ILLINOIS POLLUTION CONTROL BOARD
September 6, 2012

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 99-134
	)	(Enforcement – Water)
HERITAGE COAL COMPANY LLC (f/k/a/ PEABODY COAL COMPANY, LLC)	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by C.K. Zalewski):

The Office of the Attorney General, on behalf of the People of the State of Illinois (People), initiated this action on March 25, 1999. The People seek to enforce various provisions of the Environmental Protection Act (Act) (415 ILCS 5/1 et seq. (2010)[1]) and Board regulations.

The respondent was originally named Peabody Coal Company, Inc., was later-named Peabody Coal Co. LLC (Peabody), and now is known as Heritage Coal Company LLC (HCC), a subsidiary of Patriot Coal Company. The complaint alleges that water pollution, creation of a water pollution hazard, and groundwater pollution occurred at the Eagle No. 2 Mine Site in Gallatin County near Shawneetown, as a result of Peabody's on-site disposal of mine waste such as gob and slurry.

Since the filing of the original complaint, the parties have filed multiple amended pleadings, and motions relating to the amended pleadings. The parties have engaged in an extensive process of discovery, exchanging discovery requests and producing voluminous documents in response.

This order rules on several motions made by respondent, following an extended briefing period and motions and responses made by the People. Respondent's main request is for partial summary judgment on Count III of the People's third amended complaint. Count III alleges that respondent violated the water pollution prohibition of Section 21(a) of the Act (415 ILCS 5/12(a) (2010). The People additionally allege that Peabody exceeded certain Board water quality

[1] The pleadings and motions discussed in this order cite to the provisions of various Illinois statutes, and various editions of the Illinois Compiled Statutes. As the relevant statutory provisions discussed have not differed materially over time, this order cites uniformly to the 2010 edition of the Illinois Compiled Statutes.

standards (WQS) for surface waters at 35 Ill. Adm. Code 302.304 and 302.208[2]. Count III also alleges violation of groundwater quality standards (GWQS) at 35 Ill. Adm. Code 620[3], standards adopted by the Board to implement the Illinois Groundwater Protection Act (ILGPA), 415 ILCS 55/1 *et seq.* (2010). The pertinent time frame is from November 25, 1991 (the effective date of the Part 620 standards) until December 6, 2006 (when a groundwater management zone was established).

Among other things, respondent's motion for summary judgment on Count III raises what the parties agree is a novel legal issue: whether, where the Board's groundwater rules are silent, the definition of terms contained in the Surface Coal Mining Land Conservation and Reclamation Act (the Mining Law), 225 ILCS 720, should be applied. The basis for HCC's argument in favor of such application is that the ILGPA and the Mining Law are *in pari materia*,[4] *i.e.* that the purposes of the ILGPA and Board rules are the same as those of the Mining Law.

The Board denies respondent HCC's motion for partial summary judgment concerning applicability of the Board's groundwater quality standards to petitioner's coal mine. The Board finds, as the People argued, that there exist genuine issues of material fact which preclude granting summary judgment, and which must be addressed at hearing.

Respondent's motion for oral argument on this issue is denied, as its fact-based arguments are best aired in the context of an adjudicatory hearing. Finally, in response to respondent's notice of its erroneous inclusion of a comma in its company name, the caption in this matter is corrected as shown above.

This order first describes the relevant pleadings and rules on preliminary motions. Next, it summarizes Count III of the complaint. The relevant statutes and rules are set forth, as well as the standard for summary judgment applied by both the courts and the Board. The order then summarizes the issues and facts described as "undisputed" in HCC's motion and other filings, as well as the People's responses. Finally, the order makes and explains the Board's ruling.

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[2] Section 302.208 of the Board's regulations contains the Board's numeric general use water quality standards while Section 302.304 contains the Board's limits for public and food processing water supplies.

[3] Specifically, these include Section 620.301, a general prohibition against use impairment of resource groundwater; Section 620.405, a general prohibition against GWQS violations, and Section 620.410, containing the numeric GWQS for Class I potable resource groundwater.

[4] The concept of *in pari materia* (translated from the Latin as "in the same matter") means "that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject." Black's Law Dictionary, 7 th ed. at page 794.

RELEVANT PLEADINGS

The procedural history of this action is lengthy, and only the immediately relevant pleadings are discussed here. This case was initiated by the People's March 25, 1999 complaint. The complaint was amended on May 31, 2000 and July 23, 2002. On November 21, 2002, the Board accepted the People's October 24, 2002 third amended complaint (Am. Comp.). HCC filed its answer to the third amended complaint (Am. Ans.) on December 23, 2002. Thereafter, the parties conducted fruitless settlement discussions, and also exchanged discovery requests and answers.

On December 27, 2010, HCC filed its motion for partial summary judgment (Mot. SJ). HCC seeks judgment in its favor on Count III of the third amended complaint. The motion was accompanied by HCC's opening brief and supporting affidavits of HCC/Peabody employees Eric. P. Fry, Michael L. Munday, Scott McGarvie, and W.C. Blanton. HCC additionally filed a request for oral argument and a notice of misnomer.

Consistent with extensions of time granted by the hearing officer, the People filed a 52-page response in opposition (Resp.) on April 11, 2011. This response incorporated evidentiary submissions consisting of counter-affidavits by Illinois Environmental Protection Agency (IEPA) employees Rick Cobb and Bill Buscher, the "Gastreich Memorandum" (a document prepared by an HCC employee and obtained from HCC in discovery), and a permit document authenticated by Joseph Angleton of the Office of Mines and Minerals. The People also moved for leave to file the response, overlong by 2 pages under 35 Ill. Adm. Code 101.302(g).

As discussed during status conferences between the parties and the hearing officer, on July 12, 2011 HCC filed its reply brief in support of its motion for partial summary judgment (Reply to Resp.), accompanied by a motion for leave to file *instanter*. In addition, on the same day HCC filed excerpts of deposition testimony and interrogatory answers in support of its motion for partial summary judgment. The deposition testimony is that of IEPA's Rick Cobb, taken on March 2, 2000 in the federal civil action Saline Valley Conservancy District v. Peabody Coal Co., Case No. 98-4074-JLK in the United States District Court for the Central District of Illinois, while the interrogatory answers were provided to HCC by the People in this case. Finally, also on July 12, 2011, HCC also filed objections to, and a motion to strike, "irrelevant evidentiary submissions", contained in the People's response in opposition to the motion for summary judgment. On July 25, 2011, the People filed a response in opposition to HCC's motion to strike.

On August 23, 2011, HCC filed a reply to complainant's response to motion to strike, accompanied by a motion for leave to file reply. On August 31, 2011, the People filed objections to respondent's "untimely motion for leave to file reply."

On September 8, 2011, HCC filed what it called a "supplement" to its motion for partial summary judgment accompanied by a motion for leave to file *instanter* (Supp.). The supplement consists of a citation to one of the People's answers to an HCC request to admit facts. On September 20, 2011, the People filed a response in opposition (Resp. Supp.). On October 3,

2011, HCC filed a reply to the September 20, 2011 People's response, accompanied by a motion for leave to file (Reply Resp. Supp.).

EFFECT OF JULY 12, 2012 NOTIFICATION OF BANKRUPTCY

The Board additionally notes a recent filing in this action: respondent's July 12, 2012 notification of bankruptcy (Notification). The Notification states that on July 9, 2012, HCC, along with its parent corporation, Patriot Coal Corp., and other affiliates, filed for protection under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") with the United States Bankruptcy Court for the Southern District of New York in various listed cases being jointly administered under Case No. 12-12900. The Notice requests the Board to:

> PLEASE TAKE FURTHER NOTICE that the filing of the voluntary petitions created an automatic stay that enjoins and restrains certain acts and proceedings against any of these debtors or their property as provided in 11 U.S.C. § 362, unless relief from the automatic stay is first granted by the United States Bankruptcy Court for the Southern District of New York. Prohibited acts include, without limitation, the commencement or continuation of any judicial proceeding against any of the debtors that was or could have been commenced before the filing of the petition, any attempt to enforce a judgment against any of the debtors or their property, any act to obtain possession of or exercise control over property of the debtors' estates or any act to create, perfect or enforce any lien against property of the debtors' estates. *See* 11 U.S.C. §362 and Federal Rule of Bankruptcy Procedure 4001 for exceptions and procedures to follow in seeking relief from the automatic stay. Notification at 3-4.

The Board notes that it is well settled in practice before the Board and the courts that the automatic stay provision of Section 362(b)(4) of the Bankruptcy Code does not apply to actions such as this, where the government seeks to enforce environmental protection statutes through use of police or regulatory powers. *See, e.g.,* People v. Community Landfill Co., Inc., Edward Pruim, and Robert Pruim, PCB 97-193 and PCB 04-207 (cons.), slip op. at 17 (Apr. 5, 2012) and cases cited therein (penalty apportionment following appellate remand).

PRELIMINARY MOTIONS

The Board first considers the various motions for leave to file and to strike. To ensure that the Board is fully advised of the facts and issues in this matter, the Board accepts all timely filed documents, and also late-filed documents accompanied by motions for leave to file. After considering all objections made, the Board also denies all motions to strike materials submitted.

The Board next considers HCC's motion for oral argument. As stated in Section 101.700 (a) of the Board's procedural rules, "[t]he purpose of oral argument is to address legal questions. Oral argument is not intended to address new facts." 35 Ill. Adm. Code 101.700(a). The Board finds that the pleadings sufficiently address the legal arguments forwarded by the parties to allow the Board to make a reasoned decision on the motion for partial summary judgment. To the extent that the factual disputes may exist between the parties, the proper forum to address such

disputes is in the hearing process under Section 33 of the Act and 35 Ill. Adm. Code.Subpart F and not in oral argument. HCC's motion for oral argument is therefore denied.

THE COMPLAINT AND ANSWER GENERALLY

Factual Background

The Peabody Coal Eagle No. 2 Mine Site, located in Gallatin County near Shawneetown, covers approximately 250 acres. Peabody operated the site as an underground coal mine from 1968 to July 1993. Am. Ans. at 2. Peabody operated six refuse disposal areas at the mine site. Am. Comp. at 2.

The Board takes administrative notice of the fact that various legislative and regulatory actions that took place during the operational life of the Eagle No. 2 Mine Site. The Illinois Environmental Protection Act (415 ILCS 5/1 *et seq.* (2010)) became effective July 1, 1970. Peabody operated the site pursuant to Permit No. 34 issued by the State of Illinois on August 1, 1985 pursuant to the Mining Act, which governs lands affected by coal mining operations after 1983. The Illinois Groundwater Protection Act, enacted as P.A. 85-863, became effective on September 24, 1987. The Board adopted the first GWQS in November 1991. *See*, In the Matter of: Groundwater Quality Standards: 35 Ill. Adm. Code 620, R 89-14(B) (Nov. 17, 1991) (rules filed and effective Nov. 25, 1991) (R89-14(B)).

The Board also notes that, while not specifically mentioned in the complaint, in response to HCC's motion for summary judgment the People have presented as a business record the results of a 1996 review of Peabody's operations by the office of Mines and Minerals in the Illinois Department of Natural Resources (Department). Resp., Aff. of W. E. Buscher, Exh. 1. Based on Peabody's application for revision no. 6 to Permit 34, the Department revised Peabody's mining permit. *Id.* at 1. During the process of its review, the Department made permit findings and conditions, reviewed comments and responses, required modifications to a renewal application, and made a groundwater assessment of probable cumulative hydrogeological impacts. *Id.*

The People, in its initial 1999 complaint and subsequent amendments, allege that the mine site is located at the eastern edge of the Henry Aquifer, a Class 1 groundwater resource. The People further allege that the Saline Valley Conservancy District (SVCD) public water supply wells are located to the southwest and hydraulically down gradient from the mine site. Am. Comp. at 2. Peabody disputes this statement. Am. Ans. at 2. There are five wells in the SVCD well field and the wells supply 27,814 people. Am. Comp. at 2.

The People charge that Peabody disposed of 12.76 million tons of coal-related wastes in the refuse disposal areas, and that none of the disposal areas have liners or other barriers to prevent leaching of contaminants into the underlying aquifer. Am. Com. at 2-3. Peabody denies this allegation but admits that its operations included disposing of "substantial quantities of gob and slurry" in the areas indicated. Additionally, Peabody states the refuse contained inorganic chemicals and that Peabody's groundwater quality data show that sulfates leached into on-site groundwater. Am. Ans. at 3.

The People allege that inorganic chemicals from the coal-related wastes (such as chlorides, manganese, total dissolved solids, sulfates, and iron) at the mine have contaminated the groundwater both at the site of the mine and off-site. The People also allege that the inorganic chemicals from the coal-related wastes are the cause of deteriorating water quality at the SVCD wells. Am. Comp. at 3. Peabody denies these allegations. Am. Ans. at 3.

Peabody agrees that it received a violation notice letter, labeled M-1997-00010, from the Agency dated January 28, 1997, but denies that the notice concerned inorganic chemical groundwater quality violations at the Eagle No. 2 site. Am. Ans. at 3. In response to the notice of violation (NOV), Peabody sent a letter to the Agency disputing the Agency's characterization of the groundwater quality violations at Eagle No. 2 and claimed there were no violations of groundwater quality on or off-site at Eagle No. 2. *Id*. Peabody admits that it met with the Agency on March 13, 1997, but denies that the meeting was held pursuant to Section 31(a)(4) of the Act. Ans. at 3-4.

The parties agree that on March 17, 1997, Peabody requested an extension of time to respond to the alleged violations, and that the Agency denied the request. The parties agree that Peabody responded timely and that the Agency responded on April 23, 1997. Am. Ans. at 4. However, Peabody disputes that the Agency rejected Peabody's compliance commitment agreement. *Id*

The parties also agree that the Agency sent a notice of intent to pursue legal action on October 6, 1997. Ans. at 4. The parties agree that the Agency sent a second NOV on December 23, 1997, labeled M-1997-00133, but again Peabody denies the NOV concerned inorganic chemical Class 1 groundwater quality violations at the mine site. Am. Ans. at 4. The parties met on January 28, 1998, and the Agency sent a second notice of intent to pursue legal action on April 21, 1998, regarding the second NOV. Ans. at 4.

Finally, the parties agree that, subsequent to the filing of the third amended complaint, HCC applied for and the Agency established a groundwater management zone (GMZ) at the site on December 6, 2006. Resp. at 3.

The Complaint's Counts

In Counts I and II, complainant alleges that by allowing the discharge of inorganic chemicals into the groundwater, Peabody/HCC has caused or tended to cause water pollution in violation of Section 12(a) of the Act (415 ILCS 5/12(a) (2010)). Complainant also alleges that by allowing the deposit of coal mine refuse and related waste, Peabody has created a water pollution hazard in violation of Section 12(d) of the Act (415 ILCS 5/12(d) (2010)). Am. Comp. at 23-24, 46-47.

In Count III, complainant alleges that by causing or allowing the discharge or release of inorganic chemicals to groundwater at the mine, Peabody has violated Section 12(a) of the Act, and the water quality standards at 35 Ill. Adm. Code 302.304 and 302.208. Complainant also alleges that Peabody has violated 35 Ill. Adm. Code 620.301, 620.405, and 620.410(a).

The general environmental impact of the alleged actions was explained in the affidavit of IEPA's Rick Cobb, Deputy Manager, Division of Public Water Supplies, and former Manager of the Groundwater Section. Mr. Cobb presented testimony in support of the Part 620 groundwater rules proposal in R89-14(B). Mr. Cobb stated:

> The reason that refuse disposal areas and sludge, and slurry, and precipitated process material at a coal preparation plant are a significant threat, without proper containment measures, is because precipitation will move through the refuse disposal areas and sludge, and slurry, and precipitated process material producing a concentrated leachate high in inorganic contaminants and with a low pH that will migrate directly into the groundwater. This plume of contaminated groundwater will move down gradient as contaminants continue to be recharged through these refuse disposal areas and sludge, and slurry, and precipitated process materials. Once an aquifer is contaminated with these inorganic contaminants and pH[,] ordinary treatment techniques at a potable water supply well cannot be used to remove these contaminants. Resp., Cobb Aff. at 8.

STATUTORY AND REGULATORY PROVISIONS

Section 12(a) of the Act provides that no person shall:

> Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act. 415 ILCS 5/12(a) (2010).

The Act defines "water pollution" as

> such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety, or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life. 415 ILCS 5/3.55 (2010).

Section 302.208 of the Board's surface water quality regulations contains the Board's numeric general use water quality standards while Section 302.304 contains the Board's limits for public and food processing water supplies.

The Board's groundwater rules are codified at 35 Ill. Adm. Code Part 620. Under Section 620.201(a), all groundwaters of the State are generally designated as one of the following four classes of groundwater: Class I, potable resource groundwater; Class II, general resource groundwater; Class III special resource groundwater; or Class IV, other groundwater. Groundwater may also be designated as a groundwater management zone in accordance with

Section 620.250, or as "[a] groundwater management zone as defined in 35 Ill. Adm. Code 740.120 and established under 35 Ill. Adm. Code 740.530." *See* Section 620.201(b) and (c).

Section 620.301 is a general prohibition against use impairment of resource groundwater. Section 620.405 is a general prohibition against violations of groundwater quality standards while Section 620.410 are the numeric groundwater quality standards for Class I potable resource groundwater.

GWQS for other classes of groundwater are set forth in other provisions of 35 Ill. Adm. Code Part 620. Section 620.420(11) (establishing standards for inorganic chemical constituents in Class II general resource groundwaters); Section 620.420(d) (establishing standards for pH in Class II groundwaters); Section 620.430 (establishing standards for Class III special resource groundwaters); Section 620.440 (establishing standards for Class IV other groundwaters).

Although not cited in the People's complaint, HCC's motion (Mot. at 3) asserts that another "key" rule is at issue here: 35 Ill. Adm. Code 620.450, setting Alternative Groundwater Quality Standards. HCC specifically points to Section 620.450(b) "Coal Reclamation Groundwater Quality Standards." In summary, the alternative coal reclamation GWQS applies to the groundwater within a permitted coal mine area and any groundwater within the cumulative impact area of groundwater for which the hydrologic balance has been disturbed from a permitted coal mine area. 35 Ill. Adm. Code 620.450(b)(1). Sections 620.450 (b)(2) and (b)(3) establish GWQS for all groundwater within a permitted coal mine area, while Sections 620.450(b)(4) and (b)(5) establish GWQS for all groundwater at the location of a coal preparation plant and associated coal mining refuse disposal areas not within a permitted coal mine area, but still within the cumulative impact area of groundwater for which the hydrologic balance has been disturbed.

STANDARD OF REVIEW FOR MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E. 2d 358, 370 (1998); *see* 35 Ill. Adm. Code 101.516(b) (Motions for Summary Judgment). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd & Dowd, 693 N.E.2d at 370 (1998).

Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to relief "is clear and free from doubt." Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E. 2d 358, 370 (1998), citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E. 2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

HCC'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNT III AND FACTS RELIED UPON IN THE MOTION

HCC's motion for partial summary judgment does not address the allegations of Counts I and II of the complaint. Mot. at 2-3 and n. 3. The motions seeks summary judgment only as to Count III, asserting that "none of the GWQS allegedly exceeded as a result of HCC's operation of the Disposal Areas actually apply to any of the groundwater at issue." *Id.* at 3. HCC's motion makes various assertions concerning the issues for resolution, and the facts supporting them. The People's response addresses these assertions. More specifically:

- HCC asserts: The GWQS established by Section 620.410(a) do not apply because reclamation at the Mine was not completed at the time of the alleged violations.

  The People respond:

  > This is a legally correct statement regarding the general regulatory exemption in Section 620.450(b)(2) ("Prior to completion of reclamation at a coal mine, the standards as specified in Sections 620.410(a) and (d), 620.420(a) and (d), 620.430 and 620.440 are not applicable to inorganic constituents and pH."). However, other provisions of Section 620.450(b) specifically limit this exemption in regards to refuse disposal areas which the record shows is the source of the groundwater contamination. Resp. at 1-2.

- HCC asserts: The GWQS established by Section 620.301 do not apply because the Disposal Areas do not discharge to "resource groundwater."

  The People respond:

  > The prohibition of Section 620.301 is correctly interpreted to be limited to "the release of any contaminant to a resource groundwater." In order to be entitled to summary judgment, the Respondent must demonstrate that the groundwater contaminated by the refuse disposal areas 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. Resp. at 2.

- HCC asserts: The GWQS established by Sections 302.208 and 302.304 do not apply because the Disposal Areas are "not contained within an area from which overburden has been removed."

  The People respond:

> Although the Complainant disputes the factual statement, it is correct that the provisions of Section 620.450(b)(4) and (5) are only applicable to refuse disposal areas located where overburden removal did not occur.

- HCC asserts: "At all times after December 5, 2006, the alternative GWQS under Section 620.450(a)(3) apply because a groundwater management zone ("GMZ") was established at the Mine in December 6, 2006, pursuant to Section 620.250(a)."

  The People respond: "This is legally correct." Resp. at 2. The People concede that "respondent's liability for civil penalties does not extend past December 5, 2006." *Id.* at 51.

In support of its motion for summary judgment as to Count III only, HCC relies on 20 "undisputed facts," supported by affidavits of its various employees[5] and other documents. These "undisputed facts" are referenced in later filings by number, as they appear below; the footnotes appearing in the following quoted paragraphs appear in the original, as numbered below.

The People, in their response in opposition and other pleadings, challenge some but not all of the facts asserted by HCC. Resp. at 7. Facts disputed by the People after consideration of all pleadings are preceded by an asterisk (*****), and are numbers 13, 15, and 20. The facts disputed by the People include the nature of reclamation activities at the site, specifically what these consist of, when they commenced, and whether they have been completed at the disposal areas. Resp. Supp. at 3-4.

> 1. From 1968 until 1993, HCC constructed and operated the Mine as an underground coal mine and associated auxiliary surface areas. Brown at ¶8.
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> 2. As part of its operations at the Mine, HCC constructed the Disposal Areas at the surface portion of the Mine, including excavating trenches at some locations. These Disposal Areas are identified as Slurry No. I/Slurry No. lA; Slurry No.2; Slurry No.3; West Refuse Area/Slurry No.5; South 40 Refuse Area; the New South 40 Refuse Area; and the Emergency Slurry Area[6]. Brown at ¶ 8, Ex. 1.

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[5] As used in HCC's motion, citations to the affidavits filed by HCC are as follows:
"Blanton" means the Affidavit of W.C. Blanton, dated December 20, 20 10.
"Brown" means the Affidavit of Keith Brown, dated December 20, 2010.
"Fry" means the Affidavit of Erie Fry, dated December 16, 2010.
"McGarvie" means the Affidavit of Scott MeGarvie, dated December 20, 2010.
"Munday" means Affidavit of Michael L. Munday, dated December 16, 2010.
See Mot. at 3 and n.4.

[6] The Emergency Slurry Area was constructed just West of Slurry No. 1 by April 1978. Brown at ¶8, Ex.. I. The State has not identified the operation of the Emergency Slurry Area as an

3. Disposal Area Slurry No. 1 was active by January 1971. *Id.*

4. Construction of Disposal Area Slurry No. 2 was completed by December 1978, and that area was active by January 1979. *Id.*

5. Construction of Disposal Area. No. 3 was completed by November 1984, and that area was active by July 1985. *Id.*

6. The Disposal Area originally identified as the West Refuse Area and later as Slurry No. 5 was active by January 1971. *Id.*

7. The Disposal Area identified as the South Forty Refuse Area was active by April 1978. *Id.*

8. The New South Refuse Area was constructed south of Slurry No. 1 and Slurry No.5. *Id.*

9. The Mine was first permitted in 1968. Complaint ¶5.

10. On August 1, 1985, the Illinois Department of Mines and Minerals ("IDMM") issued Surface Mining Permit 34 ("Permit 34") to HCC pursuant to the Surface Coal Mining Land Conservation and Reclamation Act (the "Mining Law"), 225 ILCS Part 720[7], and its implementing regulations, 62 Ill. Adm. Code 1700 through 1850 (the "Mining Regulations"), thereby authorizing HCC's continued operation of the Mine under the provisions of the Mining Law.[8] Blanton at ¶3, Ex. 1.

11. Operations at the Mine were carried out pursuant to Permit 34, as amended from time to time. In particular, the coal mining refuse disposal and other activities carried out at the Disposal Areas were specifically addressed and authorized by the provisions of Permit 34, as amended from time to time, through

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alleged source of any alleged violations at issue in this matter, so this Disposal Area is not further discussed herein.

[7] The Surface Coal Mining Land Conservation and Reclamation Act (225 ILCS 720) provides for the conservation and reclamation of lands affected by coal mining operations after February 1, 1983. The Surface Mined-Land Conservation and Reclamation Act (225 ILCS 715) established control of environmental impacts for coal mining activities for operations prior to February 1, 1983.

[8] The Illinois Department of Natural Resources (IDNR) was created by the consolidation of five separate State agencies, including IDMM, effective July 1, 1999. Within IDNR, the Office of Mines and Minerals (OMM) regulates mining and oil and gas operations throughout the State of Illinois.

the cessation of active mining operations and related coal mining refuse disposal operations at the Mine in 1993. Brown at ¶5.

12. All activities carried out in the Disposal Areas pursuant to the relevant provisions of Permit 34 were subject to bonding requirements to ensure reclamation of those areas. Those bonding requirements remained in full force and effect through the cessation of coal mining refuse disposal activities at the Mine. Brown at ¶6.

*13. Throughout the period of active mining operations at the Mine and the associated generation of coal mining refuse, at least as early as the beginning of 1984, Disposal Areas were used for refuse placement, followed by carbon recovery activities, followed by further refuse placement on an ongoing and repetitive basis in a continuing cycle of refuse disposal and carbon recovery. Brown at ¶11.

> The People respond:
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> [F]actual statement #13 . . . is based upon paragraph 11 of the Brown affidavit. Mr. Brown served as the mine engineer at Eagle No.2 from early 1991 through late 1994. Brown at ¶4. Utilizing company records and documents, in late 1993 or early 1994, Mr. Brown prepared the chronology now attached to his affidavit. Brown at ¶¶8 and 9. The qualifying phrase "at least as early as the beginning of 1984" is confusing and potentially misleading in reference to either the generation of coal mining refuse or the use of disposal areas for refuse placement. The chronology suggests that carbon recovery operations began "at least as early as the beginning of 1984." The statement of fact ends with references to "ongoing" and "continuing" disposal and recovery even though the chronology prepared by Brown does not identify any activities beyond July 1993. Resp. at 7-8.

14. The development of Disposal Area Slurry 1A involved increasing the height of the existing levees around the perimeter of then-existing and active Disposal Area Slurry 1 with coal mining refuse, primarily gob, placed inside the interior walls of existing levees to a height approximately 20 feet higher than that of those existing levees so as to serve as containment for additional placement of slurry and other coal mining refuse. The construction and use of Disposal Area Slurry 1A did not involve any lateral extension in any direction of the existing and active Disposal Area Slurry 1, only a modification of that Disposal Area by the additional placement of additional slurry and other coal mining refuse onto the existing area to a height not previously approved under Surface Mining Permit 34. Thus, the development and operation of Disposal Area Slurry 1A did not increase the footprint, *i.e.*, the surface area, of that Disposal Area. During the construction of the new levees for this Disposal Area, the disposal of slurry in that Disposal Area continued. Brown at ¶12.

*15. As of early 1993, land reclamation so as to establish the approved post-mining land uses for most of the Disposal Areas had not yet begun. Land reclamation of the Disposal Areas in this regard was not completed until a number of years later. McGarvie at ¶4 and 5.

The People respond:

The first sentence is not disputed and is based upon Mr. McGarvie's review of records "from the time active mining began at that facility through the cessation of active mining at that facility." McGarvie at ¶4. However, while the second sentence appears *verbatim* in paragraph 5 of his affidavit, Mr. McGarvie does not indicate when the suggested reclamation of the refuse disposal areas has been completed. In fact, none of Respondent's proffered facts indicates when reclamation actually did commence and when any such activities might have been completed. Resp. Supp. at 2-3-.

16. On May 6, 2005, HCC submitted to IEPA HCC's original proposal (the "GMZ Proposal") for the establishment of a GMZ at the Mine to address certain groundwater quality issues at and in the vicinity of the Mine that are at issue in this matter. For several months thereafter, HCC worked with IEPA staff in modifying the GMZ Proposal to the extent necessary to provide for terms and conditions of a GMZ mutually acceptable to IEP A and HCC. Fry at ¶5.

17. On December 6, 2006, IEPA approved HCC's GMZ Proposal, as modified as of November 17, 2006, thereby establishing a GMZ at and in the vicinity of the Mine in accordance with the provisions of the HCC GMZ Proposal, as modified. Fry at ¶6, Ex. 1.

18. Since November 2007, ongoing activities at the Mine have been undertaken pursuant to Permit 34. This permit presently addresses and establishes the terms and conditions of, among other things, HCC's maintenance of the Disposal Areas at the Mine, including the bonding requirements relating to reclamation following the cessation of active operations at that facility. Munday at ¶5.

19. HCC has not sought to be released from the reclamation bonding obligations under Permit 34. Munday at ¶6.

*20. The [Illinois Department of Energy and Natural Resources] website material that provides information regarding the status of active permits issued pursuant to the Mining Law describes the current status of the Mine under Permit 34 to be: "In reclamation, has outstanding bond." Blanton at ¶3, Ex. 1.

> The People respond: Initial objections concerning foundation have been satisfied. Concerns remain about probative value and weight of factual presentation. Resp. Supp. at 3-4.

HCC'S STATEMENT OF ISSUES PRESENTED IN ITS MOTION AND THE PEOPLE'S RESPONSE

In its motion, HCC states that the issues presented for Board resolution are:

> • Whether the GWQS established by Section 620.410 (a) apply to any groundwater as to which the hydrologic balance has been disturbed as a result of HCC's operations at the Mine;
>
> • Whether the GWQS established by Section 620.301 apply to any groundwater as to which the hydrologic balance has been disturbed as a result of HCC's operations at the Mine;
>
> • Whether the GWQS established by Section 302.208 and Section 302.304 apply to any groundwater as to which the hydrologic balance has been disturbed as a result of HCC's operations at the Mine; [and]
>
> • Whether the alternative GWQS at Section 620.450(a)(3) apply to all groundwater as to which the hydrologic balance was disturbed as a result of HCC's operations at the Mine at all times beginning December 6, 2006, when a GMZ applicable to all such groundwater was established. Mot. at 10.

HCC'S Argument

Among other things, HCC argues that the Disposal Areas are "within an underground coal mine" and are part of "a permitted coal mine area" under the Mining Law for purposes of Section 620.450(b)(1). Therefore, HCC contends they are subject to the Coal Reclamation Groundwater Quality Standards set forth in Section 620.450(b). Mot. at 16.

This is but one of several arguments premised on the contention that Mining Law definitions should be used in interpretation of the Board's groundwater rules. For instance, HCC's motion states that the terms "coal mine" and "cumulative impact area" are not defined in the Groundwater Protection Act or in the Board's Pact 620 rules. Mot. at 12. HCC argues that there was no need to define them because similar terms are used in the Mining Law. *Id.* HCC then asserts that principles of statutory construction favor use of Mining Law definitions in the interpretation of Part 620.

HCC asserts that the principle of *in pari materia* construction applies here, stating that

> Illinois courts have held that where the same word is used in different sections of the same legislative act, the presumption is that the word is employed with the same definite meaning unless there is something in the act to clearly show that a different meaning was intended. See People ex rel. Lipsky v. City of Chicago, 85 N.E.2d 667 (Ill. 1949); United Consumers Club, Inc. v. Attorney General, 456 N.E.2d 856 (Ill. App. 1983); *People v. Talbot*, 153 N.E. 693 (Ill. 1926).
>
> Although the same presumption does not apply where the same word is used in different statutes, courts have also consistently recognized that "[t]he meaning of words used in a given statute may be ascertained from the consideration of other acts *in paria materia* where the words are used." *See* Lake County v. Gateway Houses Foundation. Inc., 311 N.E.2d 371, 377 (Ill. App. 1974) (citations omitted); Christ Hosp. & Medical Ctr. v. Illinois Comprehensive Health Ins. 693 N.E.2d 1237 (Ill. App. 1998); Miller v. Illinois Pollution Control Board, 642 N.E.2d 475 (Ill. App. 4th Dist. 1994) (holding that "[t]he examples of litter set forth in the Litter Control Act (Ill. Rev. Stat. 1991, ch. 38, par. 86-1 et seq.) provide additional guidance" regarding the interpretation of the term "litter" in an action alleging violation of the Illinois Environmental Protection Act's prohibition against open dumping resulting in the occurrence of litter). Mot. at. 13-14.

HCC contends that the purposes of the Mining Law and Part 620 are the same: protection of water quality. *See* Mot. at 14 comparing 225 ILCS 720/1.02 and 35 Ill. Adm. Code Section 620.105[9]. Consequently, HCC contends they are *in pari materia.*

HCC additionally notes the principle of statutory construction in which courts have held that they may presume that in drafting the language of one statute, the Legislature was aware of the construction and use of a term in another statute and intended that language to have the same meaning. *See* Mot. at 15, citing Christ Hosp. & Medical Ctr., 693 N.E.2d at 1241. Here, HCC argues, both the Agency and the Board clearly were aware of the Mining Law at the time the GWQS were adopted, noting the specific reference to the Mining Law and its implementing regulations at 62 Ill. Adm. Code 1700 through 1850 within the text of Part 620 rules. *Id.*, citing 35 Ill. Adm. Code 620.110 and 620.450(b)(1). As a result, HCC concludes that this indicates that the Mining Law and its implementing regulations are relevant to application of the Part 620 regulations. *Id.*

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[9] The purposes of the Mining Law include “protecting the health, safety and general welfare of the people, the natural beauty and aesthetic values, and enhancement of the environment in the affected areas of the State" and "prevent(ing] erosion, stream pollution, water, air and land pollution and other injurious effects to persons, property, wildlife and natural resources.” *See* 225 ILCS 720/1.02. The stated purpose of Part 620 is to “prescribe[] various aspects of groundwater quality, including method of classification of groundwaters, nondegradation provisions, standards for quality of groundwaters, and various procedures and protocols for the management and protection of groundwaters.” *See* 35 Ill. Adm. Code 620.105.

The People's Argument

The People contend that the principle of statutory construction to be applied here is to look to the plain meaning of language and to resort to other aids only in the event of ambiguity. Resp. at 19. The People contend that the unambiguous language of the respective groundwater rules should be afforded its plain meaning. *Id.*

Moreover, the People argue the Mining Law and the ILGPA and the Board's implementing Part 120 rules are simply not *in pari materia*. The People look to the declarative intention articulated in Section 1.02(a) of the Mining Act. In addition to providing for "conservation and reclamation of lands affected by surface and underground coal mining" and the other purposes cited by HCC, it is also the Law's stated intent

> to assure that the coal supply essential to the Nation's and State's energy requirements, and to their economic well-being is provided [and] to strike a balance between protection of the environment and agricultural productivity, and the Nation's need for coal as a source of energy. Resp. at 19-20, citing 225 ILCS 720/1.02.

The People conclude that the purpose of the Mining Law "is to permit the mining of coal through a balancing of interest approach where the environment and agricultural productivity are affected." Resp. at 20.

The People next look to the legislative declarations in Section 2 of the ILGPA, as reflected in the Board's statement of purpose for the groundwater rules in Section 601.105:

> (a) The General Assembly finds that: (i) a large portion of Illinois' citizens rely on groundwater for personal consumption, and industries use a significant amount of groundwater; (ii) contamination of Illinois groundwater will adversely impact the health and welfare of its citizens and adversely impact the economic viability of the State; (iii) contamination of Illinois' groundwater is occurring; (iv) protection of groundwater is a necessity for future economic development in this State.
>
> (b) Therefore, it is the policy of the State of Illinois to restore, protect, and enhance the groundwaters of the State, as a natural and public resource. The State recognizes the essential and pervasive role of groundwater in the social and economic well-being of the people of Illinois, and its vital importance to the general health, safety, and welfare. It is further recognized as consistent with this policy that the groundwater resources of the State be utilized for beneficial and legitimate purposes; that waste and degradation of the resources be prevented; and that the underground water resource be managed to allow for maximum benefit of the people of the State of Illinois. Resp. at 20, citing 415 ILCS 55/2.

From this, the People conclude that the ILGPA's purpose is:

> to protect the groundwater as a natural and public resource without regard to coal mining or any other legitimate enterprise. The legislature intended no balancing of interests but rather to achieve the "maximum benefit" for its citizens. *Id.*

Consequently, the People contend that the IGLPA and the Mining Law are not in *pari materia*. Moreover, the People assert,

> This doctrine, however, does not dictate that terms in separate statutes be given identical meanings but only that separate statutes bearing on the same subject matter be given harmonious interpretation.
>
> In interpreting the actual statutes, the Board should consider, in addition to the statutory language, the reason for the law, the problems to be remedied, and the objects and purposes sought by the law. Here, the Board must also interpret and construe the rules so as to achieve the statutory purposes of the ILGPA and must be indifferent to matters relating to the protection and support of coal mining. Resp. at 21 (footnotes and citations omitted).

The People contend that, in some instances, the definition of terms in the rules implementing the Mining Law rules and the ILGPA are "virtually identical". *See* Resp. at 40 discussing "cumulative impact area" and "hydrologic balance". However, the People contend that, in other instances, "the pertinent inquiry is more factual than legal". *Id.* One of these is whether the Disposal Areas are located "within an underground coal mine." *Id.* at 41-42.

BOARD ANALYSIS

The parties have presented the Board with hundreds of pages of evidence and arguments. As previously stated, summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E. 2d 358, 370 (1998); *see* 35 Ill. Adm. Code 101.516(b) (Motions for Summary Judgment). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id.* Here, the People have persuaded the Board that there are genuine issues of material fact, and that HCC's right to judgment in its favor is not "clear and free from doubt." Consequently, the Board will not grant summary judgment.

Existence of Genuine Issues of Material Fact

As outlined earlier, after consideration of all of HCC's materials the People stated that it disputed the material facts contained in items 13 (refuse placement), 15 (reclamation activities), and 20 (permit status and its meaning) of HCC's motion. *See, supra*, at 11-13. The Board does not place great weight on the issue of permit status in and of itself. But a full development of facts concerning refuse placement and reclamation activities is clearly germane to a determination of which groundwater standards apply to this site at which point in time.

Additionally, the People have also suggested that other of HCC's arguments required development of a factual basis on which to determine whether specific Mining Law terms may be accurately applied here providing further reason why summary judgment is not appropriate.

In Pari Materia **Claim Rejected**

Many of HCC's arguments stem from the application of Mining Law terms, definitions, and distinctions as *in pari materia* to the Act, IGWPA, and Part 620 rules. The Board is persuaded by the People's arguments that extrinsic aids to construction are not necessary for the interpretation of the Board's rules at 35 Ill. Adm. Code 620.

The Board is further persuaded that the Mining Law and the ILGPA are not *in pari materia* in all respects. The Mining Law has groundwater protection among its concerns as argued by HCC. But, in the words of the People "the protection and support of coal mining" is also an articulated concern. The ILGPA's purpose is to optimize the protection and management of groundwater so as to prevent waste and degradation, and to ensure that the State obtains maximum benefit from this resource. To this end, the purpose of the Board's implementing rules is to appropriately classify groundwater, establish non-degradation provisions, GWQS, and methods for the management and protection of groundwater.

The People contend that the application of Mining Law terms to this case can be more "legal than factual". One example given is concerning whether HCC's refuse disposal areas fall within the Mining Law's meaning of a "coal mine," in the context of whether the hydrologic balance of groundwater was disturbed and applicability of Section 620.450(b) "Coal Reclamation Groundwater Quality Standards." Here, the People contend, HCC's

> underground mine clearly disturbed the hydrologic balance of the groundwater actually located within the mine itself. There is nothing in the record, however to show that the hydrologic balance of major shallow aquifer was actually disturbed by mining activities or operations. Resp. at 41.

Obviously, if the shallow aquifer were not disturbed, the cited section would not apply.

CONCLUSION

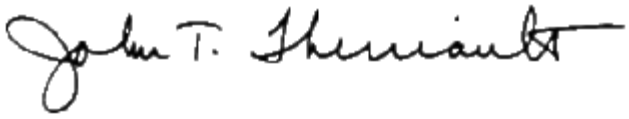
In finding that summary judgment as to Count III has not been justified here, the Board notes that the parties have made clear that the practical "remedy" for Count III violations has been created and is being implemented. The specialized assessment of the impacts of the Disposal Areas was undertaken by IEPA, and management means established in the December 6, 2006 GMZ approved by IEPA.

What remains at issue concerning Count III is precisely which standards were violated during the pertinent time frame--from November 25, 1991 (the effective date of the Part 620 standards) until December 6, 2006 (when a groundwater management zone was established)—and what penalty if any should be applied for that violation. Based on the incomplete factual

record before it, the Board declines to establish any precedent in this regard through the "drastic remedy" of summary judgment.

HCC's motion for summary judgment as to Count III is denied.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on September 6, 2012, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board