

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.)
)
PEABODY COAL COMPANY, a Delaware)
corporation,)
)
Respondent.)

PCB 99-134

RESPONDENT'S BRIEF IN OPPOSITION TO THE STATE'S MOTION TO STRIKE PCC'S AFFIRMATIVE DEFENSES

Respondent, Peabody Coal Company ("PCC"), hereby responds to Complainant's Motion To Strike PCC's Affirmative Defenses ("Motion"), filed by Complainant, People of the State of Illinois ("State"), on or about February 3, 2003. For the reasons discussed below, the State's Motion should be denied.

I. INTRODUCTION

This case concerns an underground coal mine operation formerly operated by PCC in Gallatin County, Illinois, known as the Eagle No. 2 Mine ("Mine").¹ The State alleges here that the Mine has unlawfully contaminated groundwater at and near the Mine. More specifically, the State alleges that coal mining refuse ("Refuse") disposed of at the Mine has infiltrated the groundwater, resulting in increased concentrations of sulfates, chlorides, total dissolved solids ("TDS"), manganese and iron. The State contends that the past and current concentrations of these chemicals of concern ("COCs") both on and off the Mine (1) exceed standards established by the regulations adopted pursuant to the Illinois Groundwater Protection Act ("GPA") and

¹For the purpose of this brief, the term Mine encompasses both the actual mining works and the associated surface lands and structures located thereon.

(2) constitute water pollution, with both circumstances constituting violations of Section 12(a) of the Illinois Environmental Protection Act (“Act”).

PCC denies that it has violated the Act as alleged by the State. In addition, PCC has in its answer to the State’s Third Amended Complaint (“Complaint”) pled sixteen affirmative defenses to the State’s claims. The State now has moved to strike all of PCC’s affirmative defenses, contending as to each either that PCC has failed to plead with sufficient specificity for the State to understand the basis of the defense and/or that the facts alleged by PCC as the basis for the defense are legally insufficient to establish the defense and/or both.

As demonstrated below, the State’s contentions as set forth and discussed in its Motion are neither factually nor legally sound.² Moreover, the State’s Motion is to a substantial extent procedurally improper, in that the relief it seeks with respect to certain of PCC’s affirmative defenses would be inappropriate at this stage of the proceedings.

II. FACTS

A. Case Overview

1. The Mine

The Mine opened in 1968, and coal production operations continued through 1993, all pursuant to permits issued by the Illinois Department of Natural Resources, Office of Mines and Minerals (“IDNR”) and the Illinois Environmental Protection Agency (“IEPA”) or their predecessor agencies.³ In accordance with the terms and conditions of those permits, and subject

²To a considerable degree, PCC does not disagree with the State’s enunciation of general principles of law in its Motion. Rather, most of PCC’s disagreements with the State’s legal arguments in its Motion are based upon PCC’s view that State has misapplied the law to the facts here or that legal principles articulated by the State simply have no relevance to the facts here. Accordingly, PCC has attempted in this Brief to avoid either any unnecessary reiteration of general legal principles stated in the State’s Motion or any exposition of any disagreements PCC might have with the State’s statement of legal principles that are not relevant to any of PCC’s affirmative defenses.

³IDNR, IEPA, and their respective predecessor agencies will be referred to hereafter collectively as the State Agencies.

to regular inspections by the permitting authorities, PCC disposed of Refuse⁴ at various surface areas of the Mine (“Disposal Areas”), at which in some cases shallow excavation had been done.⁵ Over time, as this Refuse was exposed to air and water, the resulting geochemical and physical processes have caused some leaching of COCs into groundwater at those locations.

From the time the State first issued a permit to PCC authorizing its Disposal Practices, those employees of the State Agencies responsible for regulating PCC’s mining activities at the Mine knew that the deposition of Refuse on and below the surface of the Mine would result in the release of some or all of the COCs at issue in this case into the groundwater at the Disposal Areas. Subsequent analyses of groundwater samples obtained at and near the Mine suggested that such releases had in fact occurred; but IDNR and IEPA continued to issue and/or renew the permits that authorized PCC’s Disposal Practices, even after those agencies concluded that these releases had caused exceedances of applicable water quality standards (“WQS”). The State Agencies did, however, from time to time require PCC to conduct studies and otherwise provide information regarding the extent of these releases; and they also required PCC to take steps to prevent or minimize the migration of COCs away from the Mine.

In 1980, PCC first installed a groundwater extraction well at the Mine. The primary purpose of this well at the time of installation was to produce water for use in operations at the Mine’s preparation plant. However, the well had the ancillary effect of limiting the migration of groundwater containing certain COCs away from the Mine. Thereafter, IDNR required PCC to install pumping wells at the Mine specifically to preclude or limit the migration of COCs in

⁴Almost all of this coal mining refuse was in the nature of either gob or slurry. Gob consists of rock and other solid material brought to the surface along with the mined coal, but separated from the coal at the Mine’s preparation plant. Slurry is a thick liquid composed of water and coal fines, *i.e.* very small particles, created in the preparation processes of washing and crushing the mined coal.

⁵Hereafter, PCC’s disposal of Refuse at the Mine will be referred to as Disposal and its methods of Disposal at the Mine will be referred to as Disposal Practices.

groundwater from the Disposal Areas away from the Mine. IDNR also required PCC to install groundwater monitoring wells at and around the Mine and to periodically sample and analyze groundwater at those locations. Although the number and location of such wells at and near the Mine has varied over the years, this basic groundwater monitoring and containment regimen has been implemented by PCC at the Mine for more than twenty years.

There have been man-made ponds located at the Mine since it opened. These ponds were built by PCC to collect and store storm water runoff and groundwater pumped from wells at the Mine. Since the Mine opened, PCC has discharged water from these ponds at Outfalls into various ditches located at the perimeter of the Mine that feed into Cypress Ditch, which empties into the Saline River, which in turn empties into the Ohio River. All such discharges have been authorized and carried out by permits issued to PCC by the State Agencies.

After production at the Mine ceased, PCC began the land reclamation process of the Mine. In 1994, PCC retained GeoSyntec Consultants (“GeoSyntec”), an Atlanta-based environmental consulting and engineering firm, to carry out a hydrologic evaluation of the groundwater system in the area of the Mine and, based upon that analysis, developed a program for managing the Disposal Areas so as to limit the migration of COCs in groundwater away from the Mine. As recommended by GeoSyntec, PCC has (among other things) covered portions of the Disposal Areas with an engineered clay cap to reduce the infiltration of rain water and the resulting production/release of COCs.

2. The District

Beginning in 1982, the Saline Valley Conservancy District (“District”) installed and began to operate public drinking water supply wells (“Production Wells”) located southwest of the Mine. The original District well field consisted of three Production Wells. A fourth well was added in 1990, and a fifth well was added in 1995.

After installing its Production Well 5 in close proximity to the western boundary of the Mine and in very close proximity to one of the unnamed ditches (“Ditch”) to which PCC has long discharged overflow water from holding basins at the Mine pursuant to a series of permits issued and administered by IEPA, the District notified PCC, IDNR, and IEPA that it had observed and was concerned about a trend of increasing concentrations of sulfates in its Production Wells, especially the new Well 5.⁶

Discussion among the District, PCC, and IEPA regarding appropriate management of this situation ensued. However, these discussions did not result in the situation being addressed by PCC and/or IEPA to the District’s satisfaction. In 1999, the District sued PCC in federal district court, seeking monetary damages and injunctive relief with respect to PCC’s alleged wrongful pollution of the District’s production wells. That litigation was resolved by the parties’ voluntary settlement of all issues between them in January 2001. The parties’ Comprehensive Settlement Agreement has the following major terms:

- (1) The District agreed to abandon Production Well 5, located nearest the Mine, and replace it with a new Production Well 6 located northwest, i.e., upgradient, of the Mine at PCC’s expense;
- (2) The District agreed to refrain in the future from installing any new production well within a designated area in close proximity to the Mine;
- (3) PCC agreed to institute a specifically-detailed groundwater monitoring and mitigation program (“GMM Plan”) at the Mine so as to (a) reduce the concentrations of certain COCs from the groundwater at and near the Disposal Areas, (b) restrain the migration of

⁶Significantly, a computerized groundwater quality modeling exercise carried out by PCC in 1985 pursuant to an IDNR directive indicated that COC s probably had migrated as far as the District s Production Wells, albeit at relatively modest concentrations.

(4) groundwater containing those COCs from the vicinity of the Mine, and
(c) monitor the presence of those COCs at specified locations in the Groundwater System until such time as certain target levels for sulfate concentrations at certain specified locations were achieved for an agreed upon period of time; and

(5) PCC agreed to pay certain sums of money to the District.

B. This Litigation

The State first notified PCC of likely enforcement activities involving the Mine on January 28, 1997, when IEPA issued Notice of Violation (“NOV”) M-1997-00010 (“NOV I”) alleging exceedances of WQS purportedly currently applicable to groundwater existing at various locations at and near the Mine that violated Section 12 of the Act, 415 ILCS 5/12, as well as 35 Ill. Adm. Code §§ 620.410(a) and 302.304. NOV I invited PCC to propose a Compliance Commitment Agreement to resolve the alleged violations. The letter also informed PCC, however, that no matter what Compliance Commitment Agreement terms PCC might agree to, the IEPA was still prepared to submit the matter for formal prosecution: “Due to the nature and seriousness of the violations cited, please be advised that resolution of the violations may also require the involvement of a prosecutorial authority for purposes that may include, among others, the imposition of statutory penalties.”

As detailed in the allegations in State’s Third Amended Complaint (“Complaint”), subject to PCC’s admissions, denials, and clarification thereto as set forth in its answer to that Complaint, the parties more or less followed the dispute resolution procedures established by Section 31 of the Act, 415 ILCS 5/31, with respect to NOV I. However, they were unable to resolve the issues raised by NOV I via that process.

On December 23, 1997, IEPA served upon PCC NOV M-1997-00133 (“NOV II”), again alleging exceedances of purportedly applicable groundwater WQS constituting violations of

Section 12 of the Act, 415 ILCS 5/12, as well as 35 Ill. Adm. Code §§ 620.410(a) and 302.304. This letter also demanded a Compliance Commitment Agreement from PCC and warned that the matter might be referred to the prosecuting authority no matter what compliance terms were agreed to, “[d]ue to the nature and seriousness of the violations cited.”

Again, the parties more or less participated in the informal dispute resolution procedures of Section 31. These efforts failed to resolve the issues raised by NOV II.

The State’s original complaint in this case was filed on March 23, 1999. The current Complaint, which sets forth the State’s claims against PCC now at issue, was filed October 24, 2002. PCC’s answer to that Complaint was filed on or about December 20, 2002.

Counts I, II, and III of the State’s Complaint contain allegations of a large number of purported violations of various WQS purportedly applicable at various locations at and near the Mine at various time periods over the past 20-plus years. However, none of those alleged exceedances of WQS are alleged to have occurred downgradient of the Mine, *i.e.*, in the direction of the District’s Production Wells. Indeed, the only alleged exceedances of applicable WQS occurring outside the footprint of the Mine involved groundwater samples obtained at monitoring wells located in a farm field that lies between the northeastern and northwestern areas of the Mine.

III. ARGUMENT

The State has advanced two separate and distinct lines of attack on PCC’s affirmative defenses. First, the State contends that certain of those defenses should be stricken because PCC allegedly has failed to set forth its allegations of fact upon which the defense is predicated with sufficient specificity for the State to determine the basis of the PCC affirmative defense and thereby have a reasonable opportunity to counter it. Second, the State contends that certain PCC

affirmative defenses, at least as the State understands them, are not legally viable. Neither contention is well-founded.

A. PCC's Affirmative Defenses Are Factually Sufficient.

1. The Relief Sought by the State is not Available.

The State's first line of attack is generally fatally flawed because the State seeks inappropriate relief for the alleged shortcomings in PCC's pleading of its affirmative defenses. To the extent that such shortcomings may be found to exist, the State is entitled only to a more definite statement of the facts upon which a PCC affirmative defense is based, not avoidance of the defense.

35 Ill. Adm. Code § 103.204(d) requires that facts constituting an affirmative defense "must be plainly set forth before appearing in the answer or in a supplemental answer" Although the Board's procedural rules are silent as to any standard of what constitutes a sufficient statement of facts to support an affirmative defense and as to how an allegedly insufficient statement of facts is to be evaluated, the Illinois Code of Civil Procedure ("Code") provides guidance as to both matters, as the State acknowledges.

First, Section 2-612(b) of the Code, 735 ILCS 5/2-612(b) provides: "No pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet." (Emphasis added.) According to Section 2-607 of the Code, 735 ILCS 5/2-607, a party is entitled to request a Bill of Particulars if the "allegations [of a pleading] are so wanting in detail that the responding party should be entitled to a Bill of Particulars."

The relevance of this guidance here is two-fold. First, the purpose of the "plain statement of fact" requirement is merely to inform an opposing party of the legal theories which will be presented in the case by the pleader. Second, if that purpose is not satisfied by the original

pleading, the remedy afforded is to require a more detailed pleading, not strike the defense in its entirety.

2. PCC's Defenses are Sufficiently Pled.

PCC is not required to set forth factual allegations in connection with its affirmative defenses to the degree of detail that the State suggests. A respondent in an enforcement case like this is not required to submit a pre-discovery statement of its proposed findings of fact and conclusions of law, especially not one that includes a complete exposition of all evidence that supports a proposed finding of fact, just in order to assert an affirmative defense.

It is clear on the face of each of PCC's affirmative defenses as pled what the "nature of the defense" is, especially when read in the context of an ongoing relationship between the State and PCC with respect to the matters that are the subject of this proceeding. That relationship now spans nearly 35 years. That context includes (a) the State's close scrutiny and evaluation of PCC's Disposal Practices and their potential effect on the quality of groundwater near the Mine that has been ongoing for nearly 20 years; (b) the State's particular concern about the District's Production Wells that has been the subject of intense scrutiny, discussion, and evaluation for nearly 10 years; and (c) detailed discussions between the parties regarding the specific issues in this case that have been ongoing for more than five years.

Moreover, it is important to keep in mind that PCC's affirmative defenses are set forth in its answer to the State's Complaint and therefore is part of a responsive pleading. That pleading includes PCC's admissions and denials of the State's allegations of fact in its Complaint (including, to some extent, affirmative statements of fact by PCC). In its attack on each of PCC's affirmative defenses, however, the State treats PCC's pleading as if both the State's 52 page exposition of alleged facts upon which it bases its claims against PCC in this case and PCC's admissions and denials thereto do not exist. The State makes no effort to explain how the

process of formulating the issues in this case would be enhanced by PCC being required to reiterate all of the State's allegations and all of PCC's admissions and denials, particularly at this stage of the case, at which the parties have conducted but limited discovery.

Finally, to the extent that the State seeks more detailed factual information regarding the grounds for PCC's affirmative defenses, the State has the full panoply of discovery methods available to it. That is, after all, a fundamental purpose of the discovery process.

As a practical matter, however, PCC sets forth below specific facts with respect to its affirmative defenses to the extent necessary to demonstrate the legal validity of each of those defenses. This should provide the State any additional information necessary for it to fully understand the nature of PCC's affirmative defenses. However, if the Board deems it appropriate and necessary for PCC to file a supplemental answer that reiterates those allegations in pleading forms, PCC would be able to do so in short order.

B. PCC's Affirmative Defenses Are Legally Viable.

PCC responds to the State's contentions that PCC's affirmative defenses are factually and legally insufficient as to each such defense immediately below.

1. First Affirmative Defense – Section 31 Jurisdiction

Facts

Prior to carrying out any of the Disposal which the State contends has caused (a) "water pollution" generally, and (b) exceedences of applicable WQS specifically, PCC informed each of the State Agencies having jurisdiction over PCC's mining activities as to its planned Disposal Practices in the course of applying for and receiving all permits necessary for that Disposal to be fully authorized. At the time the State issued each of those permits to PCC, the State's responsible personnel were aware of and understood both (a) the physical and geochemical processes that would be expected to — and in fact did — occur at the Disposal Areas, and (b) the

resulting likelihood that those processes would result in the release of COCs into groundwater at the Mine and their migration away from the Mine.

The concentrations of COCs at various locations at and near the Mine have been determined from time to time since at least July 24, 1980. The results of those determinations have been promptly provided by PCC to the State Agencies throughout the entire time period in question. The State Agencies have known since 1985 that it is likely that COCs have migrated as far as the District's Production Wells. PCC's Disposal that the State alleges to have resulted in "water pollution" and "violations of water quality standards" ended in 1993.

IEPA has issued only two NOVs in connection with the matters that are the subject of its Complaint. The first was dated January 27, 1997. The second was dated December 23, 1997. Both of these dates are more than 180 days after the last date upon which PCC's Disposal occurred. Both of these dates also are more than 180 days after PCC provided the State much of the groundwater quality data alleged by the State to constitute the basis for its claims against PCC in this action.

Law

PCC acknowledges that the Board has held that IEPA compliance with Section 31(a)(1) is not a jurisdictional prerequisite to the State bringing an enforcement case like this one. However, PCC respectfully contends that the Board cases relied upon by the State have not been correctly decided as to this issue. As this issue has not been addressed by the Illinois appellate courts, PCC adheres to its position as to its first Affirmative Defense so as to preserve that position in connection with future proceedings in this case.

2. Second Affirmative Defense – Section 31 Limitations Period

Facts

PCC hereby incorporates by reference as if fully set forth herein the statement of facts relevant to its First Affirmative Defense, as set forth above.

Law

PCC hereby incorporates by reference as if fully set forth herein its legal position relevant to its First Affirmative Defense, as set forth above. In addition, PCC observes that the only substantive difference between its First and Second Affirmative Defenses is that the former characterizes the 180-day provision of Section 31(a)(1) as a jurisdictional prerequisite, while the latter characterizes it as establishing a period of limitations. The only practical effect of this distinction is that under the principles of PCC's First Affirmative Defense, the State's failure to satisfy this statutory provision would bar the State's prosecution of its claims against PCC ab initio, while under the principles of PCC's Second Affirmative Defense, PCC is required to raise the State's failure to comply with the statutory provision as an affirmative defense and bears the burden of proving the facts necessary to establish the defense.

3. Third Affirmative Defense – Statute of Limitations

PCC hereby withdraws its Third Affirmative Defense.

4. Fourth Affirmative Defense-Laches

Facts

PCC hereby incorporates by reference as if fully set forth herein its statement of facts relevant to its First Affirmative Defense, as set forth above. In addition, PCC states that it has been prejudiced by the State's conduct in this regard, in that the State for nearly 30 years condoned PCC's Disposal Practices that were purportedly causing "water pollution" in

groundwater at and near the Mine by expressly issuing permits authorizing the continuance of those Disposal Practices.

Furthermore, even though the State was provided all data generated by PCC relevant to groundwater quality at and near the Mine required by the State as part of the terms and conditions of the permits issued to PCC, the State at no time made any effort to prohibit PCC from continuing its Disposal Practices. Rather, at most, the State from time to time (a) required PCC to provide additional information regarding its Disposal Practices and more information regarding the quality of groundwater at and near the Mine, or (b) required PCC to pump groundwater from locations at the Mine so as to reduce the amount of migration of COCs entering groundwater at the Mine to locations near the Mine. Indeed, at least some of these actions taken by the State occurred after the State was taking the position that applicable WQS at and/or near the Mine had been exceeded as a result of PCC's Disposal Practices.

Because the State's ongoing authorization of PCC's ongoing Disposal, groundwater quality monitoring, and groundwater pumping practices, PCC continued those practices in reliance upon its reasonable understanding (a) that they were acceptable to the State, and (b) that its management of any effects of those practices on the quality of groundwater at and near the Mine were satisfactory to and considered sufficient by the State.

Law

As the State acknowledges, the equitable doctrine of laches may bar claims asserted by the State in an enforcement case like this under certain circumstances. Those circumstances are present here.

This is a situation very similar to that involved in People of the State of Illinois v. John Crane, Inc., PCB No. 01-76 (May 17, 2001) ("Crane"). In that case, John Crane, Inc. ("Crane") was charged by the State with various air pollution violations. In its answer to the State's

complaint, Crane asserted a number of affirmative defenses to the State's claims, including the equitable doctrine of laches. The State moved to strike that defense, but this Board denied that motion. According to the Board, Crane's allegations that IEPA had unreasonably and unjustifiably delayed its issuance of an NOV to Crane and that IEPA's failure to issue an NOV on a timely basis had prejudiced Crane by subjecting it to greater penalty amounts of \$10,000 per day of violation was sufficient to support the affirmative defense of laches.

The facts supporting PCC's affirmative defense of laches here is even more compelling. As a consequence of the State's conduct, (a) the amount of Refuse disposed of by PCC by means of practices alleged by the State in this proceeding to have constituted and/or caused violations of the Act, (b) the duration of such violations, (c) the magnitude of the potential penalties that might be assessed with respect to any such violations, and (d) the magnitude and cost of any remedial action that PCC might be required to undertake at the Mine have all been significantly increased, compared to what they would have been had the State taken enforcement action in a diligent fashion with respect to the alleged violations of the Act that are the subject of its claims in this case. PCC thus has sustained prejudice of precisely the nature but greater in scope that the Board held in Crane to be sufficient to establish a defense of laches to some or all of the State's claims in this case.

5. Fifth Affirmative Defense - Waiver

Facts

PCC hereby incorporates by reference as if fully set forth herein its statement of facts relevant to its First and Fourth Affirmative Defenses, as set forth above. In addition, PCC states that it cannot seriously be disputed that the State Agencies have been fully aware of their right to take enforcement action against PCC with respect to any "water pollution" or any exceedances of applicable WQS ever since Disposal at the Mine began. Furthermore, for many years, the State

Agencies have addressed those environmental conditions at and near the Mine that are the subject of this case by means other than enforcement action and repeatedly indicated to PCC their approval of PCC's actions taken in response to the State Agencies' directives in this regard. This constitutes a clear indication of the State's intention over a long period of time not to take enforcement action with respect to these matters.

Law

As the State acknowledges, the equitable doctrine of waiver may bar claims asserted by the State in an enforcement case like this under certain circumstances. Those circumstances are present here.

One of the affirmative defenses asserted in Crane was waiver. The Board denied the State's motion to strike that defense also. According to the Board, Crane had alleged that IEPA was aware of the company's alleged violations for quite some time before issuing a NOV and that it would prove that IEPA's delay in issuing a NOV was due to the agency's intent to relinquish its claim.

Again, the facts here are even more compelling than those in Crane. The State's waiver of some or all of its claims against PCC that are asserted in the State's Complaint is manifest by its ongoing issuance of permits to PCC authorizing PCC's Disposal Practices even after the State had full knowledge of the groundwater quality data that it now contends constitutes evidence of both (a) the "water pollution" complained of in Counts I and II of the State's Complaint and (b) the alleged violations of WQS complained of in Count III of the State's Complaint. These facts, along with the prejudice that PCC has incurred, demonstrate that the State has waived some or all of the claims that are the subject of the State's Complaint in accordance with Crane.

6. Sixth Affirmative Defense - Estoppel

Facts

PCC hereby incorporates by reference as if fully set forth herein its statement of facts relevant to its First, Fourth and Fifth Affirmative Defenses, as set forth above. In addition, PCC states that the State knew and understood at all relevant times that PCC would rely on the State's authorization of PCC's Disposal Practices. This is evidenced not only by the very nature of the process by which PCC applied for and the State issued the permits that authorized those practices, but also by the fact that the State regularly inspected PCC's activities at the Mine and thereby confirmed that PCC was engaged in the Disposal Practices as authorized. Moreover, the nature of the relationships between IDNR and IEPA as regulatory authorities on the one hand and PCC as the regulated entity on the other was such that the State Agencies understood full well that PCC would undertake and continue its authorized Disposal Practices unless and until those authorizations were withdrawn or modified.

Law

As the State acknowledges, the equitable doctrine of estoppel may bar claims asserted by the State in an enforcement case like this under certain circumstances. Those circumstances are present here.

Crane also involved the affirmative defense of estoppel. Again, the Board denied State's motion to strike that affirmative defense. According to the Board, Crane had alleged that it relied on IEPA's representations that the company's facility was in compliance and that the company would sustain a substantial loss in the nature of penalties if the State were allowed to disavow those representations in the enforcement case.

Once again, the facts here are even more compelling than those in Crane. The facts stated above demonstrate not only that PCC relied to its detriment upon the State's authorization

of its Disposal Practices but also that the State both knew and intended that PCC do so. These facts establish the elements of estoppel sufficient to bar some or all of the State's claims asserted against PCC in this action in accordance with Crane.

7. Seventh Affirmative Defense – NPDES Permit Shield

Facts

Contrary to the State's allegation, there is not — and there is no credible evidence that there ever has been — a plume of significantly contaminated groundwater extending from the Mine to or near the District's Production Wells. More specifically, there has been no migration of COCs entering groundwater at the Mine's Disposal Areas that has resulted in increasing concentrations of such COCs in groundwater extracted by the District's Production Wells. Rather, any such migration has remained relatively steady — and completely insignificant — throughout the entire period of more than 20 years for which data regarding groundwater quality near the Mine are available.

The actual cause of increasing concentrations of sulfates in groundwater at the location of Production Wells 3 and 5 beginning in late 1995 was the District's installation and operation of Production Well 5.⁷ As that well pumped, it drew water moving along the Ditch through the bottom of the Ditch into the groundwater near that well. To the extent that water moving through the Ditch originated at one of the NPDES Outfalls at the Mine, that water consists in part of groundwater extracted from beneath the Disposal Areas and therefore contains sulfates and other COCs present in that groundwater. Consequently, when that water entered the groundwater system near Production Well 5 as a result of that well pumping, some portion of the

⁷Concentrations of sulfates at the locations of the District's Production Wells prior to the installation of Production Wells 5 were stable and low. Furthermore, there is no evidence of any real increase in the concentration of sulfates at the locations of Production Wells 1 and 2, which are closer to the Mine than Production Well 3.

sulfates and other COCs in the water moving along the Ditch also entered the groundwater near Production Well 5. Some of that COC-containing groundwater then was captured by Production Well 5; some of it was captured by Production Well 3.⁸

All of PCC's discharges of water into the Ditch at Outfalls at the Mine have been carried out pursuant to the terms and conditions of permits issued to PCC by State Agencies. At all times relevant here, those discharges have been carried out in accordance with the terms and conditions of an NPDES permit issued to PCC by IEPA. PCC is unaware of any evidence of any effluent discharge limit contained in any such permit having occurred in connection with any such discharge.

Law

Section 12(f) of the Act, 415 ILCS 5/12(f), provides that compliance with an NPDES permit issued by IEPA shall be deemed compliance with the effluent discharge provisions of Section 12(f) of the Act (except with respect to "toxic pollutants," which are not at issue here). In this case, contrary to the State's allegations, the concentrations of sulfates and other COCs in groundwater downgradient from the Mine on which the State bases certain of its claims against PCC exist only because of the District's installation and operation of Production Well 5.

On these facts, the Board should find that PCC has not "caused" the groundwater conditions downgradient of the Mine complained of by the State in the first instance; rather, it is the District that "caused" those conditions. However, if the Board should somehow conclude that PCC at least in part "caused" those conditions by discharging water into the Ditch containing sulfates and other COCs found in the groundwater pumped from underneath the Disposal Areas, no liability may be imposed upon PCC in this regard, because all such

⁸The fate of this groundwater depended in part on whether or not Production Well 5 was pumping, which was not always the case, as the District generally pumps only three of its Production Wells at a time.

discharges have been carried out in accordance with the terms and conditions of an NPDES permit issued by IEPA — and that constitutes compliance with Section 12(f) of the Act as a matter of law.

The State's citation of People v. Midwest Grain Products of Illinois, Inc., PCB 97-179 (Aug. 21, 1977) (slip opinion at 4) is inapposite. In that case, which involved alleged air pollution violations, Midwest Grain included allegations in its answer that it had made good faith efforts to comply with the applicable air pollution regulations, characterizing those allegations as affirmative defenses. The Board concluded that these allegations “set forth facts which, if proven, would be relevant to the issue of an appropriate penalty rather than the liability of Midwest Grain for the violations set forth in the complaint,” explaining “[t]hat the appropriate penalty to be imposed for violation of Act is a separate inquiry from whether a violation of the Act has occurred, and mitigation is used or only considered once the violation of the Act has been found,” whereas “[a]n affirmative defense is a response to a claim which attacks the complainant's right to bring an action” at all. (Id.)

In this case, in contrast, (a) PCC's only connection to the concentrations of sulfates and other COCs in groundwater downgradient from the Mine that the State alleges to be a “water pollution” violation of Section 12(a) and (d) of the Act is its discharge of water into the Ditch pursuant to an NPDES permit issued by IEPA, and (b) that every such discharge involved compliance with Section 12(f) — and therefore not a violation of Section 12(a) or (d) — of the Act. Therefore, PCC can have no liability under the Act in the first instance with respect to the groundwater conditions downgradient of the Mine at issue, assuming for the sake of argument that PCC's acts can be deemed to have been a “cause” of those conditions at all, due to its NPDES “permit shield.”

8. Eighth Affirmative Defense

Facts

PCC hereby incorporates by reference as it fully set forth herein the statement of facts relevant to its Seventh Affirmative Defense, as set forth above.

Law

This Board may on its own motion add as a party to any case any person who is not already a party if (1) a complete determination of a controversy cannot be had without the presence of that person; (2) that person has an interest that the Board's order may affect; or (3) it may be necessary for the Board to impose a condition on that person. 35 Ill. Adm. Code § 101.403(a). If the Board determines that such joinder is necessary, it will grant the complainant leave to file an amended complaint that sets for a claim against the added respondent. 35 Ill. Adm. Code § 103.206(a)(b).

In this case, as noted above, it is the District that has directly "caused" the presence of sulfates and other COCs in the groundwater downgradient from the Mine at the concentrations that are the subject of certain of the State's claims in this case. Therefore, a proper allocation of responsibility for this situation cannot be had without the District's presence; the District has an interest that the Board's resolution of this case may affect, in that the State seeks an order restricting the conduct that has caused this situation to exist; and it may be necessary for the Board to impose a condition on the District in order to ensure that the District's actions that have caused this condition do not recur. Accordingly, the District is a necessary party to this proceeding. Accordingly, the Board should direct the State to file an amended complaint that sets forth a claim against the District based upon the District's actions that have caused the groundwater conditions downgradient from the Mine complained of by the State.

9. Ninth Affirmative Defense – Retroactive Liability

Facts

PCC hereby incorporates by reference as if fully set forth herein its statement of facts relevant to its First, Fourth, Fifth and Sixth Affirmative Defenses, as set forth above. In addition, PCC states that the nature of the physical and geochemical processes that have been ongoing in the Disposal Areas since PCC disposed of Refuse in those areas, the nature of groundwater flow at and near the Mine, and the nature of solute transport within that groundwater may have resulted in concentrations of certain COCs in groundwater at and/or near the Mine that exceed WQS established by certain regulations promulgated to implement the GPA after the great majority of PCC's Disposal Activities occurred. Thus, to the extent that the State contends that certain of those regulations apply to the results of PCC's Disposal Activities that took place before the regulations became effective, the State is attempting to impose retroactive liability upon PCC, i.e., liability for its conduct that was lawful in all respects at the time it occurred.

In this proceeding, the State seeks the imposition of many millions of dollars (at least) in civil penalties against PCC. The State also seeks an order compelling PCC to take all steps necessary to "remediate" the groundwater at and near the Mine so that all WQS asserted by the State to apply to that groundwater will be satisfied, including, but not limited to, the relocation of all Refuse disposed of at the Disposal Areas to another location. The cost of such a project has been reasonably estimated by PCC to be more than \$115 million.

Law

In its Motion, the State confuses the concepts of procedural and substantive due process under the United States and Illinois Constitutions. Consequently, to the extent the State discusses the issue of whether the procedures established by Illinois for an enforcement case like

this one satisfy procedural due process requirements, that discussion is wholly inapposite to PCC's Ninth Affirmative Defense.

Rather, that defense based upon PCC's contention that the State's effort to impose staggering liabilities upon PCC for conduct that was lawful in all respects at the time it occurred constitutes a violation of PCC's substantive due process rights under the principles enunciated in Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998). In that case, which involved the Coal Industry Retiree Health Benefits Act of 1992 ("Coal Act"), the United States Supreme Court addressed the circumstances under which government regulation that imposes retroactive liability violates a person's substantive due process rights and constitutes a taking in violation of the Takings Clause of the Fifth Amendment of the U.S. Constitution.

Justice O'Connor, writing on behalf of herself, Chief Justice Rehnquist and Justices Scalia and Thomas,⁹ began her analysis by observing this process for evaluating the constitutionality of any regulation that imposes a burden on a private party for the public good "involved an examination of the 'justice and fairness' of the governmental action." 524 U.S. at 523 (citation omitted). Although this inquiry is fact intensive, the primary significant factors to be considered are "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." Id. (citation omitted). In this regard, as Justice O'Connor recognized: "Retroactivity is generally disfavored in the law" 524 U.S. at 532 (citation omitted).

⁹ Significantly, Justice Thomas also wrote a short concurring opinion in which he stated his willingness to reconsider the issue of whether the ex post facto clause of the Constitution, Article I, /9, cl. 3, bars retroactive civil laws generally, even if they would pass muster under the Supreme Court's Takings Clause jurisprudence! 524 U.S. 538-539.

Justice Kennedy concurred in the court's judgment that obviated the Coal Act's allocation of liability to Eastern Enterprises; but he dissented from Justice O'Connor's opinion to the extent that it was based upon an application of the Takings Clause. Rather, Justice Kennedy relied upon generally accepted principles prohibiting retroactive legislation like the Coal Act to bar that statute's application to Eastern Enterprises. Thus, he stated:

If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership. As a consequence, due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity. Groups targeted by retroactive laws, were they to be denied all protection, would have a justified fear that a government once formed to protect expectations now can destroy them. Both stability of investment and confidence in the constitutional system, then, are secured by due process restrictions against severe retroactive legislation.

524 U.S. 548-549.

Here, PCC's Disposal Practices now alleged by the State to have been unlawful began almost 30 years before NOV I was issued. Those Disposal Practices were expressly authorized by permits issued to PCC by the State, which knew the likely consequences of the permitted Disposal Practices on groundwater quality at and near the Mine. To the extent that PCC might have obtained some immediate economic benefit to its Disposal Practices rather than utilizing methods of Refuse disposal that might have resulted in some lesser effect on groundwater quality at the Mine, those cost savings were equally beneficial to the public — which was not required to bear the costs of more expensive Refuse disposal practices in its electric bills.

In short, the Eastern Enterprises tests for the unconstitutionality of retroactive legislation are satisfied here to the extent that the State's contentions as to the applicability of the GPA WQS regulations is found to be legally correct. Accordingly, those regulations cannot serve as the basis for imposing retroactive liability on PCC on the basis of its past Disposal Practices that

were duly authorized by the State with full knowledge of the consequences of those practices now complained of at the time they were authorized.

As the State acknowledges, the Illinois Constitution also provides substantial protection against laws that purport to impose retroactive or retrospective obligations. Indeed, Illinois law supports striking down laws like the provisions of the GPA and its implementing WQS regulations that create new obligations with respect to “transactions or consideration already past.” U.S. Steel Credit Union v. Knight, 32 Ill. 2d 138, 142, 204 N.E.2d 4, 6 (1965) (quoting C.J.S., Statutes § 412 (1953)). Consequently, the Board should here apply the general rule of statutory construction in Illinois that requires the application of the GPA and its WQS regulations at issue as prospective only. Rivard v. Chicago Firefighters Union, Local No. 2, 122 Ill. 2d 303, 309, 522 N.E.2d 1195, 1198 (1988).

10. Tenth Affirmative Defense - Equal Protection

Facts

PCC hereby incorporates by reference as if fully set forth herein its statement of facts relevant to its First, Fourth, Fifth, Sixth, and Ninth Affirmative Defenses, as set forth above. In addition, PCC states that its Disposal Practices were no different in nature than those employed by numerous other coal mine operators at numerous other mines in Illinois during the time period in question. Furthermore, the physical and geochemical processes that have been ongoing at the Disposal Areas are no different in nature than those that have been ongoing at similar coal mining refuse disposal areas at those other mines. Finally, any release into groundwater of certain COCs from those disposal areas at other mines is of the same nature and degree as is that at the Mine. However, the State has not taken enforcement action against the operators of those other mines as it has against PCC in this case.

PCC reasonably believes that the evidence that will be developed through the discovery process will demonstrate that the State's prosecution of this enforcement action against PCC has been motivated in significant part by political considerations relating to the District's demands that the State force PCC to take such measures as might be necessary to reduce the concentrations of sulfates in the District's Production Wells. In any event, the State has handled this case in almost every respect in a manner disproportionate to any possible adverse effect on groundwater quality resulting from PCC's Disposal Practices¹⁰ or any other rational evaluation of the seriousness of the violations of the Act alleged by the State in this case. This alone raises a reasonable inference of improper motivation.

Law

The State agrees that it cannot single out PCC for enforcement on the basis of improper motives. However, that is precisely what appears to have happened here.

The totality of circumstances here strongly suggests that this is not a case of innocently disparate treatment of PCC "or even arbitrary administration of state powers." Summers v. Ill. Commerce Comm'n, 58 Ill. App. 3d 933, 936, 374 N.E.2d 1111, 1113 (4th Dist. 1978). The State's focus on this Mine, given the wholly unremarkable conduct in question, the State's total lack of concern and attention directed to the District's conduct in creating the groundwater conditions at the District's Production Wells, the State's consistent overstatement of the significance of the concentrations of COCs present in groundwater at and near the Mine, and the State's litigation strategies to date surely at least in the aggregate raise a serious question of what the State's enforcement motives are here. However, that question can be answered only after PCC has had an opportunity to conduct full discovery as to this issue. In the meantime, the State

¹⁰Indeed, the concentrations of sulfates in groundwater downgradient of the Mine are lower than the concentrations of that substance that are naturally occurring in a significant percentage of Illinois public water

has been placed on fair and adequate notice of PCC's legal theories that give rise to its Tenth Affirmative Defense.

The State, though, asserts in its Motion that it has insufficient knowledge the factual basis for PCC's Tenth Affirmative Defense to respond to PCC's contention that those facts, if proven, demonstrate a violation of PCC's right to the equal protection of the laws under the United States and Illinois constitutions. Accordingly, PCC makes no further response to the State's Motion as to the Tenth Affirmative Defense at this time.

11. Eleventh Affirmative Defense – Non-compliance With Section 31

Facts

It is undisputed that the State has made no effort to comply with the procedural requirements of Section 31 as to those claims set forth in Counts II and III of the State's Complaint.¹¹ Upon close examination, it is clear that the State has not complied with any of the procedural requirements of Section 31 with respect to its claims against PCC asserted by Count I of the State's Complaint either.

As to matters of substance, the State alleges in Count I of its Complaint that analyses of groundwater samples taken at various locations at and near the Mine during the time period January 10, 1995 through July 31, 1997 demonstrate numerous exceedances of purportedly applicable WQS. The State further alleges that these supposed exceedances constitute proof of "water pollution" and therefore PCC's violation of Section 12(a) and (d) of the Act.

As to matters of procedure, the State alleges in Count I of its Complaint that it has issued two NOV's to PCC that relate to its claims asserted by Count I. The State's version of the parties' correspondence and meetings pursuant to the Section 31 process in connection with

supply systems that utilize groundwater as a source of raw water.

¹¹Indeed, it is the State's position that Section 31 is wholly inapplicable to Counts II and III.

those two NOV's are set forth in rhetorical paragraphs 10 through 12 of the State's Complaint; and PCC's exposition of its views of the accuracy of the State's allegations in this regard is set forth at rhetorical paragraphs 10 through 12 of PCC's Answer.

Copies of the two NOV's are attached as Exhibits 1 and 2, respectively. A comparison of these NOV's to Count I of the State's Complaint reveals that the claims asserted by the State in Count I are not based upon the alleged violations that are described in the two NOV's. In short, the two NOV's issued to PCC by the State allege violations of the "regulations and standards" clause of Section 12(a) of the Act, while Count I of the State's Complaint alleges violations of the "water pollution" clause of Section 12(a) and of Section 12(d) of the Act.

Both NOV's contain statements of IEPA's contentions as to the nature of the violations allegedly committed by PCC. However, neither NOV contains any allegation that PCC's Disposal Practices at the Mine have resulted in "water pollution" and that PCC thereby has violated Section 12(a) or (d) of the Act. Rather, both NOV's are based solely upon contentions that PCC's Disposal Practices have resulted in exceedences of WQS that the State contends to be applicable at various locations at and near the Mine.

Similarly, all of the correspondence between PCC and IEPA and all of the discussions at meetings of those parties following the issuance of NOV I address PCC's alleged violation of the WQS regulations that implement the GPA and how those alleged violations must be addressed under those regulations. The fundamental disagreements between PCC and IEPA throughout the Section 31 process involved issues as to which WQS regulations apply at what locations at and near the Mine. At no time during that process did the parties address in any way the issue of whether PCC's Disposal Practices had resulted in adverse effects upon the quality of groundwater at and near the Mine that either adversely affected or threatened to adversely affect any existing or potential use of that groundwater. Indeed, at no time prior to the State's filing of

its original complaint in this case did the State assert that the alleged violations of WQS under the GPA regulations constitute “water pollution” and therefore evidence any violation of Section 12(a) or (d) of the Act.

Law

Re Count 1 Claims

The claims asserted against PCC in Count I of the State’s Complaint simply are not based upon the same alleged violations of the Act that are the subject of the NOVs issued to PCC by IEPA. These are separate and distinct types of violations. This distinction is clearly illustrated by the State’s Complaint itself, in which the allegations of exceedences of purportedly applicable WQS as set forth in Counts I and II are set forth by the State solely in the nature of facts that purportedly establish the existence of “water pollution” and a “water pollution hazard” allegedly caused by PCC in violation of Section 12(a) and (d) of the Act. In contrast, Count III of the State’s Complaint also alleges that PCC has caused exceedences of applicable WQS at and near the Mine at various times and that these purported exceedences themselves constitute violations of the “regulations and standards” clause of Section 12(a) of the Act.

This is a distinction with a real difference. As to the “regulations and standards” clause of Section 12(a) of the Act, the issues are limited and specific: (1) what is the applicable WQS? (2) has that WQS been exceeded or not? In contrast, the issues presented by the “water pollution” clauses of Section 12(a) and (d) are more complex. For example, (1) what are the current and potential uses of the groundwater in question? (2) what is the nature of the alleged pollutants? (3) what is the significance of each of those pollutants at varying concentrations in groundwater? (4) what is the significance of the WQS for a pollutant changing over time? (5) which, if any, of the current uses and/or potential uses of the groundwater in question have been adversely affected by the presence of the alleged pollutants in question? (6) what is the

extent, if any, to which any actual and/or potential use of the groundwater in question has been precluded or limited by the presence of any of the alleged pollutants and the concentrations in which they exist in that groundwater? The State's claims in Count I raise the second line of questions. IEPA's NOV's raise only the first, as did the parties' written and oral communications relating to the matters that are the subject of those NOV's. Consequently, PCC has not been afforded the benefit of the Section 31 process at all with respect to State's claims as set forth in Count I.

PCC, of course, has not been privy to IEPA's referral of the matters that are the subject of the NOV's to the Attorney General or the Attorney General's development of the State's claims against PCC that have been asserted in this case. Therefore, PCC has no explanation as to the discrepancy between the alleged violations that are the subject of the NOV's and the alleged violations that are the subject of Count I. However, a comparison of the NOV's and the matters that were the subject of the related Section 31 proceedings involving IEPA and PCC prior to that agency's referral of the NOV's to the Attorney General demonstrates that the claims against PCC set forth in Count I have not been the subject of the Section 31 process and therefore could not have been the subject of the Section 31 referral by IEPA to the Attorney General. As such, the State may not prosecute those claims against PCC in this case.

Re Counts II and III Claims

PCC acknowledges that the Board has held that claims pursued by the Attorney General independent of any enforcement referral from IEPA are not subject to any of the requirements of Section 31 of the Act. Therefore, if the claims set forth in Counts II and III of the State's Complaint have been independently developed by the Attorney General, State's failure to comply with Section 31 with respect to those claims would not constitute a bar to the State's

prosecution of those claims under prior Board decisions. That, however, is not the last word as to this issue.

First, PCC respectfully contends that the Board cases relied upon by the State again have not been correctly decided as to this issue. As this issue also has not been addressed by the Illinois appellate courts, PCC adheres to its position as to this issue so as to preserve that position in connection with future proceedings in this case.

Second, it has not been established that Counts II and III of the State's Complaint actually have been brought by the Attorney General outside the context of IEPA's referral in this case. IEPA has been closely involved in the regulation of PCC's Disposal Practices at the Mine ever since it opened. This process has included IEPA's consideration of the relationship between those Disposal Practices and the quality of groundwater at and near the Mine throughout that entire period of time. Under these circumstances, PCC reasonably believes it likely that IEPA materially assisted the Attorney General in the development of the State's claims that are the subject of Counts II and III and contends that this would constitute a de facto referral of those claims by IEPA to the Attorney General.

In People of the State of Illinois v. Eagle-Picher-Boge, L.L.C., PCB No. 99-152 (July 22, 1999) ("Eagle-Picher"), the respondent moved to this dismiss the State's complaint, brought by the Attorney General, on the grounds that the State had not complied with the notice requirements of Sections 31(a) and (b) of the Act. The Board denied the motion on the grounds that the Attorney General is not required to comply with Section 31 with respect to claims brought on her own behalf, i.e., not on the basis of a referral from IEPA. However, the Board noted that the Attorney General had learned of violations pursued in the amended complaint in that case through discovery. According to the Board: "Since nothing in the record indicates that

the Agency [IEPA] referred the violations contained in Count II to the Attorney General, Sections 31(a) and (b) do not apply.” (Slip opinion at 17.)

The necessary implication of Eagle-Pitcher, then, is that if claims purportedly being prosecuted by the Attorney General on her own initiative were referred to her by IEPA, those claims may not be brought in an enforcement case like this unless IEPA had complied with Section 31 pre-complaint procedural requirements. That seems likely to be the case here with respect to the claims asserted by the State in Counts II and III of the State’s Complaint. PCC believes that discovery will reveal that these claims were not truly developed by the Attorney General independently but rather were developed directly from the prior enforcement activities of IEPA. If so, because it is undisputed that the Section 31 process was in no way employed by IEPA with respect to the claims against PCC set forth in Counts II and III of the State’s Complaint, those claims also would be barred in this case. Therefore, until discovery is complete, it would be premature for the Board to rule upon the legal viability of PCC’s Eleventh Affirmative Defense as to those claims.

12. Twelfth Affirmative Defense – Prior Enforcement Action

Facts

As noted above, the State authorized by the issuance of a series of permits PCC’s Disposal Practices, knowing the normal physical and geochemical consequences of those practices. Furthermore, as also noted above, the State has long known that these normal, expected consequences of PCC’s Disposal Practices had in fact occurred, yet the State repeatedly authorized the continuation of those practices after gaining that knowledge.

This was no mere generalized, qualitative knowledge possessed by the State. Rather, the State has since at least 1980 possessed specific knowledge of groundwater quality at the Mine sufficient for determinations as to whether possible exceedances of applicable WQS existed at

and near the Mine that might be related to PCC's Disposal Practices. Indeed, long before initiating this enforcement case, the State informed PCC of the State's contention that PCC's Disposal Practices had caused exceedences of then-applicable WQS.¹²

In approximately 1984, PCC sought IDNR's authorization to place a slurry pond in an area of the mine previously used as a gob pile. IDNR initially denied PCC's request on the grounds that there allegedly had been exceedences of then-applicable WQS at or near the Mine. However, after PCC provided IDNR additional information that indicated that the proposed disposal of slurry over the existing gob pile actually should improve the water quality situation in that area, IDNR granted the requested authorization.

Similarly, in early 1992, IEPA notified PCC that the agency had determined that the then-applicable WQS for sulfates and TDS had been exceeded at the locations of two monitoring wells at the Mine. Consequently, IEPA required PCC to carry out a complete hydrogeological study and to develop a remedial action plan in order to obtain that agency's approval of PCC's proposal for the installation of a new pumping well as part of the company's program for preventing or limiting the migration of COCs in groundwater away from the Mine. PCC complied with IEPA's directive in this regard to the agency's apparent satisfaction, as IEPA took no further action with respect to these alleged WQS exceedances until the State's original complaint in this case was filed.

Thus, on at least two occasions, the State alleged that PCC had violated then-applicable Illinois law relating to PCC's Disposal Practices and thereafter addressed the alleged violations in such a way as to satisfy the State's concerns, including that consequences to PCC that should result from the alleged violations. As PCC understands the claims made by the State in this proceeding, the State bases this enforcement case in part on exactly the same conduct by PCC,

¹²PCC has not to date learned the basis for these IDNR and IEPA contentions of WQS exceedances.

exactly the same alleged violations of certain formerly applicable WQS,¹³ and therefore exactly the same alleged violations of Illinois law that were resolved by the State in its dealings with PCC in 1984 and 1992.

Law

Because the State claims to have no idea as to the factual basis of PCC's Twelfth Affirmative Defense, the State has set forth no legal arguments to support its request that this affirmative defense be stricken. Accordingly, PCC makes no further response to the State's Motion to the extent that it is directed to PCC's Twelfth Affirmative Defense.

13. Thirteenth Affirmative Defense – Board Authority (Health)

Facts

In the course of promulgating the WQS for sulfates, chlorides, and TDS purportedly established by 35 Ill. Adm. Code § 620.410(a) ("Section 620.410(a)"), the Board made no effort to determine the concentrations at which any of those COCs might have an adverse effect on human health. There is no scientifically or medically valid evidence that the presence of sulfates, chlorides, or TDS in drinking water at or below the WQS for those COCs purportedly established in Section 620.410(a) has or may have any adverse health effects upon humans. There is, however, substantial credible scientific and medical evidence that the presence of sulfates, chlorides, or TDS in drinking water has no adverse effect on human health except at concentrations substantially higher than those that constitute the WQS purportedly established by Section 620.410(a). The Board, though, picked these WQS numbers solely on the grounds that 95% of the groundwater sources for Illinois public water supply systems at that time satisfied them.

¹³It is possible, of course, that other, similar situations have also occurred prior to the commencement of this enforcement case, but PCC has not yet had an opportunity to conduct sufficient discovery to determine whether or not that has in fact occurred.

Law

Section 8(a) of the GPA, 415 ILCS 55/8(a), requires that all water quality standards established by the Board to implement the GPA be “health-based,” i.e., based on scientific and medical evidence as to what concentrations of those COCs in drinking water have or may have adverse effects upon human health and what the nature of those adverse health effects are or might be. However, it cannot reasonably be disputed that the Board did not base its decisions to establish WQS for sulfates, chlorides, and TDS at concentrations of 400, 200 and 1200 milligrams per liter, respectively, on the basis of any evidence that those standards are necessary to protect human health.

The State contends that this PCC affirmative defense is somehow barred by Section 41(c) of the Act, 415 ILCS 5/41(c). However, the State acknowledges that this subsection of the Act only prohibits challenges to the validity of Board orders “made in any enforcement proceeding under Title XII of the Act as to any issue that could have been raised in a timely petition for review under [Section 41].” See Motion at 29, ¶ 62, and 30, ¶ 64; see also 415 ILCS 5/41(c). Count I of the State’s Third Amended Complaint is not “any enforcement proceeding under Title XII of this Act,” but instead is brought pursuant to Section 31, which is not included in Title XII, but rather is a part of Title VIII. Therefore, with respect to Count I, Section 41(c) is irrelevant on its face.

Moreover, the State’s far-reaching theory suggests that any action of this Board which is accomplished through entry of an order somehow is rendered immune from later scrutiny if the State claims that it is proceeding pursuant to Section 42 or some other provision within Title XII. Again, though, the wording of Section 41(c) belies this interpretation. That subsection addresses only any “challenge to the validity of a Board order” that could have been subject to judicial review pursuant to Section 41. Here, though, PCC is not challenging through these affirmative

defenses any order issued by this Board, but rather is challenging certain regulations. Clearly there is a distinction between this Board's orders adopting regulations, and the regulations that are thereafter submitted to the Secretary of State for publication in the Illinois Register. However, adopting the State's theory would allow the State to "immunize" any regulatory provision by bringing its action to enforce under the regulation pursuant to Title XII.

The Illinois Supreme Court has already rejected a similar position raised by the State. In The Celotex Corp. v. Pollution Control Board, 94 Ill. 2d 107, 445 N.E.2d 752 (1983), the court rejected the State's argument that a party's failure to appeal from the issuance of a new regulation, as permitted by Sections 29 and 41 of the Act, 415 ILCS 5/29 and 5/41, deprived the Board of jurisdiction to consider defenses raised with respect to the validity of regulations. The court quoted Professor David P. Currie, "a principal draftsman of the Act and the first chairman of the Board, [who] has stated that the normal method for challenging a pollution regulation is by way of a defense in a proceeding to enforce the rule (D Currie, Rulemaking Under the Illinois Pollution Law, 42 U.Chi.L.Rev. 457, 473 (1975).) He considers that Section 29 provides an additional method for challenging regulations. Its provisions allow one to test a regulation without having to risk being charged with its violation. 42 U.Chi.L.Rev. 457, 473-74." (94 Ill. 2d at 116-17, 445 N.E.2d at 756).

As also pointed out by the Supreme Court in Celotex, Section 41 itself answers the State's position: "Review of any rule or regulation promulgated by the Board shall not be limited by this section but may also be had as provided in Section 29 of this Act." 415 ILCS 5/41(a); see also 94 Ill. 2d at 117, 445 N.E.2d at 756. Thus, Section 41 itself differentiates between final orders of the Board on the one hand, and rules or regulations promulgated by the Board on the other. PCC's Thirteenth Affirmative Defense challenges the latter, not the former; so Section 41(c) simply has no applicability to this affirmative defense.

The sole authority cited by the State for its contention is People v. Wood River Refining Co., PCB 99-120 (Aug. 8, 2002). The discussion of this issue included in that opinion is insufficient to discern what precisely was being alleged by the respondent in that case; but the Board did not in that case purport to reject, or even distinguish, either the Supreme Court's Celotex holding, or the legislative distinction between the "[r]eview of any rule or regulation promulgated by the Board," addressed in Section 41(a), and a "challenge to the validity of a Board order," which is the subject of Section 41(c).

14. Fourteenth Affirmative Defense – Board Authority (Physical/Technical/Economic)

Facts

In the process of promulgating the WQS regulations implementing the GPA, the Board did not take into account the relevant existing conditions or the technical feasibility and economic reasonableness of those regulations. In fact, there are no technically feasible and economically reasonable means by which PCC could have complied with the WQS purportedly established by Section 620.410(a) as applied by IEPA generally and by the State in this case as of the effective date of the Part 620 WQS regulations; nor are there any such means by which PCC can do so at this time. Nor are there any such means by which any operator of any coal mine in Illinois that engaged in the common and standard coal mining refuse disposal practices employed by PCC at the Mine could have done so either at the time the WQS regulations under the GPA purportedly became effective or at this time.

Law

It is undisputed that the Board did not address the issue of whether there existed or reasonably could be expected to exist technically feasible and economically reasonable methods that could be employed by the operators of coal mines in Illinois to satisfy the Part 620 Standards

in connection with the process by which those regulations were promulgated. Nor can it reasonably be disputed that Section 27(a) of the Act, 415 ILCS 5/27(a), required the Board to do so.

PCC hereby incorporates by reference as if fully set forth herein its response to the State's contention that PCC may not challenge the legal validity of the Board's regulations relied on by the State as part of its defense to the State's claims asserted against it in this case, as set forth in PCC's discussion of that contention with respect to its Thirteenth Affirmative Defense above. PCC's discussion in this regard is equally applicable to the State's identical contention as to PCC's Fourteenth Affirmative Defense, as set forth in the State's Motion.

15. Fifteenth Affirmative Defense – Due Process

Facts

In Count III of the State's Third Amended Complaint, the State seeks to impose liability upon PCC based upon alleged exceedences of WQS not applicable to any groundwater located at or near the Mine at the time the State's original complaint in this case was filed or at any time thereafter to date.

Law

The State misapprehends PCC's Fifteenth Affirmative Defense, which, contrary to the State's suggestion, is not duplicative of PCC's Ninth Affirmative Defense. PCC's Ninth Affirmative Defense is based upon the fact that the State seeks to impose liability upon PCC in this action on the basis of PCC's conduct that was lawful in all respects at the time the conduct occurred. In contrast, PCC's Fifteenth Affirmative Defense is based upon the fact that the State seeks in this case to impose liability upon PCC for conduct that was purportedly unlawful at the time the conduct occurred but which was not unlawful at the time this enforcement action was commenced, *i.e.*, the date upon which the State's original complaint in this case was filed.

Because the State has made no argument that PCC's Fifteenth Affirmative Defense as actually pled is not legally viable, PCC makes no further response to the State's contention that this defense should be stricken.

16. Sixteenth Affirmative Defense – Failure to Establish GMZ

Facts

On November 27, 1995, PCC submitted GeoSyntec's report entitled "Site Characterization Report and Corrective Action Plan" ("GeoSyntec Report") to IDNR to satisfy that agency's request for additional information regarding PCC's reclamation of certain areas of the Mine at which the surface had been disturbed. On the same date, a copy of the GeoSyntec Report was provided to IEPA, so that agency could review PCC's plans for (a) reducing the rates at which the ongoing physical and geochemical processes in the Disposal Areas would proceed, thereby decreasing the rate and extent to which COCs (either present at the time of Disposal or subsequently generated) might be released into the groundwater at those locations, (b) monitoring the quality of groundwater at and near the Mine, and (c) pumping groundwater from various locations at the Mine so as to prevent or limit the migration of COCs that might be released into the groundwater at the Disposal Areas from migrating to other groundwater located outside the footprint of the Mine.

In response to IEPA's issuance of NOV I, PCC requested that agency to concur in the establishment of a groundwater management zone ("GMZ") at and near the Mine in accordance with the provisions of 35 Ill. Adm. Code § 620.250 ("Section 620.250"). However, IEPA has declined to do so. Rather, IEPA has advised PCC that IEPA will not concur in the creation of a GMZ as requested by PCC unless PCC provides the agency certain information and takes certain action, even though such requirements are not identified in Section 620.250.

Law

As an initial matter, PCC disputes the State's contention that IEPA does not have the responsibility under the applicable GPA regulations to "establish" a GMZ in accordance with Section 620.250. As the State acknowledges, this is a situation in which PCC proposes and IEPA disposes. That is, although PCC can suggest/request the establishment of a GMZ under Section 620.250(a), no GMZ is established unless and until IEPA concurs with such a request. Therefore, it is IEPA's "concurrence" that establishes a GMZ under Section 620.250(b). Accordingly, the State's semantic quibbling as to the purportedly proper characterization of IEPA's role in the process of establishing a GMZ serves no useful purpose here.

As for more substantive matters, IEPA's ongoing refusal to concur with PCC's request for the establishment of a GMZ at and near the Mine is unlawful, because the agency's conduct in this regard is arbitrary, capricious, and contrary to law. The prerequisites for such concurrence upon which IEPA has insisted are not required by any provision of the GPA or its implementing regulations.¹⁴

If the GMZ requested by PCC were to be agreed to by IEPA, no otherwise applicable groundwater WQS as to the COCs would apply at any location within that GMZ so long as PCC was proceeding with any required corrective action. 35 Ill. Adm. Code § 620.450(a)(3). Thus, as of the time such a GMZ is established, PCC no longer would be in violation of any applicable WQS, even under the State's view of what those standards are at this time. Conversely, until such time as IEPA approves the GMZ requested by PCC, any violations of applicable WQS in the area of the proposed GMZ will continue. Thus, the duration of any such violations has been unreasonably and unduly extended by IEPA's wrongful withholding of its approval of the GMZ

¹⁴Indeed, Section 620.250 establishes no standards for IEPA concurrence in the establishment of a GMZ.

proposed by IEPA. Therefore, to the extent that the State contends in this case that violations of Section 620.410(a) WQS are continuing, those claims are barred by IEPA's failure to "establish" a GMZ as requested by PCC.

Contrary to the State's contention, PCC's Sixteenth Affirmative Defense is in the nature of an "affirmative defense" under Illinois law, not merely the assertion of mitigating factors that go to the issue of penalties. The State contends in this action that PCC's violations of the Act are ongoing. To the extent that the State can demonstrate this to be true, each day of ongoing violation is a separate and distinct violation for which a separate and distinct penalty may be imposed. In that (a) the basis for the State's allegations of violations of the Act are alleged exceedances of purportedly applicable WQS, and (b) it is undisputed that these WQS would not be applicable if a GMZ is established as requested by PCC, the State's wrongful refusal to concur in PCC's establishment of a GMZ at and near the Mine has put PCC in a position of being found liable for many dozens, if not hundreds, of violations of the Act that would not have occurred if the GMZ had been established via IEPA concurrence with PCC's proposal. Consequently, PCC's Sixteenth Affirmative Defense is legally viable.

IV. CONCLUSION

For the reasons discussed in detail above, the State's Motion is not well-taken and should be denied in its entirety. If, however, it is determined that any of PCC's affirmative defenses have not been pled in sufficient factual detail, PCC should be granted leave to file an amended answer so as to satisfy any pleading deficiencies identified.

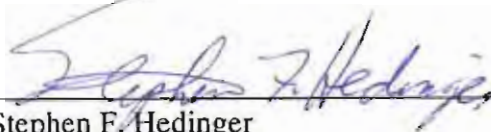
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