

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.)
)
AET ENVIRONMENTAL, INC., a)
Colorado corporation, E.O.R. ENERGY,)
LLC, a Colorado limited liability)
company,)
)
Respondent.)

PCB No. 07-95
(Enforcement)

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on December 4, 2012, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, PEOPLE'S MOTION TO STRIKE RESPONDENT AET ENVIRONMENTAL, INC.'S RESPONSE TO PEOPLE'S MOTION FOR SUMMARY JUDGMENT DIRECTED TO HEARING OFFICER a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

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

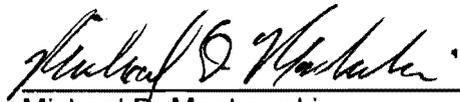
BY: 

Michael D. Mankowski
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CERTIFICATE OF SERVICE

I hereby certify that I did on December 4, 2012, 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 and PEOPLE'S MOTION TO STRIKE RESPONDENT AET ENVIRONMENTAL, INC.'S RESPONSE TO PEOPLE'S MOTION FOR SUMMARY JUDGMENT DIRECTED TO HEARING OFFICER upon the persons listed on the Service List.


Michael D. Mankowski
Assistant Attorney General

This filing is submitted on recycled paper.

SERVICE LIST

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
LISA MADIGAN, Attorney General)	
of the State of Illinois,)	
)	
Complainant,)	
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v.)	PCB No. 07-95
)	(Enforcement)
AET ENVIRONMENTAL, INC., a Colorado)	
corporation, E.O.R. ENERGY, LLC, a)	
Colorado limited liability company,)	
)	
Respondents.)	

PEOPLE'S MOTION TO STRIKE RESPONDENT AET ENVIRONMENTAL, INC.'S RESPONSE TO PEOPLE'S MOTION FOR SUMMARY JUDGMENT DIRECTED TO HEARING OFFICER

NOW COMES the Complainant, PEOPLE OF THE STATE OF ILLINOIS, LISA MADIGAN, Attorney General of the State of Illinois, ("People"), and moves the Hearing Officer, pursuant to Sections 101.500, 101.502 and 101.506 of the Board's Procedural Rules, 35 Ill. Adm. Code 101.500, 101.502 and 101.506 as guided by Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 (2010), to strike Respondent AET ENVIRONMENTAL, INC.'s Response to the People's Motion for Summary Judgment and in support thereof state:

I. INTRODUCTION

1. On March 20, 2007, the State filed a five-count Complaint against Respondents, AET ENVIRONMENTAL, INC. ("AET") and E.O.R. ENERGY, LLC ("EOR"). Of the five counts, AET is named only in Count I, which alleges illegal transport of a waste from Colorado for storage and disposal in Illinois.

2. On June 27, 2012, the People filed their Motion for Summary Judgment Against AET for violations alleged in Count I of the People's Complaint. AET did not respond to the People's Motion for Summary Judgment within 14 days of service as required by Sections 101.500(d) and 101.516(a) of the Board's General Rules, 35 Ill. Adm. 101.500(d) and 101.516(a).

3. On August 6, 2012, attorney Felipe N. Gomez filed an appearance on behalf of AET.

4. On September 14, 2012, Mr. Gomez also filed an appearance on behalf of EOR.

5. During an October 23, 2012 status call, the Hearing Officer waived Rules 101.500(d) and 101.516, over the People's objection, and granted AET an extension to file a response to the People's Motion for Summary Judgment by November 14, 2012. The Hearing Officer also granted the People the right to file a reply by December 5, 2012.

6. On November 14, 2012, AET filed a pleading titled "AET Response To Motion For Summary Judgment" ("Response").

7. Instead of filing a responsive pleading addressing the question of whether there exists a genuine issue of material fact, as expected of a response to a motion for summary judgment, in its Response, the Respondent only requests that the Board dismiss the People's entire five-count Complaint against AET and EOR, including the counts to which Respondent is not a party, and in the alternative dismiss the action against AET alone. The Response does not request that the Board deny the People's Motion for Summary Judgment.

8. Accordingly, the Hearing Officer should strike the Respondent's Response because it is the improper pleading under which to request a dismissal of the People's Complaint. In the alternative, even if the Response can be construed as a motion and not a responsive pleading, it should still be stricken because it is untimely and drafted in such a manner so as to violate the Board's Rules and the Illinois Code of Civil Procedure ("Code").

II. **RESPONDENT'S RESPONSE IS NOT PROPER RESPONSE TO PEOPLE'S MOTION FOR SUMMARY JUDGMENT**

9. Pursuant to Section 101.516(a) of the Board's General Rules, 35 Ill. Adm. Code 101.516(a), "Any time after the opposing party has appeared, but no fewer than 30 days prior to the regularly scheduled Board meeting before the noticed hearing date, a party may move the

Board for summary judgment for all or any part of the relief sought." "Any response to a motion for summary judgment must be filed within 14 days after service of the motion for summary judgment." *Id.* "If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment." 35 Ill. Adm. Code 101.516(b); *see also* 735 ILCS 5/2-1005 (2010).

10. Our Supreme Court has stated the purpose of summary judgment is to determine whether a genuine issue of material fact exists, not to try a question of fact. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill.2d 294, 305, 297 Ill.Dec. 319, 837 N.E.2d 99 (2005); *see also* 35 Ill. Adm. Code 101.516(b). A genuine issue of material fact exists when "the material facts are disputed, or, if [they] are undisputed, reasonable persons might draw different inferences from the undisputed facts." *Adames v. Sheahan*, 233 Ill. 2d 276, 296, 909 N.E.2d 742, 754 (2009).

11. When ruling on a motion for summary judgment, the facts "must be construed strictly against the movant and liberally in favor of the opponent." *Id.*, 233 Ill. 2d at 295-96, 909 N.E. 2d at 754. A party opposing a motion for summary judgment may not rest on his pleadings, but must "present a factual basis which would arguably entitle [him] to judgment." *Gauthier v. Westfall*, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

12. This matter is before the Board because the People filed a motion for summary judgment against AET.

13. As a result, the sole purpose of this instant action is to determine whether genuine issues of material fact exist and thereby determine whether the People are entitled to a judgment as a matter of law. Appropriate relief is for the Board to either grant or deny the People's Motion in whole or in part.

14. Respondent titled its pleading as a "Response to Motion for Summary Judgment."

Such a title is supposed to alert the People and the Board that the Respondent is making a responsive pleading to the People's Motion for Summary Judgment.

15. Respondent was required to address whether there is a genuine issue of material fact, given that the only purpose of summary judgment is to determine whether a genuine issue of material fact exists.

16. Contrary to its title, Respondent's Response fails to address the sole question before the Board: *whether there is a genuine issue of material fact*. Respondent failed to file counteraffidavits challenging the People's evidence. Respondent failed to allege new evidence which would suggest an issue of material fact. The Response does not even request that the Board deny the People's Motion for Summary Judgment. Respondent's failures constitute waiver and support a finding in favor of the People's Motion for Summary Judgment.

17. Respondent misconstrues its Response and attempts to make piecemeal arguments which attack the sufficiency of the People's Complaint and of the evidence relied upon by the People in support of their Motion for Summary Judgment. Respondent asks the Board to dismiss the People's Complaint either in whole or in part instead of asking the Board to deny the People's motion.

18. 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. 35 Ill. Adm. Code 101.100(b).

19. In the present action, the Hearing Officer should look to Section 2-1005 of the Code, 735 ILCS 2-1005 (2010), which obligates the Board to "draw an order specifying the major issue or issues that appear without substantial controversy, and direct such further proceedings upon the remaining undetermined issues as are just." Moreover, Board Rule 101.516(b) is instructive: "If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment."

20. "A summary judgment motion may not be used as a substitute for a section 2-615 motion asserting defects appearing on the face of the pleading... Objections to the sufficiency of the complaint must be made specifically under section 2-615." *Fox v. Heimann*, 375 Ill.App.3d 35, 42, 872 N.E.2d 126 (Ill. App. 1 Dist., 2007) (internal citations omitted).

21. Respondent fails to address whether there is an issue of material fact and merely asks the Board to dismiss the People's Complaint. The relief requested can only be addressed through a proper and timely filed motion to dismiss, not a response to a motion for summary judgment.

22. Therefore, Respondent's Response fails to respond to the People's motion, and also fails to bring the Board any closer to identifying the major issues that appear without substantial controversy. As a result the People respectfully request that the Hearing Officer strike the entire Response, under the authority of Rules 101.500, 101.502 and 101.506, as guided by Section 2-615 of the Code, because it is nonresponsive to the People's Motion for Summary Judgment.

23. Furthermore, there is no provision in Section 101.516(b) of the Board's Rules that provides for dismissal of the Complaint; as such, if the Hearing Officer chooses not to strike the entire Response, because the instant action is before the Board on a motion for summary judgment, the People respectfully request that the Hearing Officer, under the authority of Rules 101.500, 101.502 and 101.506, as guided by Section 2-615 of the Code, strike the portions of Respondent's Response requesting dismissal of the People's Complaint because such sections are beyond the relief available to Respondent at this juncture.

III. RESPONSE IS AN IMPROPER MOTION

24. In the alternative, if the Response is actually a motion, it should be stricken as untimely.

25. Moreover, if the Response can be construed as a motion instead of a response, it

should be stricken as it is drafted in a confusing and complicated manner which violates the basic principles of the Board's Rules and the Code.

A. LEGAL STANDARDS APPLICABLE TO MOTIONS

26. Section 101.506 of the Board's General Rules, 35 Ill. Adm. Code 101.506 (2010) states as follows: " 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 of the challenged document, unless the Board determines that material prejudice would result."

27. Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615(a) (2010) states as follows: "All objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of, and shall ask for appropriate relief, such as: that a pleading or portion thereof be stricken because substantially insufficient in law, or that the action be dismissed, or that a pleading be made more definite and certain in a specified particular, or that designated immaterial matter be stricken out, or that necessary parties be added, or that designated misjoined parties be dismissed, and so forth." "The purpose of requiring that defects in pleadings be attacked by motion [...] is to point out the defects in the pleadings so that the complainant will have an opportunity to cure them before trial." *Knox College v. Celotex Corp.*, 88 Ill.2d 407, 422 430 N.E.2d 976 (1981) (internal citation omitted). "A section 2-615 motion to dismiss tests the legal sufficiency of a complaint." *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148 ¶ 31, 976 N.E.2d 318 (2012) (internal citations omitted).

28. Section 2-619 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-619 (2010) states as follows: "(a) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit: (1) That the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction..." "A section 2-619 motion to

dismiss admits the sufficiency of the complaint, but asserts a defense outside the complaint that defeats it." *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148 ¶ 31, 976 N.E.2d 318 (2012) (internal citations omitted).

29. In ruling on motions to dismiss pursuant to either section 2–615 or 2–619 of the Code, the trial court must interpret all pleadings in the light most favorable to the nonmoving party. *Doe ex rel. Ortega-Piron v. Chicago Bd. of Educ.*, 213 Ill.2d 19, 23-24, 820 N.E.2d 418 (2004). When ruling on section 2-615 and 2-619 motions, a court must accept as true all well-pleaded facts, as well as any reasonable inferences that may arise from them, but a court cannot accept as true mere conclusions unsupported by specific facts. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148 ¶ 31, 976 N.E.2d 318 (2012).

30. Section 2-619.1 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-619.1 (2010) states as follows: "Motions with respect to pleadings under Section 2-615, motions for involuntary dismissal or other relief under Section 2-619, and motions for summary judgment under Section 2-1005 may be filed together as a single motion in any combination. A combined motion, however, shall be in parts. Each part shall be limited to and shall specify that it is made under one of Sections 2-615, 2-619, or 2-1005. Each part shall also clearly show the points or grounds relied upon under the Section upon which it is based."

31. "Ostensibly, section 2–619.1 was the legislature's response to the fact that "[r]eviewing courts have long disapproved of [the] slipshod practice" of filing hybrid motions to dismiss pursuant to both sections 2–615 and 2–619, because those motions "cause[] unnecessary complication and confusion." *Higgins v. Richards*, 401 Ill.App.3d 1120, 1125, 937 N.E.2d 215 (2010) (citing *Talbert v. Home Savings of America, F.A.*, 265 Ill.App.3d 376, 379, 202 Ill.Dec. 708, 638 N.E.2d 354 (1994)). Meticulous practice dictates that movants clearly state the section of the Code under which a motion to dismiss is brought. *Wheaton v. Steward*, 353 Ill.App.3d 67, 69, 817 N.E.2d 1029 (2004).

32. "A summary judgment motion may not be used as a substitute for a section 2–615 motion asserting defects appearing on the face of the pleading...Objections to the sufficiency of the complaint must be made specifically under section 2–615." *Fox v. Heimann*, 375 Ill.App.3d 35, 42, 872 N.E.2d 126 (Ill. App. 1 Dist., 2007) (internal citations omitted).

B. IF A MOTION, RESPONSE IS UNTIMELY

33. As stated earlier, the Response is not responsive to the People's motion for summary judgment. From the relief requested and the arguments made within, the Response may be construed as either a motion to dismiss, a countermotion for summary judgment, or possibly a motion to strike.

34. If the Hearing Officer finds that it is actually a motion, and not a response to the People's motion for summary judgment, the Hearing Officer should strike that Response as untimely.

35. As addressed above, the 14-day deadline for a motion for summary judgment is found in Sections 101.500(d) and 101.516 of the Board's General Rules. 35 Ill. Adm. Code 101.500(d) and 101.516.

36. On October 23, 2012, the Hearing Officer granted Respondent an extension to file a response to the People's motion for summary judgment. This should be considered an extension of the deadline created by Rules 101.500(d) and 101.516.

37. If Respondent meant its Response to be a motion challenging the People's Complaint, then such a motion is controlled by Rule 101.506 which sets a deadline of 30 days after the service of the challenged document, unless the Board determines that material prejudice would result. 35 Ill. Adm. Code 101.506.

38. The Complaint was filed on March 23, 2007, and served on AET on March 28, 2007. The deadline to file a challenge to the Complaint was April 27, 2007.

39. During the October 23, 2012 status call, the hearing officer granted an extension to

file a response to the People's motion, not an extension to file a motion challenging the Complaint.

40. According to the Board's rules, in order to allow a motion challenging the Complaint to be filed after the April 27, 2007, deadline, the Board needs to make a finding that material prejudice would occur if the motion were not filed.

41. The Board has made no such determination.

42. Because the Board has not made a determination that material prejudice would occur, the Hearing Officer has no authority to grant the Respondent an extension to file a motion challenging the People's Complaint.

43. Therefore, the Hearing Officer's October 23, 2012, extension cannot be considered an extension to file a motion challenging the Complaint.

44. The Respondent may argue that its Response challenges the Board's jurisdiction over this matter and therefore the Response can be filed at any time during the proceedings.

45. If Respondent does make such an argument, the Hearing Officer should note that the arguments made in the Response are not based solely on jurisdiction. Only Sections II, IV.A, IV.D.2, V.B.1.d and the Conclusion to the Response appear to argue that the Board lacks jurisdiction.

46. If the Hearing Officer determines that jurisdiction is at issue, and determines that striking the entire Response is imprudent, it should at least strike all parts of the Response which do not deal with jurisdiction because they not timely filed.

47. The People respectfully request that the Board, under the authority of Rules 101.500, 101.502 and 101.506, as guided by Section 2-615 of the Code, strike the entire Response as untimely.

48. In the alternative, if the Hearing Officer determines that striking the entire Response is imprudent because there is a valid issue related to the Board's jurisdiction, the People respectfully request that the Hearing Officer, under the authority of Rules 101.500,

101.502 and 101.506, as guided by Section 2-615 of the Code, strike all parts of the Response which do not deal with jurisdiction because they were untimely filed.

C. IF A MOTION, RESPONSE DOES NOT MEET LEGAL REQUIREMENTS FOR MOTIONS

49. As previously stated, the Response is not responsive to the People's motion for summary judgment. Instead, the Response appears to make various challenges to the People's Complaint.

50. It is well established Illinois law, that all objections or challenges to pleadings must be timely raised by motion. It is also well established that all such motions should clearly state the authority under which they are made.

51. While the Code allows for combined motions, it does not allow for hybrid pleading. Where a party intends to combine separate classes of motions, the motion should be separated into parts. Each part shall be limited to and shall specify under what authority it is made. Each part shall also clearly show the points or grounds relied upon under the authority upon which it is based.¹

52. Respondent does not follow any of these established requirements.

53. Respondent makes various arguments which would be best brought under motions to dismiss, a cross-motion for summary judgment or possibly a motion to strike. These arguments are scattered throughout the Response and are not clearly separated or delineated.

54. The Respondent also fails to clearly state the authority upon which its arguments are based.

55. In addition, while it is focused on the People's Complaint, the Response does contain arguments which may challenge the sufficiency of the People's motion; however, nowhere does the Respondent ask the Board to deny or strike the People's Motion. The only

¹ 735 ILCS 5/2-619.1 (2010); see also, *Higgins* 401 Ill.App.3d at 1125.

relief requested by Respondent is for the Board to dismiss the Complaint. Therefore, it is unclear whether the Response is actually meant to challenge the People's motion in addition to the Complaint.

56. It is clear, the Response does not comply with the Board's Rules or the Code. It is a confusing and overly complicated motion which attacks the People's Complaint in a slipshod manner. This is exactly the type of motion the General Assembly wanted to avoid when it created Section 2-619.1 of the Code, 735 ILCS 5/2-619.1 (2010).

57. The hybrid nature of the current filing causes confusion. Section 2-619.1 was specifically enacted to prevent filings like the Response.

58. This confusion also makes it impossible for the People to formulate a response or reply.

59. Without knowing upon which authority Respondent has made its arguments, the People cannot adequately respond.

60. The type of motion controls what response the People must make.

61. Motions to dismiss, motions for summary judgment, motions to strike and properly filed responsive pleadings have separate standards of review, separate requirements for the Board's interpretation of facts and pleadings as well as different deadlines and filing requirements.

62. The People should not be required to weed out and consolidate the Respondent's various arguments before being able to form a response.

63. The General Assembly and Illinois Courts have made it abundantly clear that it is the Respondent's responsibility to make sure that any motion it files is clear and unambiguous. If Respondent chooses to file a combined motion, it is required to make sure that each section of the motion is clearly separated. Respondent is also required to clearly state what the authority which creates the basis for each of the combined arguments.

64. The People would be greatly prejudiced if they were required to respond or reply to the Response as currently drafted, because there is no way to determine which standard of review the Board should apply to the Response or any reply or response filed by the People.

65. The People are further prejudiced because, not knowing what type of pleading the Response is, the People cannot be sure certain type of response they are allowed to make, when it can be timely filed and how it will be reviewed by the Board.

66. For the forgoing reasons, the People request that the Hearing Officer, under the authority of Rules 101.500, 101.502 and 101.506, as guided by Section 2-615 of the Code, strike the Response in its entirety because it is confusing, overly complex and fails to meet the basic requirements for a motion as set out in the Board's Rules as guided by the Code.

IV. RESPONDENT CANNOT CHALLENGE COUNTS II THROUGH V OF COMPLAINT
BECAUSE IT IS NOT A PARTY TO THOSE COUNTS

67. As a final matter, in its Response, Respondent requests that the Board dismiss all five counts of the People's Complaint.

68. The People only named the Respondent in Count I of the Complaint, alleging that the Respondent improperly transported waste, including hazardous waste, into the State for storage or disposal at a site which does not meet the requirements of the Act and associated regulations.

69. The Respondent is not a named party to the other four counts.

70. Section 101.500(a) of the Board's General Rules, 35 Ill. Adm. Code 101.500(a) states as follow: "The Board may entertain any motion the parties wish to file that is permissible under the Act or other applicable law, these rules, or the Illinois Code of Civil Procedure."

71. Section 101.202 defines a "party" as the person by or against whom a proceeding is brought.

72. Counts II through V of the Complaint are brought solely against EOR.

73. Therefore, AET is not a party to Counts II through V and the Board is not authorized to entertain any motions brought by AET which pertain to Counts II through V of the Complaint, despite the fact that EOR and AET are represented by the same counsel.

74. The People respectfully request that the Hearing Officer, under the authority of Rules 101.500, 101.502 and 101.506, as guided by Section 2-615 of the Code, strike any and all portions of the Response related to Counts II through V of the Complaint because Respondent AET is not a party to those counts.

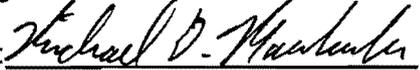
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WHEREFORE, the PEOPLE pray that this Honorable Hearing Officer grants their Motion to Strike the Respondent AET Environmental, Inc.'s Response to Motion for Summary Judgment, and strikes such Response in its entirety, in accordance with Rules 101.500, 101.502 and 101.506, as guided by Section 2-615 of the Illinois Code of Civil Procedure. In the alternative, the PEOPLE pray that this Honorable Hearing Officer strikes Respondent's Response in part, in accordance with Rules 101.500, 101.502 and 101.506, as guided by Section 2-615 of the Illinois Code of Civil Procedure. The PEOPLE also pray that the Honorable Hearing Officer grants the People leave to file a response to any portion of the Respondent's Response to Motion for Summary Judgment which is not stricken.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
LISA MADIGAN
ATTORNEY GENERAL

MATTHEW J. DUNN, Chief
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Litigation Division

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Dated: