear the burden of establishing that HCC has violated certain groundwater quality standards which the State contends are applicable to this facility.

One of HCC's major lines of defense to the State's claims is that those groundwater standards do not apply to groundwater at and in the vicinity of the mine until — if at all — reclamation at the mine is complete, and that reclamation was not complete at the time of the alleged violations. HCC has provided substantial evidence to support that contention in connection with its motion for partial summary judgment. The State's only argument against that evidence, raised in its response to the Motion For Partial Summary Judgment and expanded upon in the Response To Motion For Leave To Supplement, is that perhaps HCC could have provided stronger evidence, and perhaps some other information may exist which conflicts with the claim that the facility has been in reclamation during the relevant time period. Notably absent from anything submitted by the State, though, is any affirmative proof by relevant documentation, by the regulators overseeing the permitting and recordkeeping for this coal mine, by the regulators in charge of inspecting and reviewing the facility for environmental compliance and for compliance with coal mine safety and other regulations, by neighbors, by former employees, by local officials, by anyone at all, that the facility was not in reclamation at the times asserted and proven by HCC. Rather, the gravamen of the State's Response To Motion For Leave To Supplement is the assertion that HCC has somehow failed to establish that the closed surface coal mine at issue, Eagle #2, has been in reclamation during the time period made relevant by this enforcement action. However, the State still does not controvert HCC's assertion. With the fact established beyond dispute that reclamation at the mine was not complete at the time of the alleged groundwater quality standards exceedances, the State's legal arguments in support of its claims of violation are greatly diminished: thus, the extraordinary effort by the State to avoid acknowledgment of this undisputed fact.

9. In summary, this Board should disregard the last half of paragraph 5 and all of

paragraphs 6 and 7 of the State's Response To Motion For Leave To Supplement, in granting HCC's Motion For Leave To Supplement, because these consist only of improper re-argument of issues not raised by the motion under consideration. To any extent this Board considers the State's improperly made and placed arguments to be appropriate and subject to review, HCC requests leave to substantively respond to those arguments prior to this Board rendering a decision on the Motion For Partial Summary Judgment.

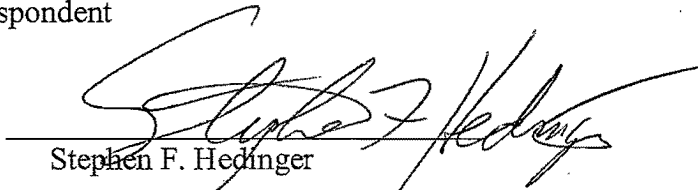
WHEREFORE Respondent, HERITAGE COAL COMPANY LLC, respectfully requests the Board to grant HCC's Motion For Leave To File Supplement as unopposed by the State; to disregard the last half of paragraph 5 and the entirety of paragraphs 6 and 7 of the State's Response to Motion For Leave To Supplement; and to grant HCC all other such relief this Board deems just and appropriate.

Dated: October 3, 2011

Respectfully submitted,

HERITAGE COAL COMPANY LLC,
Respondent

By: _____


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CERTIFICATE OF SERVICE

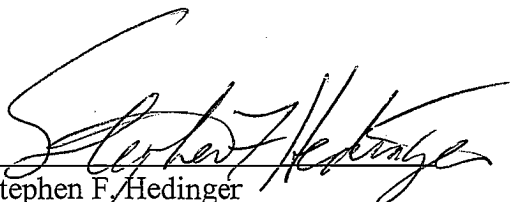
I hereby certify that I did on October 3, 2011, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following Respondent's Motion For Leave To File Reply and Respondent Heritage Coal Company LLC's Reply to Complainant's Response To Motion For Leave To File Supplement In Support Of Motion For Partial Summary Judgment, and the attached Notice of Electronic Filing, upon the following persons:

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