BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF ELECTRONIC FILING

To: Bradley Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph St., Suite 11-500
Chicago, IL 60601

Thomas Davis
Office of the Illinois Attorney General
Environmental Bureau
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Springfield, IL 62706

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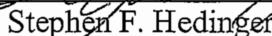
PLEASE NOTE NOTICE that on July 12, 2011, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, c/o John T. Therriault, Assistant Clerk, James R. Thompson Center, 100 West Randolph St., Suite 11-500, Chicago, IL 60601, Motion for Leave to File Instanter and Respondent Heritage Coal Company LLC's Reply Brief in Support of its Motion for Partial Summary Judgment, copies of which are attached hereto and herewith served upon you.

Printed on Recycled Paper

Dated: July 12, 2011

Respectfully submitted,

HERITAGE COAL COMPANY LLC
Respondent

By: 
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	)	
Respondent.	)	

MOTION FOR LEAVE TO FILE INSTANTER

NOW COMES Respondent, HERITAGE COAL COMPANY LLC ("HCC"), through its undersigned attorneys, and moves this Board through its Hearing Officer to allow the filing instanter of the "Respondent Heritage Coal Company LLC's Reply Brief in Support of its Motion for Partial Summary Judgment" being filed herewith. In support of this motion, HCC states as follows:

1. By motion filed with this Board on July 1, 2011, HCC sought a final extension of time to and until July 11, 2011, to finalize and file its reply to the response filed by Complainant to the motion for partial summary judgment previously filed by HCC. To the best of HCC's knowledge, no ruling has yet been entered on that motion.

2. Despite the diligent efforts of counsel for HCC, and due in part to the unanticipated number of ancillary filings needed to complete the reply, HCC was unable to finalize and file the reply and accompanying materials on July 11, but instead is submitting them with this motion, via electronic filing, one day later.

3. Because the previous motion for enlargement has not been ruled upon, and because of the one day delay in meeting the requested deadline, HCC at this time requests leave

to file instanter the finalized reply, being submitted herewith.

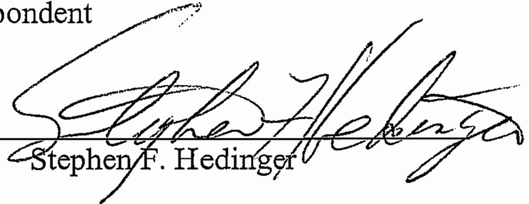
4. Counsel for HCC has conferred with counsel for Complainant concerning this motion for leave to file instanter, and counsel for Complainant advised that Complainant has no objection to the motion.

WHEREFORE Respondent, HERITAGE COAL COMPANY LLC, requests leave to file instanter the "Respondent Heritage Coal Company LLC's Reply Brief in Support of its Motion for Partial Summary Judgment," which is being submitted to the Board for electronic filing herewith on this same date.

Dated: July 12, 2011

Respectfully submitted,

HERITAGE COAL COMPANY LLC,
Respondent



By: ______________________
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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	)	
Respondent.	)	

RESPONDENT HERITAGE COAL COMPANY LLC'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

Respondent, Heritage Coal Company LLC ("HCC"), hereby submits its reply brief in support of its motion for partial summary judgment ("HCC's SJ Motion").[1] For the reasons discussed below, the arguments in opposition to HCC's SJ Motion presented by the State in Complainant's Response To Motion For Partial Summary Judgment (the "State Response") fail to demonstrate that there exists a genuine issue of fact material to the issues presented by HCC's SJ Motion or that HCC is not otherwise entitled to judgment as a matter of law with respect to the State's claims against HCC set forth in Count III of the State's Complaint. In short, as shown in HCC's Opening Brief and below, none of the groundwater GWQS alleged by the State to have been exceeded at specific locations at specific times due to HCC operations at the Mine apply to the groundwater at any of those locations at any of those times; and therefore HCC is entitled to

[1] "Shortened" terms used but not defined herein have the same meanings as defined in HCC's Opening Brief. However, because HCC has filed herewith its motion to strike certain evidentiary materials submitted by the State as part of its response to HCC's motion for partial summary judgment ("HCC's Motion To Strike"), HCC will use the term "HCC's SJ Motion" in this brief to refer to its motion for partial summary judgment, rather than "HCC's Motion," as used in Respondent Heritage Coal Company LLC's Opening Brief In Support Of Motion For Partial Summary Judgment (the "Opening Brief").

summary judgment as to all the State's Count III claims.

I. INTRODUCTION AND OVERVIEW

HCC's SJ Motion challenges the State's claims under Count III of its Complaint on specific, narrow grounds, i.e., that the concentrations of sulfates, chlorides, TDS, iron, and manganese (the chemicals of concern or "COCs") at specific times at specific locations in and at the vicinity of the Mine did not exceed any applicable GWQS, because the State mis-identifies the GWQS applicable at those locations at those times, in that reclamation at the Mine was not completed at the time of the alleged violations; the Disposal Areas at the Mine do not discharge to "resource groundwater"; and certain of the GWQS in question do not apply because the Disposal Areas are not "not contained within an area from which overburden has been removed."[2] (Intentional double negative here and as used similarly throughout)

The State Response fails to identify any grounds for denying HCC's SJ Motion on either factual or legal grounds. The State's factual arguments fail because the parties do not dispute the facts actually material to the issues raised by HCC's SJ Motion; the State's complaints about some of HCC's evidence regarding reclamation at the Mine do not undercut either the accuracy of that evidence or its significance; and the State's evidence relating to the releases of COCs into groundwater from the Disposal Areas at the Mine and the resulting increases in concentrations of those COCs in groundwater at and in the vicinity of the Mine as compared to background, up-gradient, pre-mining levels is irrelevant to the legal issues as to what GWQS applied at the locations where COC concentrations were determined at the times at which those determinations were made.

[2] As discussed below, the State has conceded that there have been no exceedances of any applicable GWQS at any time after December 5, 2006 as a matter of law as a result of IEPA's approval of a GMZ at and in the vicinity of the Mine.

The State's legal arguments fail primarily because of the State's flawed premise that the regulations at 35 Ill. Adm. Code Part 620 ("Part 620") do not acknowledge and cannot be interpreted to take into account the fact that the effects on groundwater quality resulting from coal mining constitute specifically-recognized special circumstances under the Illinois environmental laws generally and the Part 620 regulations specifically.

The State argues that the exemption pursuant to Section 620.450(b)(2) from the GWQS established by Section 620.410(a) is limited by other provisions of Section 620.450(b), including Sections 620.450(b)(4) and (b)(5). Although the State is correct that Sections 620.450(b)(4) and (b)(5) dictate the applicability of the GWQS notwithstanding that reclamation is not complete for purposes of (b)(2), those sections apply only in certain limited, specified circumstances, i.e., at refuse disposal areas located outside a permitted mine area at which the refuse is placed directly on the surface without excavation of overburden.

Similarly, the basis for certain of the State's claims under Count III of its Complaint is its contention that the groundwater for which the State alleges applicable GWQS were exceeded must be considered "resource groundwater" unless HCC can "demonstrate that . . . [it] cannot be considered as presently being (or capable of being) put to beneficial use due to its suitable quality and is instead a Class IV groundwater pursuant to Section 620.240." This suggests that the State would classify an aquifer as resource groundwater if groundwater withdrawn from any location within such aquifer is currently being put to beneficial use or is capable of such use at some undetermined time in the future. This is an unworkable contention, in that the State bases its arguments in large measure on its contention that there has been "material damage" to the hydrologic balance of the groundwater in question. If there has been material damage to the point that the use of the groundwater as potable drinking water is no longer possible, of course,

then the groundwater is Class IV groundwater per se. If, on the other hand, the groundwater at the locations where violations are alleged to have existed nonetheless was perfectly fine for use as drinking water at the times in question, it should be beyond dispute that the concentrations of the regulated substances of concern necessarily do not constitute "material damage" to the hydrologic balance of the groundwater at those locations at those times.

As for the issue of whether the Sections 302.208 and 302.304 GWQS do not apply because the Disposal Areas are not "not contained within an area from which overburden has been removed," the State argues that the quoted phrase should be read as if the word "all" appears immediately before "overburden." However, as discussed below in detail, the State's positions with respect to the proper application of this phrase fail.

For these reasons, discussed in detail below, the State Response fails to identify any grounds upon which HCC's SJ Motion should be denied.

Finally, a substantial portion of the State Response and virtually all of the "evidence" the State has submitted as part of its response to HCC's SJ Motion has nothing whatsoever to do with any of the issues presented by HCC's straightforward request that the Board interpret various provisions of Section 620.450(b). HCC's demonstration that much of the State's evidentiary submission is not relevant to any issue is more fully presented by HCC's Motion To Strike. The State's irrelevant arguments based on those materials are briefly addressed at the beginning of Section V below.

II. FACTS

The State does not dispute the facts stated in paragraphs 1-12, 14, and 16-19 of Section II HCC's Opening Brief. Furthermore, although the State declines to acknowledge the truth and accuracy of the facts stated by HCC in paragraphs 13, 15, and 20, the State fails to identify a

genuine issue of material fact as to those statements, much less provide or identify any evidence before the Board that refutes those statements.

The State's quibbling as to the statements in paragraph 13 that rely on the McGarvie and Brown affidavits as to precisely when reclamation and secondary coal recovery activities at the Mine started and stopped is a classic "straw man" argument that addresses a non-issue here. The State cannot in good faith dispute the fact that reclamation at the Mine had not been completed as of the dates of the alleged violations of Part 620 regulations upon which the State's Count III claims are based. Indeed, the State cannot in good faith dispute the fact that reclamation of groundwater at and in the vicinity of the Mine was completed as of December 6, 2006, when the GMZ was approved by IEPA, thereby establishing by operation of law that all groundwater standards applicable in the areas covered by the GMZ were satisfied as of that date. The fundamental factual basis of those claims is that the disposal of gob and slurry ("Mining Refuse") in the Disposal Areas resulted in the release of COCs into groundwater at those locations, which then migrated to the locations at which the alleged exceedances of applicable GWQS existed. However, it is axiomatic that for reclamation of groundwater at and in the vicinity of the Mine to have been completed before approval of the GMZ, concentrations of those COCs at the locations in question could not have exceeded background (i.e., upgradient, pre-mining) levels. Also, nothing in paragraph 13 is either confusing or potentially misleading. Rather, it is a straightforward statement of fact.

With respect to paragraph 15, the State's criticism of HCC's failure to provide evidence as to when land reclamation of the Disposal Areas was completed misses the point. The issue here is whether all reclamation required at the Mine had been completed as of the dates that the groundwater quality assessments at issue were undertaken. "Reclamation" involves restoration

of both land and water (both surface water and groundwater) affected by mining activities to be restored to pre-mining levels to the extent required by applicable reclamation standards. Here, it is undisputed (and cannot be disputed) that reclamation required at the Mine had not been completed as of December 6, 2006, long after the groundwater sampling and analysis upon which the State's Count III claims are based were conducted.

The State's refusal to acknowledge the information posted on the IDNR website as stated in the Blanton Affidavit and as discussed in paragraph 20 is baseless. Not only is the statement on that website admissible as either a statement against interest or as an admission under Illinois Rule of Evidence 804(b),[3] the State has no basis to make a good faith claim that the posting identified in the Blanton Affidavit either was inaccurately reproduced or that the posting did not accurately state IDNR's official position as to the status of reclamation at the Mine as of the date its posting was read and reported by the affiant. Nonetheless, HCC has herewith served the State with requests for admission asking the State to admit that: (1) that OMM maintains the ArcIMS Illinois Coal Mine Permit Viewer (the "Permit Viewer"), the web-based mapping application from which the exhibit to the Blanton Affidavit was printed; (2) that the Permit Viewer is the means by which OMM communicates to the public information regarding mines subject to the Mining Law and the Mining Regulations; (3) that OMM understands that the public relies on information contained in the Permit Viewer; (4) that the information contained in the Permit Viewer for Permit 34 is based on OMM data reflecting the current status of the Mine; and (5) that Exhibit 1 to the Blanton Affidavit is a genuine printout of a screen from the Permit Viewer for Permit 34.

[3] See Ill. R. Evid. 804(b) ("The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: ... (3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true").

To the extent that the State offers evidence as to any issue presented by HCC's SJ Motion, that evidence fails to support the State's position.

First, the State asserts that important factual issues regarding the Disposal Areas are discussed in the Cobb and Buscher Affidavits and that based upon such facts IEPA "concludes" that the Disposal Areas are subject to Section 620.450(b)(4) and (5). State Response at 35. However, the State makes no effort to identify what "facts" it is referring to and how such "facts" purportedly have the effect the State attributes to them.

Second, the State also asserts that allegations in its Complaint "denied by Respondent" show that the groundwater contaminated by the Mine Refuse disposed of at the "Disposal Areas" is utilized by the Saline Valley Conservancy District ("SVCD") as a public water supply. State Response at 45. The State goes on to assert that the Cobb and Buscher Affidavits "also provide sufficient evidentiary facts to support these allegations" and that "[t]his proof adequately supports the alleged violations of Section 620.301." Id. However, the State again makes no effort to identify what "facts" it is talking about or how that proof adequately supports either a finding that SVCD uses the groundwater at issue as a public water supply or the conclusion that the groundwater where sampled therefore is Class I groundwater.

III. APPLICABLE REGULATIONS

The key regulation to be considered in connection with the issues presented by HCC's Motion, 35 Ill. Adm. Code 620.450(b), is set forth verbatim in Section III of HCC's Opening Brief. For the Board's convenience, the subsections of Section 620.450(b) are summarized here, as follows:

> Section 620.450(b)(1) makes subject to Section 620.450 any inorganic chemical constituent or pH "within an underground coal mine" or "within the cumulative impact area of groundwater for which the hydrologic balance has been disturbed from a permitted coal mine area."

> Section 620.450(b)(2) states that the standards at Sections 620.410(a)&(d), Sections 620.420(a)&(d), Section 620.430, and Section 620.440 do not apply "prior to reclamation at a coal mine."
>
> Section 620.450(b)(3) states that the standards identified in Section 620.450(b)(2) apply "after completion of reclamation at a coal mine," except that different standards apply for TDS, chloride, iron, manganese, sulfate, and pH.
>
> Section 620.450(b)(4) states that a "refuse disposal area (not contained within the area from which overburden has been removed)" is subject to 35 Ill. Adm. Code 302 Subparts B and C, Section 620.440(c), or Subpart D, depending on the date on which the refuse disposal area was placed into operation.
>
> Section 620.450(b)(5) states that for such areas placed into operation prior to February 1, 1983, but modified to include additional area, different standards apply to the additional area.
>
> Section 620.450(b)(6) and Section 620.450(b)(7) establish standards for certain coal preparation plants, but the State does not contend that these provisions apply.

IV. ISSUES

The State does not dispute HCC's exposition of the legal issues presented by HCC's Motion as set forth in Section IV of HCC's Opening Brief. To properly apply Section 620.450(b) to the undisputed material facts now before it, the Board must determine the following issues of law or mixed fact and law:

- Whether the Disposal Areas are "within an underground coal mine" for purposes of Section 620.450(b)(1);
- Whether the Disposal Areas are "within the cumulative impact area of groundwater for which the hydrologic balance has been disturbed from a permitted coal mine area" for purposes of Section 620.450(b)(1);
- Whether the Disposal Areas are part of a "coal mine" for purposes of Section 620.450(b)(2) and Section 620.450(b)(3);

- Whether "reclamation" at the Mine was complete at the time of the alleged exceedances for purposes of Section 620.450(b)(2) and Section 620.450(b)(3);
- Whether the Disposal Areas discharge leachate to "resource groundwater" for purposes of Section 620.301;
- Whether the Disposal Areas are not "not contained within the area from which overburden has been removed" for purposes of Section 620.450(b)(4) and Section 620.450(b)(5);
- When the Disposal Areas were placed into operation for purposes of Section 620.450(b)(4) and Section 620.450(b)(5);
- Whether the Disposal Areas have been in "continuous operation" since being placed in operation for purposes of Section 620.450(b)(4) and Section 620.450(b)(5); and
- Whether "additional area" has been added to the Disposal Areas for purposes of Section 620.450(b)(4) and Section 620.450(b)(5).

Contrary to the State's suggestion, the facts relevant to these issues are undisputed. The "facts" that the State alleges are in dispute are actually issues of law that require the proper interpretation of the controlling regulatory provisions and the application of those provisions to the undisputed facts. For instance, the State alleges that it has supported its argument that the Disposal Areas are subject to Section 620.450(b)(4) and (b)(5) by providing factual allegations "compris[ing] the groundwater monitoring data reported by the Respondent to the Illinois EPA" and that HCC has denied those factual allegations "in a wholesale fashion." See pages 31-32. However, all of the State's allegations rely on legal conclusions. Specifically, and most significantly, the State does not simply allege in paragraph 20 of its Complaint that groundwater

and water quality sample results showed concentrations at the levels shown in the table, but instead alleges that "[t]he following sample results from the monitoring wells at Eagle No. 2 referenced in paragraph 15 indicate exceedances of groundwater quality and water quality standards." (Emphasis added.) Thus, unqualified admissions of the "facts" alleged by the State would require HCC to concede the applicability of certain regulatory standards — which is the very issue central to this motion and the State's case in general.

Additionally, as noted above, the State Response addresses at length issues in this case that are not presented for resolution at this time in connection with the Board's consideration of HCC's SJ Motion. Both the State arguments and the State's evidentiary submissions pertinent to those issues are irrelevant to this proceeding and will not be addressed further in this brief.

V. SUMMARY JUDGMENT STANDARD

The State does not dispute the legal standards that apply in connection with the Board's consideration of HCC's SJ Motion, as set forth at Section V of HCC's Opening Brief. Nor does HCC dispute the State's additional legal standards noted by the State at pages 3, 6-7, and 45 of the State Response. However, HCC maintains its contention that HCC's Motion satisfies all such standards.

Most notably, the State repeatedly and consistently asserts that there exists a genuine issue of material fact with respect to an issue identified in Section IV above because the State has in its Complaint made certain allegations of fact relating to that issue and HCC has denied those allegations in its answer to the Complaint. But HCC has provided evidence that would be admissible at trial to establish the facts necessary to support its legal positions with respect to each of the issues identified in Section IV above, while the State has provided no evidence that contradicts or undercuts any of the evidence submitted by HCC. Indeed, the State challenges the

admissibility of only Exhibit 1 to the Blanton Affidavit, which challenge is not well-taken for the reasons discussed above.

Under these circumstances, the State may not stand on the allegations in its Complaint to create genuine issues of material fact; and the cases cited by the State in support of its position do not hold otherwise. Rather, the State must satisfy its burden of producing evidence that creates genuine issues of material fact in the face of HCC's evidence — and it has not made any effort to do so. See Lumberman's Mut. Cas. Co. v. Sykes, 890 N.E.2d 1086, 1096-97 (Ill. App. 1st Dist. 2008) ("If the movant presents facts that, if uncontradicted, would entitle him or her to judgment as a matter of law, then the nonmovant may not rest on the pleadings to create a genuine issue of material fact, but must instead present some factual evidence that would arguably entitle it to favorable judgment.")

VI. ARGUMENT

A considerable portion of the State Response is devoted to discussions of factual, legal, and mixed factual and legal matters that are not relevant to any issue presented for resolution by HCC's SJ Motion, although some of those matters are or may be germane to other issues to be resolved at a later point in these proceedings. Most notably, the State has launched an effort to paint HCC as a "bad actor" and its legally permitted activities at the Mine as rogue operations, as well as a corresponding effort to paint the State mining agencies primarily responsible for oversight of HCC's operations at the Mine as uninformed and incompetent. As the irrelevance of these State aspersions and its "supporting" materials are fully addressed in HCC's Motion To Strike, that evidentiary issue is not further discussed here.

As for the substance of these attacks on HCC and the State mining agencies, a detailed rebuttal of the State's assertions and insinuations is beyond the scope of this brief. Rather, that rebuttal will be presented by HCC at an appropriate time later in this case if the State (as HCC

fully expects) resurrects the attacks in a context that is at least arguably relevant to some issue then before the Board. However, under these circumstances, it is not only appropriate, but necessary, for HCC to make the following observations regarding the State's effort to depict HCC's operations at the Mine as willfully causing wanton degradation of a valuable groundwater resource in the absence of proper government oversight.

First, HCC does not deny the importance of protecting the State's groundwater resources. Indeed, HCC has worked with State regulatory authorities for decades to develop and implement appropriate measures at all of its Illinois operations to minimize any adverse impacts of its operations upon on- and off-site groundwater and to monitor the effectiveness of those measures. Moreover, since the issues with the SVCD that gave rise to this enforcement action boiled over in 1994, HCC has devoted very substantial resources, including enormous sums of money, to ameliorate SVCD's and IEPA's concerns and continues to do so.

Second, it is important to keep in mind the relevant factual contexts in which the issues in this case have arisen and exist for resolution. That is so with respect both to the nature of the COCs that are the subject of this action and the conduct of HCC and the State regulatory authorities in relation to the regulation and management of those COCs.

As to COCs — The State's constant references to the presence of COCs in groundwater as "contamination" and "pollution" — although technically accurate as a legal proposition — convey an exaggerated impression of the situation from environmental, public health, and other practical standpoints. The COCs are naturally occurring inorganic compounds that are present in concentrations exceeding the Part 620 GWQS for Class I resource groundwater in approximately five percent of the groundwater in Illinois. See Respondent Heritage Coal Company LLC's Notice Of Filing Deposition Testimony In Support Of Its Motion For Partial Summary

Judgment, Transcript, p. 33, l. 12 through p. 40, l. 11. The State acknowledges that those GWQS are not health-based. Id., p. 110, l. 7 through p. 113, l. 23; Respondent Heritage Coal Company LLC's Notice Of Filing State Interrogatory Answers In Support Of Its Motion For Partial Summary Judgment ("State Answers"), Answers To Respondent Heritage's Fourth Set Of Interrogatories To Complainant, Answers 21-27. Those GWQS, which must be satisfied just a few feet from the Mining Refuse disposal areas to which they are applicable, are more stringent than the State's GWQS for discharges into "general use" surface waters of the State generally and far more stringent than the effluent limitations specifically applicable to such discharges from coal mines, even following this Board's revision of those mine-specific standards in 2008. Indeed, the revised Subtitle D effluent limitations applicable to coal mine discharges to surface water contain no limitations for chloride or sulfate. 35 Ill. Adm. Code 406.106(b). Furthermore, as mining-related COCs migrate through groundwater away from locations at which they are released into groundwater, they are substantially diluted by the much greater volume of "uncontaminated" groundwater (i.e., groundwater containing lower concentrations of the same substances) into which they have moved. Consequently, the presence of those COCs at the locations at which they were found in the concentrations at which they were found in fact had little, if any, practical effect on water quality in the Henry Aquifer.

As to HCC/Agency Matters — HCC's Mining Refuse disposal activities at the Mine at all times were carried out pursuant to permits duly issued by the Illinois administrative agencies having jurisdiction over such matters with those agencies' full knowledge of the manner in which disposal on and in the ground would be carried out; the fact that there would be releases of COCs from Disposal Areas into groundwater at those locations; and that there would be migration of those COCs into groundwater beyond the horizontal and vertical limits of the

Disposal Areas. Those State agencies required monitoring and groundwater pumping at the Mine as early as 1980. Furthermore, HCC provided the agencies confirmation in 1985 per groundwater constituent fate and transport modeling that COCs generated at the Mine might migrate as far as the neighboring SVCD production wells. Yet the State's agencies continued to expressly authorize the HCC disposal practices now complained of.

Notably, IEPA itself long has been fully aware of and directly involved in those permitting decisions. Furthermore, in late 1995, HCC submitted to IEPA a lengthy and detailed report by HCC's consultants addressing groundwater quality at and in the vicinity of the Mine; potential migration of COCs from the Mine to SVCD's then-proposed new production well; and recommended corrective action to reduce the release of COCs into groundwater at the Mine and to limit off-site migration of past and future releases. Thus, the State's focus on and criticism of an OMM permitting process nearly a year later — after IEPA was fully in charge of the State's handling of the situation — is especially curious.

Third, there is nothing unique about the situation at the Mine. The State has identified in response to interrogatories directed to it by HCC some 116 other Illinois coal mines at which on- and in-ground disposal of Mining Refuse has been carried out for many years.[4] See State Answers, Answers To Respondent Heritage's Fifth Set Of Interrogatories To Complainant, Answers 14 and 15. As the State knows, in the overwhelming number of those cases, that disposal was carried out with no installation or construction of impermeable liners in the disposal areas. Indeed, no coal mine installed an impermeable liner in such a disposal area until 1993 or

[4] Affiant Richard P. Cobb's analysis of coal mining operations inaccurately sharply distinguishes between Mining Refuse disposal practices at surface and underground mines to support the State's position regarding the meaning of "overburden" as used in the Part 620 regulations. See Affidavit Of Richard P. Cobb attached to State Response, at Section 3, pp. 4-8. Although Mining Refuse has historically at some operations been disposed of in the areas of surface mines from which coal has been excavated, it also has not been uncommon for that material to be disposed of at surface coal mines as well as underground mines at on- and in-ground disposal areas located well away from coal extraction areas near a preparation plant.

so, i.e., about the time HCC's disposal practices at the Mine at issue here ceased. Thus, the State's assertion that installation of such a liner would have been "state of the art" for the Disposal Areas as far back as 1983, see State Response at 39, is spurious.

Finally, that HCC has taken all reasonable post-closure steps to control the off-site migration of COCs released from the Disposal Areas has been explicitly recognized by IEPA in approving the GMZ. That the measures taken by HCC have been successful has been recognized by both IEPA and IDNR in terminating all regulatory requirements that HCC operate pumping wells at the Mine to prevent further off-site migration. Perhaps most telling, HCC and SVCD entered into a settlement agreement resolving all of SVCD's claims against HCC in January 2001; and HCC operations have continued uninterrupted since that time and without further complaint regarding any perceived threat to those operations.

A. The GWQS established by Section 620.410 do not apply.[5]

HCC Opening Brief

Section 620.450(b)(2) contains a general regulatory exemption to the GWQS for inorganic constituents and pH specified in Sections 620.410(a) and (d), 620.420(a) and (d), 620.430 and 620.440 that applies "[p]rior to completion of reclamation at a coal mine."

State Response

The State argues in its response that the general exemption at Section 620.450(b)(2) is limited "in regards to refuse disposal areas which the record shows is the source of the groundwater contamination." See pages 1-2.

[5] For the Board's convenience, HCC has set forth in each subsection of this Argument section summaries of the arguments made in HCC's Opening Brief and in the State Response with respect to the issues addressed in that subsection.

HCC Reply

The general exemption at Section 620.450(b)(2) is limited in regards to certain coal mining refuse disposal areas only, i.e., refuse disposal areas that are "not within the area from which overburden was removed," if such areas were placed into operation or modified to include "additional area" after a certain date or if the disposal area has not been in "continuous operation" since such time.

1. **The Disposal Areas are located "within an underground coal mine" and "within the cumulative impact area of groundwater for which the hydrologic balance has been disturbed from a 'permitted coal mine area'" for purposes of Section 620.450(b)(1).**

   a. **The Disposal Areas are located "within an underground coal mine."**

HCC Opening Brief

The term "coal mine" is not defined in the GPA or implementing regulations, but similar terms are used in the Mining Law, including "mining operations" and "underground mining operations." "Mining operations" includes "underground mining operations," which is broadly defined to include "surface operations incident to the underground extraction of coal, such as . . . areas used for the storage and disposal of waste." The Disposal Areas meet this definition.

The Board should look to the definitions in the Mining Law as an aid in interpreting the key terms related to mining in Section 620.450(b)(1). Although the presumption that a term used in different sections of the same act should be given the same meaning throughout does not apply to terms used in different statutes, courts can look to definitions in other statutes when laws are "in pari materia." The GPA and the Mining Law are in pari materia because their purposes are the same and because courts should presume that in drafting the language of one statute, the legislature was aware of the construction and use of that language in another statute and intended the meanings to be the same.

State Response

The State argues that the definitions in the Mining Law are not relevant to interpretation of terms in Section 620.450(b)(1), for four reasons: (1) that the presumption that where the same word is used in different sections of the same act, the word has the same meaning, does not apply, see page 18; (2) statutory construction is unnecessary because the statutory language clearly and unambiguously applies to the 300,000 gallons of groundwater that are pumped from the underground works during operations to extract coal, see pages 32 & 35; (3) the primary objective in construing a statute is to give effect to legislative intent, and the plain language of the statute, including statutory purposes and legislative findings, is the best indication of that intent, see pages 36-38; and (4) the in pari materia doctrine of statutory construction does not apply because the purposes of the GPA and the Mining Law are different, see pages 18, 19-21; the terms to be interpreted are not "virtually identical;" and the terms to be interpreted are capable of having different meanings for purposes of the different laws, see pages 18-19 & 40.

HCC Reply

Coal mining is a major industry in Illinois with a long history and a wide geographic impact. As such, it has long been a heavily regulated industry, particularly with respect to its potential — and, to a significant degree, unavoidable — environmental impacts, some of which are transient in nature and some of which are permanent. Accordingly, the GPA and its implementing regulations must be interpreted in the context of the overall regulation of coal mining's environmental impacts. More specifically, it would be unworkable to interpret terms used in the GPA and implementing regulations that have well-established meanings under the Mining Law and other environmental laws applicable to coal mining operations as having some

different, special meaning in the GPA context in the absence of explicit definitions in that statute or associated regulations that establish different meanings for purposes of that law.[6]

The State is correct that the presumption applicable to terms in different sections of a single statute does not apply. However, the presumption is nonetheless relevant because the in pari materia doctrine extends that presumption to terms in different acts. Thus, contrary to the State's contention, HCC has not urged the Board to "employ a special rule of statutory construction" to the Part 620 regulations. Rather, HCC asserts that the Board should apply this well-established general rule of statutory construction to the language in question.

Here, the statutory language is not clear and unambiguous. Illinois courts have found that a term is ambiguous and subject to more than one reasonable interpretation "as indicated by the arguments of the parties." See MQ Const. Co., Inc. v. Intercargo Ins. Co., 742 N.E.2d 820, 826-27 (Ill. App. 1st Dist. 2000).

The State suggests that the Part 620 regulations must be read in light of the purposes of the GPA and not the Mining Law, and that the GPA "does not make any provision for the special treatment of mining." But the State's overall environmental regulatory scheme consistently makes provisions for the special treatment of coal mining. See, e.g., 35 Ill. Adm. Code Subtitle D, Mine Related Water Pollution, Parts 401 to 407 (establishing different effluent limitations and other requirements for state-issued NPDES permits authorizing discharges from coal mining activities into surface waters of the State versus permits authorizing discharges from other industrial activities). Most notably, Part 620 itself establishes different standards that apply prior to completion of reclamation at a coal mine. The State's suggestion that the terms in Part 620

[6] The State ignores that this enforcement action was initiated by the State in its sovereign capacity and thus is a proceeding in which the relevant laws are all such laws administered by those State agencies that have had regulatory responsibility for operations at the Mine since Mining Refuse disposal activities began in 1968.

should not be interpreted to provide any such special treatment for mining is unreasonable given this context.

Also, the terms at issue and the purposes of the statutes in question need not be completely identical for statutes to be considered in pari materia. See Lee County Bd. of Review v. Property Tax Appeal Board, 663 N.E.2d 473, 480 (Ill. App. 1996) (holding that "the fact that one statute concerns taxation while the other relates to public safety is irrelevant, as long as the statutes can be read in harmony with regard to the subject matter they have in common -- mobile homes").

In any case, Illinois law follows this principle for statutory construction even when statutes are not strictly in pari materia. See, e.g., JP Morgan Chase Bank, N.A. v. Earth Foods, Inc., 939 N.E.2d 487, 496 (Ill. 2010) ("When discerning legislative intent, it is also proper to compare statutes relating to the same subject matter as well as statutes "upon related subjects though not strictly in pari materia" because "statutes are to be read in the light of attendant conditions and the state of the law existent at the time of their enactment") (citations omitted); People ex rel. Madigan v. Excavating and Lowboy Services, Inc., 902 N.E.2d 1218, 1227 (Ill. App. 1st Dist. 2009) ("Where the language of a statute is unclear, it is appropriate for the court to compare other statutes on the same subject matter, even though not strictly in pari materia.") (quoting Lee County Board of Review, 663 N.E.2d at 480); Marshal v. City of Chicago, 2011 WL 1227831, at *4 (Ill. App. 1st Dist. March 31, 2011) ("Where statutory language is unclear, we look to similar laws for guidance, even when the laws do not relate precisely to the same subject matter.") (citing Wade v. City of North Chicago Police Pension Board, 877 N.E.2d 1101 (Ill. 2007)).

Several cases that apply this principle reason that the legislature must have intended to incorporate the established meaning from terms used in an earlier statute. For instance, in JP Morgan Chase Bank, the Illinois Supreme Court noted that:

> [W]e look to the well-known meaning of statutory terms at the time the law was passed. People v. Bailey, 232 Ill.2d 285, 290, 328 Ill. Dec. 22, 903 N.E.2d 409 (2009), citing Case v. Los Angeles Lumber Products Co., 308 U.S. 106, 115, 60 S. Ct. 1, 7, 84 L.Ed. 110, 119 (1939). See also 2A N. Singer, Sutherland on Statutory Construction 46:04, at 152-53 (6th ed. 2000) ("if the term utilized [in a statute] has a settled legal meaning, the courts will normally infer that the legislature intended to incorporate the established meaning").

939 N.E.2d at 491.

Similarly, in Bertell v. Rockford Memorial Hospital, 913 N.E.2d 123 (Ill. App. 2d Dist. 2009), the court interpreted the term "holiday" for purposes of a statutory provision providing the time for filing a petition under the Mental Health and Developmental Disabilities Code, 405 ILCS 5/3-600, with reference to the State Commemorative Dates Act and the Statute on Statutes. In so holding, the court stated that "we may presume that, when the legislature specifically chose to designate Lincoln's Birthday a 'legal holiday,' it did so with full awareness of the customary and well-established meaning of that term." Id. at 127.

In Excavating and Lowboy Services, the Illinois Court of Appeals held that the court did not have subject matter jurisdiction over a claim alleging that the Illinois Department of Transportation violated the State Environmental Protection Act because the statute did not express a consent by the State to be sued in circuit court. The court explained that the Act "does not by any of its terms or provisions evince an intent to override other statutes governing jurisdictional concerns, including the Immunity Act or the Claims Act." The court then stated:

> The Environmental Act . . . is conspicuously silent as to jurisdictional concerns . . . . The void in the terms of the Environmental Act is, however, adequately compensated by the established rules found in the Claims Act and the Immunity Act.

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902 N.E.2d at 1227.

Finally, in Christ Hospital and Medical Center v. Illinois Comprehensive Health Insurance Plan, 693 N.E.2d 1237 (Ill. App. 1st Dist. 1998), the court stated that although there are limitations in importing definitions from other statutes since the context in which a term is used bears on its intended meaning, "we may presume that the legislature, when drafting the language of section 7(e)(2) [of the Comprehensive Health Insurance Plan Act], was aware of the construction and use of the term in the Illinois Health Finance Reform Act." Id. at 1240-41 (citations omitted). See also People v. Wicks, 669 N.E.2d 722 (Ill. App. 1996) (holding that the court may presume the legislature was aware of the judicial construction given to a term used in a statute other than the statute at issue, and that the language used was intended to have the same meaning).

The justification for this inference is discussed in MQ Const. Co., Inc., which explains that:

> On the basis of analogy the interpretation of a doubtful statute may be influenced by language of other statutes which are not specifically related, but which apply to similar persons, things, or relationships. By referring to other similar legislation, a court is able to learn the purpose and course of legislation in general, and by transposing the clear intent expressed in one or several statutes to a similar statute of doubtful meaning, the court not only is able to give effect to the probable intent of the legislature, but also to establish a more uniform and harmonious system of law.

742 N.E.2d at 826 (quoting 2B N. Singer, Sutherland on Statutory Construction 53.03 at 233 (5th ed. 1992)). In that case, the court found that when a term at issue in the Bond Act that was not defined in the statute and that was ambiguous and subject to more than one reasonable interpretation, "as indicated by the arguments of the parties," it was "appropriate to review other courts' interpretations of language in similar statutes in order to give effect to the intention of the legislature in enacting the Bond Act." Id. at 826-27 (finding that the term should be defined for

purposes of the Bond Act "in a manner similar to the nearly identical terms in the Miller Act and the Mechanics Lien Act").

Contrary to the State's assertion, HCC has not contended that the purposes of the Mining Law and the GPA "are identical." However, the State cannot reasonably dispute that both statutes regulate coal mining with respect to the potential adverse impacts of mining on groundwater quality. Nor can the State dispute the fact that both the Mining Law and the GPA regulations specifically establish performance standards, requirements, and prohibitions directed to the adverse effects of mining on groundwater and do so by providing less stringent performance standards for mining operations than are generally applicable.

The State's description of HCC's argument that terms relating to aspects of coal mining with well-established meanings at the time the GPA was enacted should be given those meanings in connection with the use of those terms in the Part 620 regulations as trying to force a "square peg" into a "round hole" has the analysis precisely backwards. If IEPA, in proposing, and this Board, in promulgating, the Part 620 regulations intended for terms such as "mining" and "overburden" and "cumulative impact area" to be interpreted in some way distinct from their respective well-established meanings under the Mining Law, they should have — and undoubtedly would have — provided specific different definitions to suit an intended contrary meaning for the terms in the GPA context. They did not do so. Therefore, the statutory construction rules relied upon by HCC in its Opening Brief apply here.

In short, regardless of the GPA's general purpose of imposing stringent groundwater quality protections, the regulations promulgated by this Board to implement the GPA are what they are, say what they say, and mean what they say. Thus, the issue here is not whether, as the State urges, any concentration of a regulated substance in groundwater at any location at or in the

vicinity of the Mine at any time that is higher than the most stringent GWQS established by the Part 620 regulations constitutes a violation of those GWQS. Rather, such a concentration constitutes an exceedance of those GWQS if and only if those GWQS apply to the location where the concentration was detected at the time the concentration was detected.

b. The Disposal Areas are located "within the cumulative impact area of groundwater for which the hydrologic balance has been disturbed from a permitted coal mine area."

HCC Opening Brief

Section 620.110 defines "cumulative impact area" to mean "the area, including the coal mine permitted under the Surface Coal Mining Land Conservation Act [225 ILCS 720] and 62 Ill. Adm. Code 1700 through 1850, within which impacts resulting from the proposed operation may interact with the impacts of all anticipated mining on surface water and groundwater systems." (Emphasis added.) Because the cumulative impact area is an area in which impacts on groundwater are anticipated, it would make no sense if the alternative GWQS did not encompass that area.

State Response

The State argues that the groundwater assessment conducted pursuant to the Mining Laws adopted an "expansive view" of the cumulative impact area, see pages 42-43; that HCC does not attempt to clarify the extent of that area, see pages 42-43; and that "the regulatory exemption for coal mines in the Part 620 regulations does not apply to the entire cumulative impact area, but only to such portion for which the hydrologic balance is disturbed by mining," see page 42.

The State also asserts that the Disposal Areas are not within such portion for two reasons: (1) although the IDNR groundwater assessment determined that the affected groundwater was in

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such area, the Board "cannot accept the Department's substantive determinations and findings in the groundwater assessment because the technical rules regarding the necessary minimum data to support such an assessment were legally deficient at that time," see pages 21-29 & 39-40; and (2) that groundwater may be contaminated without its hydrologic balance necessarily being disturbed, and there is nothing in the record to show that the hydrologic balance of the major shallow aquifer was actually disturbed by mining operations, see pages 40-41.

Finally, the State argues that "[t]he implications of this argument are that the adverse impacts of a coal mine's broadly defined operations and activities upon any groundwater are simply the consequences of mining" and that "[t]he Board must reject that argument," see page 43.

HCC Reply

For purposes of the assessment of probable cumulative impact, the cumulative hydrologic impact area is considered "the watershed of Cypress Ditch and the underlying aquifer." The State's argument that the "cumulative impact area" under Part 620 should be anything other than the "cumulative impact area" identified under the Mining Law is untenable. The State offers no authority in support of its position that groundwater can be contaminated without its hydrologic balance necessarily being disturbed.

Also, the IDNR determination that the affected groundwater was "within the cumulative impact area of groundwater for which the hydrologic balance has been disturbed from a permitted coal mine area" was valid at the time it was made and cannot be called into question now, since all activities conducted at the Mine site are conducted pursuant to the permit issued

on the basis of that determination.[7] Also, the State argues specifically elsewhere that the IDNR determination "that the operations proposed under the application have been designed to prevent material damage to the hydrologic balance outside the permit area" was "wrong" and "is disproved by the consequential groundwater contamination," see pages 12 & 14. The State can not "have it both ways" here.

Finally, the implications of this State argument are that any adverse impacts upon groundwater from a coal mine's operations and activities conducted prior to February 1983 are simply the lawful consequences of mining. This is a reasonable conclusion, given that the GPA imposed new requirements for certain Mining Refuse disposal areas and other mining activities that had already taken place, and that the GPA and its implementing regulations expressly establish exceptions to the generally applicable GWQS for previously mined areas.

2. **The Disposal Areas are part of a "coal mine" for purposes of Section 620.450(b)(2).**

a. **The Disposal Areas are part of a "coal mine."**

HCC Opening Brief

The term "coal mine" must be read to include any coal mine area permitted pursuant to the Mining Law.

State Response

The State does not separately address this argument.

[7] Moreover, this Board has no jurisdiction to review final administrative decision of IDNR, and that administrative determination must be considered res judicata for purposes of this proceeding. The State has no authority to collaterally attack that decision in this forum.

HCC Reply

Application of the Section 620.450 standards requires any mine area subject to Section 620.450(b)(1) to similarly be subject to Section 620.450(b)(2), which establishes standards that apply "[p]rior to completion of reclamation at a coal mine." For such an application, the term "coal mine" in Section 620.450(b)(2) must be defined to include the area "within an underground coal mine" and "within the cumulative impact area of groundwater for which the hydrologic balance has been disturbed from a 'permitted' coal mine area" in Section 620.450(b)(1). Similarly, the term "coal mine" must be defined to include the area "within the permitted area," as the standards in Section 620.450(b)(3) that apply "[a]fter completion of reclamation at a coal mine" impose standards for such area. This supports HCC's contention that the use of slightly different terms throughout the GPA and its implementing regulations and the Mining Law and its implementing regulations does not necessarily evidence an intent that the terms have significantly different meanings.

b. Reclamation was not complete at the time of the alleged violations.

HCC Opening Brief

"Reclamation" is not defined in Part 620, but the Mining Law defines "reclamation" to mean "conditioning areas affected by mining operations to achieve the purposes of the Act." The Mining Law also requires applications for coal mining permits to contain a reclamation plan and a determination of the probable hydrologic consequences of the proposed operation on the permit area, shadow area, and adjacent area; to file a bond to ensure reclamation; and to maintain the bond until "all the reclamation or a phase of the reclamation covered by the bond or portion thereof has been accomplished." Reclamation at the Mine is not yet complete, as neither HCC

nor OMM has initiated an application for a bond release; and IDNR's website shows that the Mine is "In reclamation, has outstanding bond."

The State also has not established a violation of Section 620.405, because that regulation requires a showing that another GWQS was exceeded, and the regulations identified by the State do not apply.

State Response

The State argues that the record exclusive of the materials submitted by HCC in support of HCC's Motion is devoid of any information regarding reclamation, see page 5; that allegations in HCC's affidavits, including that reclamation is not yet complete, are not pleaded in the complaint or as affirmative defenses, see page 5; that HCC's affidavits do not specify when reclamation was commenced or completed, see page 8; and that IDNR's website is inadmissible hearsay because it is not a business record and provides no foundational showing, see pages 8-11.

The State also argues that the distinction between the groundwater monitoring wells located within the outermost edge of the Disposal Areas and groundwater located outside of the Disposal Areas is significant, see pages 30-31.

HCC Reply

The State does not contend that reclamation in fact is complete, much less offer any evidence contrary to HCC's evidence. Consequently, the State cannot establish that Sections 620.410(a) and (d), 620.420(a), 620.430, and 620.440 were applicable to the groundwater at issue.

The State wrongly suggests that HCC's assertion that reclamation was not completed at the Mine at the times the State contends exceedances of certain applicable GWQS occurred is

presented as an affirmative defense to the State's Count III claims. Rather, it is the State's burden to prove the applicability of the GWQS that it contends have been violated to the locations and times at issue. HCC has merely contended that certain GWQS alleged by the State to be applicable here do not apply as a matter of law because they are trumped by Section 620.450(b)(2).

The State's nit-picking about HCC's evidence of the obvious — that reclamation at the mine was not complete at the time of the alleged exceedances of the GWQS — is not only legally unsound, but unbecoming. On December 6, 2006, IEPA approved a GMZ, which by regulation may only be established "to mitigate impairment caused by the release of contaminants from a site" that is subject to a corrective action process approved by the Agency or the owner or operator undertakes an adequate, timely and appropriate corrective action and provides written confirmation of such action to the State. This is a tacit admission by the State that reclamation at the Mine was not completed as of December 6, 2006. However, as a result of IEPA's approval of a GMZ, full "reclamation" of groundwater affected by the Mine is no longer required.

B. <u>The GWQS established by Section 620.301 do not apply because the disposal areas do not discharge to "resource groundwater."</u>

HCC Opening Brief

Section 620.301 prohibits discharges to "resource groundwater," but the groundwater at the Disposal Areas is Class IV groundwater, and Class IV groundwater is not "resource groundwater." Class IV groundwater includes groundwater within a "previously mined area," which is defined as "land disturbed or affected by coal mining operations prior to February 1, 1983." An exception exists for groundwater within a previously mined area if monitoring demonstrates that the groundwater is capable of consistently meeting the standards of

Section 620.410 or 620.420; but there is no evidence that the groundwater at issue here is capable of meeting such standards.

State Response

The State argues that in order to establish that the Disposal Areas do not discharge to "resource groundwater," HCC must demonstrate that the contaminated groundwater cannot be considered as presently being or capable of being put to beneficial use due to its quality, see page 2. The State asserts facts to support its belief that the groundwater is capable of being put to such use, including that the Mine is located on the eastern edge of the Henry Aquifer, a Class I groundwater resource, see page 5; that the groundwater to which the Disposal Areas discharge was and is utilized by the SVCD as a public water supply, see page 5; and that the groundwater on the Mine site that is not located within the outermost edge of the coal preparation plant [sic] is Class I potable resource groundwater, see page 34.

The State also argues that the groundwater in question is not within a "previously mined area" because: (1) Section 620.110 defines "previously mined area" to mean "land disturbed or affected by coal mining operations prior to February 1, 1983," the definitions "affected area" and "disturbed area" in the Mining Law should not be applied, and a "previously mined area" should be interpreted to mean only land that was itself mined, not land that was used for activities incidental to mining like refuse disposal, see pages 43-45; and (2) installation of a refuse disposal area should not result in classification of the groundwater contaminated by such refuse as a Class IV groundwater, see page 45.

Finally, the State appears to argue that, to the extent that the groundwater in question is contained within the area from which overburden has been removed, Section 620.301 applies, see page 45-46.

HCC Reply

The State does not dispute that Class IV groundwater is not resource groundwater.

Furthermore, the definition of Class IV groundwater does not require a showing that the contaminated groundwater is not capable of being put to beneficial use at some point in the future. Rather, the definition of Class IV groundwater requires HCC only to show that the groundwater is located "within a previously mined area" and that monitoring does not demonstrate that "the groundwater is capable of consistently meeting the standards of Sections 620.410 or 620.420."

The regulatory history of Part 620 indicates that classification of groundwater as Class IV groundwater is intended to be temporary. See In the Matter of Groundwater Quality Standards, 35 Ill. Adm. Code 620, R89-14, Proposed Rule, First Notice (Sept. 27, 1990) (stating that the proposed classification for "remedial groundwater" would contain groundwaters "that, due to contamination, temporarily cannot meet the water quality standards which would otherwise apply to them," including "coal mining sites that were mined prior to current State land reclamation regulations"); In the Matter of Groundwater Quality Standards, 35 Ill. Adm. Code 620, R89-14(B), Adopted Rule, Final Order (Nov. 7, 1991) (promulgating the classification for "Class IV: Other Groundwater," including groundwater "within a previously mined area," in place of the proposed "remediation groundwater" class).

Groundwater within a previously mined area should therefore be classified as Class IV groundwater until such time as the groundwater has been remediated to the point at which it is capable of meeting the standards in Sections 620.410 or 620.420. Here, the State can not dispute that the groundwater in question is not capable of meeting the standards in Sections 620.410 or

620.420 at this time, as the violations alleged by the State require a showing that the COC concentrations in the groundwater did not meet those standards.

Nothing in Part 620 supports the limited reading of the definition of "previously mined area" advanced by the State. The plain language at Section 620.110 defines the term to include all land "disturbed or affected by coal mining operations." Coal refuse disposal areas are a part of "coal mining operations" and clearly "disturb" or "affect" the land.

The fact that groundwater in a previously mined area cannot meet the standards of Sections 620.410 or 620.420 should result in classification of the groundwater as a Class IV groundwater. The provision for previously mined areas applies only to areas affected prior to February 1, 1983. This acknowledges that certain exceptions to the resource groundwater classifications are necessary to accommodate areas that had already been affected by Mining Refuse disposal at the time the Part 620 regulations were promulgated. In addition, the regulatory history of the rule creating a classification for Class IV groundwaters makes it clear that "[t]he purposes of the class is to accommodate certain waters that, due to particular practices or natural conditions, are limited in their resource potential. Included are . . . groundwaters in mining-disturbed areas." See In the Matter of: Groundwater Quality Standards (35 Ill. Adm. Code 620), R89-14(B), Adopted Rule, Final Order (Nov. 7, 1991) (emphasis added).

Finally, the State's argument that groundwater that is contained within the area from which overburden has been removed cannot be considered Class IV groundwater relies on an inapplicable regulatory provision. Under Section 620.420(f), Class IV groundwater includes groundwater "which underlies a coal mine refuse disposal area not contained within an area from which overburden has been removed," if certain conditions are met. However, groundwater within a "previously mined area" is considered Class IV groundwater under Section 620.450(g).

This establishes that groundwater "which underlies a coal mine refuse disposal area not contained within an area from which overburden has been removed" is different than groundwater within a "previously mined area" (logically, a coal mine refuse disposal area that is contained within an area from which overburden has been removed).

The State's argument that Section 620.505(a)(3) requires compliance with the applicable standards for coal mine refuse disposal areas at the outermost edge of such an area pursuant to Section 620.505(a)(3) and Section 620.240(f)(1) does nothing to further this argument, as those regulations simply identify the point of required compliance with such standards; under Section 620.505(a)(3), compliance with the GWQS is to be determined for groundwater that underlies a coal mine refuse disposal area "at the outermost edge as specified in Section 620.240(f)(1) or location of monitoring wells in existence as of the effective date of this Part on a permitted site," and Section 620.240(f)(1) defines Class IV groundwater to include "groundwater which underlies a coal mine refuse disposal area not contained within an area from which overburden has been removed," provided that the "outermost edge" is "the closest practicable distance" and does not exceed a lateral distance of 25 feet from the edge of such refuse disposal area or impoundment, or the property boundary, whichever is less. These Sections do not dictate which GWQS apply to the monitoring wells at such points.

C. The GWQS established by Section 302.208 and Section 302.304 do not apply.

The Board's regulations specify that the regulations in 35 Ill. Adm. Code 302 Subparts B and C, including 35 Ill. Adm. Code 302.208 and 35 Ill. Adm. Code 302.304 "do not apply to underground waters, except as provided at 35 Ill. Adm. Code 620.450(b)." See 35 Ill. Adm. Code 303.203 (emphasis added). Under 35 Ill. Adm. Code 620.450(b), the GWQS established by Section 302.208 and Section 302.304 only apply to areas that are "not contained within the area from which overburden was removed" if those areas were constructed or modified after a

certain date or were not in continuous operation since such date. All other areas are not subject to 35 Ill. Adm. Code 302.208 and 35 Ill. Adm. Code 302.304.

1. **The Disposal Areas are located within areas from which overburden has been removed.**

HCC Opening Brief

The "area from which overburden has been removed" should be interpreted to mean the same as "the permitted coal mine area" in order to harmonize the alternative GWQS with the mining regulations that apply to certain areas "not within the permit area for a specific mine."

Even if the standards apply within the permitted mine area, the Disposal Areas are within "the area from which overburden has been removed" because overburden was removed to construct the Disposal Areas. Under the Mining Law regulations, "overburden" is "material of any nature, consolidated or unconsolidated, that overlies a coal deposit, excluding topsoil," and the Disposal Areas were constructed by removing material other than topsoil from the surface of the land overlying a coal deposit. Removal of all overburden is not required, in light of the ordinary meaning of the language.

State Response

The State argues that the definitions in the Mining Law regulations are not applicable for the reasons discussed above, see pages 46-47.

The State also argues that Part 620 allows refuse disposal areas for a surface mine to be sited within the area from which overburden has been removed, and that the removal of overburden is not necessary for underground mining, see page 49.

Finally, the State argues that the record does not show that overburden was removed at the Mine, see page 50; and that even if HCC's interpretation of overburden is accepted, summary judgment is inappropriate because the Board would be required to assume that the material

overlying the coal deposits that was removed to construct the Disposal Areas was something other than topsoil, see page 50.

HCC Reply

The State acknowledges that "[a]ny groundwater disturbed by surface mining is regulated in the same way as groundwater within an underground mine and both, during mining and reclamation, are exempt from the otherwise applicable GWQS," see page 48. For this to hold true, the terms in Sections 620.450(b)(4) and (b)(5), including "overburden," must be read in a manner that makes those provisions applicable to both surface mining and underground mining.

Application of the alternative standards in Section 620.450(b) to both surface mining and underground mining is supported by the regulatory history of Part 620. The regulatory history expressly states that Section 620.450 recognizes that special groundwater standards are necessarily associated with certain activities, and that these activities are identified to include "sites for surface and underground coal mining activities." See In the Matter of: Groundwater Quality Standards (35 Ill. Adm. Code 620), R89-14(B), Adopted Rule, Final Order (Nov. 7, 1991) (noting that) (emphasis added).

Also, the regulatory history illustrates that one of the guiding principles at the time the Part 620 regulations were first being implemented was simplicity. In discussing a revision to the surface water quality standards intended to except underground waters from the applicability of the standards in light of the recently adopted groundwater quality standards, the Board explained that:

> Among the principles guiding today's action is the desirability of promulgating a system of standards that is not needlessly complicated. A simple rule is particularly desirable in the instant case because the arena of groundwater standards is so new. In this circumstance it is wise to resist the temptation to build an overly elaborate rule where there is no history to

> warrant the conclusion that the elaborate rule is either necessary or workable.
>
> Moreover, a simple rule is also essential to assure that the limited resources available to both the regulators and the regulated community may be applied in such manner as to provide the maximum environmental protection, A regulation is only as good as the availability of resources to implement and enforce it.

See In the Matter of Groundwater Quality Standards, 35 Ill. Adm. Code 620, R89-14(A) and R89-14(B), Proposed Rule, Second Notice (July 25, 1991). In its attempt to limit the applicability of Section 620.450 to areas in which the removal of overburden was necessary during surface mining operations, the State would unnecessarily complicate the administration of those alternative standards.

The State's assertion that Appendix III to the Cobb Affidavit proves that overburden was not removed at the Mine simply assumes what is in dispute, i.e., whether the term "overburden" as used in the Part 620 regulations, specifically Section 620.450(b), must be read to mean "all the overburden at the location of the Disposal Areas" rather than the plain meaning of the term as used to refer only to "some" overburden. Again, if IEPA and this Board had intended for the term "overburden" to mean all the overburden at some location, they should have and would have used the phrase "all of the overburden" or, at the very least, the term "the overburden" rather than merely "overburden" — a word that in its common meaning refers only to the nature of the material overlying a coal scene, not the extent of that material and certainly not the concept of "all of that material."

The nature of the material that was removed to construct the Disposal Areas cannot be reasonably disputed by the State, which acknowledges that Mining Refuse was placed in excavations at the Mine up to 30 feet deep, and generally between 10-20 feet deep. The State

has offered no evidence to establish that the topsoil in Gallatin County is more than ten feet thick; and its mere contention is not sufficient to establish that fact.

2. All Disposal Areas except Slurry No. 3 are not subject to the regulations governing disposal areas placed into operation after February 1983 because they have been in "continuous operation" since before February 1983 and have not been laterally expanded.

HCC Opening Brief

Even if the standards applicable to areas "not within the area from which overburden was removed" are applicable, Section 620.450(b)(4) and Section 620.450(b)(5) do not require compliance with the GWQS identified by the State. Different standards apply depending on the date the Disposal Area in question was placed into operation, whether the Disposal Area has been in continuous operation since such time, and whether additional area has been added to the Disposal Area.

Only Slurry No. 3 was placed into operation after February 1983.

Slurry No. 1, Slurry No. 2, the West Refuse Area, and the South 40 Refuse Area were placed into operation prior to February 1983, and the State acknowledges this.

Contrary to the State's assertions, Slurry No. 1A was placed into operation prior to February 1983. It is a "continuous operation" of Slurry No. 1, notwithstanding that slurry disposal was suspended from February 1981 to June 1982, because it was operated in accordance with the approved refuse disposal plan. Issuance of Subtitle D Permit No. 1992-MD-6977 on August 24, 1992, is not evidence that Slurry 1A was placed into operation on such date, as development of Slurry 1A pursuant to such permit involved vertical extension of the existing disposal area only, and a permit was only required because vertical extension was not authorized under Permit 34. Vertical extension does not add "additional area."

Also contrary to the State's assertions, West Refuse Area/Slurry No. 5 was placed into operation prior to February 1983. It was in "continuous operation" since it became active in January 1971, notwithstanding that it was inactive and revegetated from April 1978 through July 1984, because operation continued in accordance with the approved refuse disposal plan. Also, West Refuse Area/Slurry No. 5 was not modified to include additional area, because the only expansion was vertical.

The term "continuous operation" is not defined by the GWQS, but the mining regulations require a notice of intent to temporarily cease or abandon operations and there is no evidence that HCC submitted any such notice. Also, the term "additional area" is not defined, but must be understood to mean a change in the length and width or "footprint" of the disposal area under the commonly understood definition of the term.

State Response

The State argues that the affidavits submitted by HCC in support of its assertions that the Disposal Areas have been in "continuous operation" are confusing, misleading, and not supported by facts, see pages 7-8, and that application of definitions from the Mining Law and regulations to interpret the term "continuous operation" is inappropriate, see page 50.

The State also alleges that Slurry No. 1 was modified to include additional area through vertical <u>and lateral</u> expansion after November 25, 1991, see page 32, and that the West Refuse area was modified to include additional area through vertical expansion after February 1, 1983, and before November 25, 1991, see page 33.

HCC Reply

The State's arguments assume that a Disposal Area must be used literally non-stop for active Mining Refuse disposal to establish "continuous operation," but this is not required by

Part 620. Also, the State's arguments assume that vertical expansion of a Disposal Area adds "additional area," but provides no authority for this interpretation. As explained in HCC's Opening Brief, the mining laws provide context for interpretation of the term "continuous operation" in lieu of any more concrete definitions in Part 620, and requiring a showing of lateral expansion to establish that "additional area" was added to a Disposal Area is consistent with the commonly understood definition of the term.

3. **Section 302.208 and Section 302.304 do not apply to any groundwater.**

HCC Opening Brief

Under Section 620.130, groundwater "is not required to meet the general use standards and public and food processing water supply standards of 35 Ill. Adm. Code 302 Subparts B and C."

State Response

The State does not address this argument.

HCC Reply

The State does not dispute that those provisions are only applicable as required by Section 620.450(b)(4) or (b)(5), which are themselves inapplicable here. Therefore, HCC is entitled to summary judgment as to all State claims set forth in Count III based on alleged exceedances of Section 302.208 or 302.304 water quality standards.

D. **HCC's liability, if any, does not extend past December 5, 2006.**

1. **There is no evidence of continuing violations.**

HCC Opening Brief

The State has not alleged any fact that would evidence a continuing violation. The only facts alleged are purported exceedances occurring before March 15, 2000; and evidence of past exceedances does not raise a genuine issue of material fact.

State Response

The State does not address this issue.

HCC Reply

Because the State does not address this issue, HCC is entitled to summary judgment as to any State claim based on an allegation of a continuing violation.

2. A Groundwater Management Zone was established December 6, 2006.

HCC Opening Brief

Illinois's GMZ regulations provide that generally applicable GWQS do not apply prior to completion of a corrective action in a GMZ, provided that initiated action proceeds in a timely and appropriate manner.

State Response

The State acknowledges that "Respondent's liability for civil penalties does not extend past December 5, 2006." State Response at 51.

HCC Reply

Because of the State's acknowledgement, HCC is entitled to summary judgment as to any claim based on an allegation of a violation occurring after December 5, 2006.

VII. CONCLUSION

For the reasons discussed in HCC's Opening Brief and above, the GWQS established by Section 620.410, Section 620.301, Section 302.208, and Section 302.304 do not apply to HCC's

operation of the Disposal Areas at the Mine. Therefore, no violations of the State Act as alleged by the State in Count III of its Complaint have occurred.

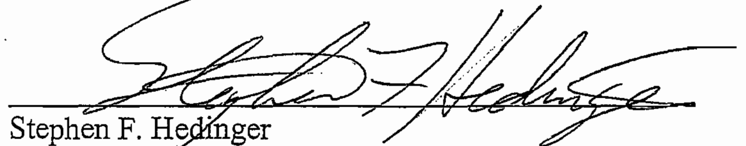
WHEREFORE, HCC respectfully requests the Board to grant HCC's SJ Motion, to enter summary judgment in HCC's favor and against the State with respect to all allegations of violations asserted by the State in Count III of its Complaint, and to grant HCC all other such relief this Board deems just and appropriate.

Date: July 12, 2011

Respectfully submitted,

HERITAGE COAL COMPANY LLC

By its attorneys:



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CERTIFICATE OF SERVICE

I hereby certify that I did on July 12, 2011, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled Motion for Leave to File Instanter and Respondent Heritage Coal Company LLC's Reply Brief in Support of its Motion for Partial Summary Judgment, and the attached Notice of Electronic Filing, upon the following persons:

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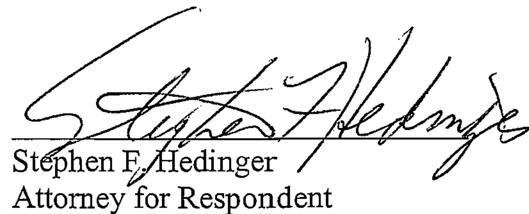

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