STATE OF ILLINOIS
DEPARTMENT OF NATURAL RESOURCES
OFFICE OF MINES AND MINERALS, LAND RECLAMATION DIVISION

RECEIVED
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Dept. of Natural Resources
OFFICE OF LEGAL COUNSEL

DON B. LANGENHORST,	)	
Petitioner,	)	
vs.	)	
ILLINOIS DEPARTMENT OF NATURAL RESOURCES, OFFICE OF MINES AND MINERALS, LAND RECLAMATION DIVISION,	)	**Re: Monterey #2 Revision #6, Permit No.57 Incidental Boundary Revision**
Respondent,	)	
and	)	
EXXONMOBILE COAL COMPANY, LLC,	)	
Intervenor.	)	

ORDER

This matter comes to me pursuant to Petitioner's Motion for Summary Judgment, filed April 18, 2007. In arriving at the decisions contained within this Order, I carefully perused the arguments set forth within Petitioner's Motion for Summary Judgment, together with the arguments set forth within the "Motion for Denial of Petitioner's Motion for Summary Judgement and for Dismissal of Appeal," filed by the Illinois Department of Natural Resources (hereinafter "Department"), and the arguments presented within Intervenor ExxonMobile's "Memorandum in Opposition to Petitioner's Motion for Summary Judgment."

Findings of Facts:[1]

1. On December 11, 2006, the Department issued its Findings and Decision ("Decision") to grant Revision No. 6, Permit No. 57 ("Permit") for an incidental boundary revision at the ExxonMobile Coal Company Monterey #2 mine site ("Monterey #2 site") located near Albers, Clinton County, Illinois, in order to include with the Permit jurisdiction an additional parcel of land used for an NPDES permitted underground waste water discharge pipeline ("pipeline") leading from the southeastern portion of the Monterey #2 to the Kaskaskia River[2]. (**See**, Exhibit A - Letter to Monterey Coal Company, dated 12/11/06, w/ Appendix A thru D)

2. On January 4, 2007, the Department received a request for administrative appeal of its Decision from Mr. Don Langenhorst of Germantown, Illinois ("Petitioner") pursuant to Section 8.07 of the Surface Coal Mining Land Conservation and Reclamation Act. 225 ILCS 720/1.01 *et seq.* ("the Act") and its regulations, specifically 62 Ill. Adm.Code 1847. This request was forwarded to the Hearing Officer [].

[1] Many of these initial findings (*i.e.*, #1 through #6) are taken, *verbatim*, from the Department's "Motion for Denial of Petitioner's Motion for Summary Judgement and for Dismissal of Appeal." When such Motion is not the source for a Finding, I note such and indicate where the Finding originated. For instance, the Findings #8 through # are found in ExxonMobile Coal USA, Inc.'s Statement of Undisputed Material Facts as to its Motion for Summary Decision."

[2] Misidentified as the Kaskakia River in the Department's Motion. (**See**, Department's Motion, ¶1, p.2)

3. The Department has determined that the Petitioner is a resident of Germantown, Clinton County, Illinois, and also serves as Highway Commissioner for Germantown Township.

4. On April 18, 2007, the Petitioner filed a Motion for Summary Judgement ("Motion") requesting entry of summary judgment for Petitioner "because there is no genuine issue as to material fact, and Petitioners [sic] are entitled judgment."

5. On April 23, 2007, a telephonic pre-hearing conference was held with the Petitioner, the Intervenor, the Department, and the Hearing Officer at which time the Petitioner stated that the only issue raised within this appeal was "whether the pipeline leading from the above-referenced Permit area is to be considered a continuance of mining operation so as to require the Permittee to comply with all applicable mining statutory and regulatory requisites." (See Exhibit B - Paragraph 2 of Order, dated April 30, 2007.)

6. During the April 23, 2007 telephonic pre-hearing conference, the Petitioner "affirmatively" indicated that any and all arguments he intended to raise have been incorporated within the Motion for Summary Judgement and that he did not desire to proceed to a formal administrative hearing should the Hearing Officer deny his Motion for Summary Judgment. [See Exhibit B - Paragraph 6 of Order, dated April 30, 2007.]

7. In this Motion [*i.e.*, Petitioner's Motion for Summary Judgment], the Petitioner alleges that the waste water discharge pipeline is "a continuing mining

operation."[3]

8. Surface and underground coal mining operations at Mine No. 2 began in 1977. (Finding of Fact supported by Affidavit of F. Serrapere, at ¶3, attached to Intervenor's Memorandum as Exhibit A)

9. Active, ongoing mining operations ceased at Mine No. 2 in 1996 when the mine closed. (Finding of Fact supported by Affidavit of f. Serrapere, at ¶4; Deposition of D. Langenhorst, dated May 10, 2007, p.96, lines 19-22)

10. After Mine No. 2 closed, ExxonMobil Coal began working with the state to formulate a plan permanently closing the mine and reclaiming the mine's facilities. **See**, Serrapere Affidavit at ¶5.

11. On or about June 24, 2002, Illinois Environmental Protection Agency approved the Mine No. 2 Corrective Action Plan – a comprehensive plan to reclaim the mine's refuse disposal areas and treat impacted groundwater confined to the mine's property boundaries. **See**, Serrapere Affidavit, ¶6; IEPA letter approving Corrective Action Plan dated June 24, 2002 at ¶2, attached to Intervenor's Memorandum as Exhibit C.

12. On or about March 3, 2004, the Department approved ExxonMobil Coal's final reclamation plan for Mine No. 2, which, in conjunction with the Corrective Action Plan, allowed ExxonMobil Coal to implement and complete reclamation of the Mine No. 2 property. **See**, Serrapere Affidavit (Ex.A) at ¶8; IDNR Written

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[3] The remaining portion of the Department's "finding" (*i.e.*, ¶7, is argumentative and therefore inappropriate to include within the Findings of Fact

Findings on Revision Applications No. 3 to Permit 57 and No. 2 to Permit 183 dated March 3, 2004 at ¶1, a true and accurate copy of which is to ExxonMobile Coal's Memorandum as Exhibit D.

13. The primary elements of the approved Corrective Action Plan and final reclamation plan at the Mine No. 2 site include: (1) reclamation of the two refuse disposal areas; (2) installation of an underground bentonite slurry wall and operation of groundwater extraction wells to both manage impacted groundwater and prevent offsite migration; (3) construction of a treatment system that routes impacted groundwater from the extraction wells and surface runoff through passive treatment areas built to reduce constituent concentrations prior to discharging the water offsite; (4) construction/operation of the pressurized water discharge pipe to the Kaskaskia River; and (5) reclamation work concerning some remaining mine facilities and structures. **See** Serrapere Affidavit at ¶10; Elements of Reclamation/Corrective Action Plan at 1, attached to Intervenor's Memorandum as Exhibit E.

14. The discharge pipeline and the effluent outfall into the Kaskaskia River are permitted by the IEPA under NPDES Permit #IL0076317. **See**, Langenhorst Depo at p.58, lines 10-18, p.70, lines 3-22; Serrapere Affidavit at ¶12; NPDES Permit #IL0076317, attached to Intervenor's Memorandum as Exhibit F.

15. The discharge pipeline runs 3.3 miles from the Mine No. 2 property boundary south to the Kaskaskia River. **See** Serraperre Affidavit at ¶14; Elements of Reclamation/Corrective Action Plan at 1.

16. Prior to construction of the pipeline, Intervenor ExxonMobil Coal needed the Germantown Township Road District to authorize the boring of the pipeline under township roads. **See**, Serrapere Affidavit at ¶15; Langenhorst Depo at p.75, lines 3-25; p.76, lines 1-25; p.77, lines 1-25; p.78; lines 1-22; Escrow Agreement between Germantown Township Road Commissioner and ExxonMobil Coal's contractor dated August 11, 2004, attached to Intervenor's Memorandum as Exhibit G; Permit from Germantown Township Road Commissioner to Intervenor dated April 14, 2004 at ¶6, attached to Intervenor's Memorandum as Exhibit H.

17. On or about April 14, 2004, Mr. Langenhorst, in his elected capacity as Road Commissioner, executed a permit with ExxonMobil Coal authorizing construction and installation of the discharge pipeline under Germantown Township Roads. **See**, Langenhorst Depo. at p.77, lines 6-25; p.78, lines 1-22; Permit from Germantown Township Road Commissioner to ExxonMobil Coal dated April 14, 2004 at p.3; Serrapere Affidavit at ¶16.

18. The permit expressly states that Intervenor is under a legal obligation to repair township roads should damage occur from the discharge pipeline. **See**, Langenhorst Depo. at p.79, lines 6-14; Permit from Germantown Township Road Commissioner to ExxonMobil Coal dated April 14, 2004 at §4.

19. On or about August 11, 2004, Mr. Langenhorst executed an escrow agreement with ExxonMobil Coal, whereby $50,000 was set aside to cover any damage to township roads caused by the discharge pipeline. **See**, Langenhorst Depo. at p.75, lines 2-25; p.76, lines 1-22; Escrow Agreement between Germantown Township

Road Commissioner and ExxonMobil Coal's Contractor dated August 11, 2004 at 1; Serrapere Affidavit at ¶18.

20. Under the permit and escrow agreement, the Germantown Township Road District has the legal right to require ExxonMobil Coal to repair and/or pay for any damage to township roads caused by the discharge pipeline. **See**, Langenhorst Depo at p.80, lines 14-24; Serrapere Affidavit at ¶20.

21. During late 2004 and early 2005, Mr. Langenhorst pursued a prior state administrative appeal in which he challenged IDNR's approval of the Mine No. 2 final reclamation permits. **See**, Langenhorst Depo. at p.29, lines 22-24; p.30, lines 1-25; p.31, lines 1-5; Serrapere Affidavit at ¶21.

22. Hearing Officer Daniel Maher in that proceeding heard two issues: (1) whether IDNR's public hearing on the final reclamation permits was sufficient; and (2) whether the proposed reclamation plan for the refuse disposal areas was adequate in addressing contamination of the underlying shallow aquifer. **See**, Langenhorst Depo. at p.30, lines 17-25; p.31, lines 1-5; Serrapere Affidavit at ¶22.

23. On or about April 22, 2005, the Hearing Officer in that prior proceeding granted IDNR and ExxonMobil Coal summary decision on the merits as to both the public hearing and groundwater issues. **See**, *id.* at p.31, lines 3-5 and 17-25; p.32, lines 1-25; p.33, lines 1-23; p.35, lines 24-25; p.36, lines 1-25; p.37, lines 1-25; p.38, lines 1-11; Serrapere Affidavit at ¶23; April 22, 2005 Order on the Parties' Cross Motions for Summary Judgment at 1-7, a true and accurate copy of which is attached to ExxonMobil Coal's Memorandum as Exhibit I.

24. In addition. the Hearing Officer granted IDNR and ExxonMobil Coal summary decision as to Robert Johnson's illegal practice of law because he provided Mr. Langenhorst legal advice and drafted all of his pleadings. **See**, Langenhorst Depo. at p.32, lines 4-25; Serrapere Affidavit at ¶24; April 22, 2005 Order on the Parties' Cross Motions for Summary Judgment at 4.

25. After obtaining all of the necessary reclamation permit approvals, ExxonMobil Coal constructed most of the permitted facilities, including the discharge pipeline, between early 2004 and late 2006. **See**, Serrapere Affidavit at ¶26.

26. INDR initially did not require ExxonMobil Coal to incorporate the discharge pipeline within the geographical boundaries of the reclamation permits. **See**, Serrapere Affidavit at ¶27; IDNR Written Findings on Revision Applications No. 3 to Permit 57 and No.2 to Permit 183, dated Mar 3, 2004; NPDES Permit #IL0076317.

27. However, IDNR changed course during construction and required ExxonMobil Coal to submit the IBR application to place the discharge pipeline within the physical boundaries of Permit No. 57. **See**, Langenhorst Depo. at p.91, lines 18-25; p.92, lines 1-9; Serrapere Affidavit at ¶28; October 27, 2005 letter from IDNR to OSM at ¶2, attached to Intervenor's Memorandum as Exhibit J.

28. On or about July 7, 2005, ExxonMobil Coal submitted to IDNR the application for the IBR that Mr. Langenhorst is now challenging. **See**, Langenhorst Depo. at p.59, lines 20-25; p.60, lines 1-8; Serrapere Affidavit at ¶30; Application of IBR No. 6 to Permit No.57 with cover letter dated July 7, 2005, attached to

Intervenor's Memorandum as Exhibit K.

29. The IBR incorporates the discharge pipeline into the physical boundaries of the reclamation permits. **See**, Serrapere Affidavit at ¶30; Langenhorst Depo at p.62, lines 9-25; p.63, lines 1-4; Application for IBR No. 6 to Permit No. 57 with cover letter dated July 7, 2005 at 1.

30. After notice of the IBR appeared in the Breese Journal, Mr. Langenhorst on July 26, 2005 sent IDNR a letter providing comments to the IBR application and requesting a public hearing. **See**, Langenhorst Depo. at p.82, lines 8-25; p.83, lines 1-25; p.84, lines 1-24; Serrapere Affidavit at ¶33.

31. On or about August 3, 2005, IDNR informed Mr. Langenhorst that Illinois law does not provide for a public hearing on incidental boundary revisions. **See**, Langenhorst Depo. at p.85, lines 3-20; Serrapere Affidavit at ¶35; August 3, 2005 letter from IDNR to Mr. Langenhorst at ¶2, attached to Intervenor's Memorandum as Exhibit L.

32. When Mr. Langenhorst pressed IDNR on the need for a public hearing, IDNR on August 17, 2005, informed Mr. Langenhorst that it would hold a public hearing under 225 ILCS §720/7.01(b)-(c) and 62 Ill.Adm.Code 1761.14. **See**, Langenhorst Depo. at p.86, lines 6-25, p.87, lines 1-8; Serrapere Affidavit ¶37; August 17, 2005 letter from IDNR to Mr. Langenhorst at ¶1, attached to Intervenor's Memorandum as Exhibit M.

33. On or about October 7, 2005, ExxonMobile Coal's legal counsel presented IDNR with a position paper demonstrating that 225 ILCS §720/7.01(b)-(c) and 62

Ill.Adm.Code §1716.14 did not apply to the IBR under the Federal Surface Mining Control and Reclamation Act of 1997, 30 U.S.C. A. §1201 *et seq.* (hereinafter "Federal Act"), the Illinois Surface Coal Mining Land Conservation and Reclamation Act, 225 ILCS §720 *et seq.* (hereinafter "State Act"), and the correspondence regulations, respectively. **<u>See</u>**, Langenhorst Depo. at p.88, lines 8-25; p.89, lines 1-11; Serrapere Affidavit at ¶39; October 7, 2005 letter from P. Sonderegger to IDNR at 1, attached to Intervenor's Memorandum as Exhibit N.

34. ExxonMobil Coal asserted that, because the discharge pipeline was merely a part of, or incidental to, the reclamation and not part of active, ongoing mining operations, the mining prohibitions and public hearing requirements set forth at 225 ILCS §720/7.01(b)-(c), 62 Ill.Adm.Code §1716.14, and 30 U.S.C.A. §1272(e) did not apply to the IBR. **<u>See</u>**, Langenhorst Depo. at p.89, lines 12-25; p.90, lines 1-25; p.91, lines 1-11; Serrapere Affidavit at ¶40; October 7, 2005 letter from P. Sonderegger to IDNR at 1, 8-10.

35. On or about October 27, 2005, IDNR requested that OSM conduct a review of the Federal Act and State Act to lend guidance in determining the issue. **<u>See</u>**, Langenhorst Depo. at p.91, lines 14-25; p.92, lines 1-25; p.93, lines 1019; Serrapere Affidavit at ¶42; October 27, 2005 letter from IDNR to OSM at ¶5.

36. On or about July 12, 2006, OSM issued its legal opinion to IDNR. **<u>See</u>** Langenhorst Depo. at p.97, lines 19-25; p.98, lines 1-23; Serrapere Affidavit at ¶42; July 12, 2006 letter from OSM to IDNR, attached to Intervenor's Memorandum as Exhibit O.

37. Pursuant to the July 2, 2006 legal opinion, OSM informed IDNR that: 1) the state under its primacy regimen must determine whether the discharge pipeline is an active, ongoing mining operation; 2) based upon the facts, IDNR in its discretion reasonably could determine that the discharge pipeline is a reclamation-only operation, an active mining operation, or a state groundwater law requirement that does not require an IDNR permit; and 3) only if IDNR determined that the discharge pipeline was an active, ongoing mining operation would the mining prohibitions and public hearing requirements appy to the IBR. **See**, Langenhorst Depo. Ex. B at p.99, lines 5-25; p.170, lines 1-5; Serrapere Affidavit at ¶44; July 12, 2006 letter from OSM to IDNR (Ex. O) at 1, 8-10.

38. OSM established that IDNR could reasonably find that the IBR was solely a reclamation operation. **See** Langenhorst Depo. Ex. B at p.100, lines 15-24; Serrapere Affidavit at ¶45; July 12, 2006 letter from OSM to IDNR (Ex. O) at 1, 8-10.

39. On or about August 21, 2006, IDNR sent Mr. Langenhorst a letter stating that, after consultation with both OSM and IDNR's legal staff, IDNR had determined that 225 ILCS §720/7.01(b)-(c) and 62 Ill.Adm. Code §1761.14 only apply to active, ongoing mining operations and therefore did not apply to the IBR. **See** Langenhorst Depo. Ex. B at p.110, lines 8-25; p.111, lines 1-16; Serrapere Affidavit at ¶47; August 21, 2006 letter from IDNR to Mr. Langenhorst at ¶3, attached to Intervenor's Memorandum as Exhibit P.

40. IDNR approved the IBR and issued its written findings with respect to the IBR

application. **See** Langenhorst Depo. Ex. B at p.65, lines 12-21; p.66. lines 13-25; p.67, lines 1-3; Serrapere Affidavit at ¶49: December 11. 2006 Written Findings on IBR No. 6 to Permit No. 57, attached to Intervenor's Memorandum as Exhibit Q.

41. IDNR formally found that the public hearing requirements of the State Act do not apply to the IBR because the proposed activities do not constitute active mining operations. **See** Langenhorst Depo. Ex. B at p.68, lines 24-25; p.69, lines 2-12; December 11, 2006 Written Findings on IBR No. 6 to Permit No. 57 (Ex. Q) at 1, Appendix B, Comment 2.

42. Mr. Langenhorst is pursuing this administrative appeal in his elected capacity as Germantown Township Road Commissioner. **See** Langenhorst Depo. Ex. B at p.43, lines 6-9;

43. The sole issue brought by Mr. Langenhorst is whether the pipeline leading from the Permit No. 57 area is to be considered a continuation of mining operations so as to require ExxonMobile Coal to comply with all applicable mining statutory and regulatory requisites. **See**, April 23, 2007 Corrected Second Amended Discovery Order at ¶2.

44. Mr. Langenhorst's only alleged interest in this proceeding is the potential adverse impact the discharge pipeline may have on Germantown Township roads in the future. **See** Langenhorst Depo. Ex. B at p.43, lines 10-15, lines 16-25; p.56, lines 1-8, January 8, 2007 letter from IDNR to Hearing Officer Michael O'Hara with enclosure, attached to Intervenor's Memorandum as Exhibit R.

45. Mr. Langenhorst admits that his pleadings contain numerous mistaken and inaccurate statements that completely mischaracterize IDNR's and OSM's actions with respect to the discharge pipeline. **See** Langenhorst Depo. Ex. B at p.119, lines 14-20.

46. Mr. Langenhorst admits that there have been no active, ongoing mining operations at Mine No. 2 since it closed eleven years ago. **See** Langenhorst Depo. Ex. B at p.96, lines 23-25; p. 97, lines 1-7.

47. After the Corrective Action Plan and final reclamation plan were approved, Mine No. 2's operating permits both expired. **See** Langenhorst Depo. Ex. B at p.95, lines 3-25.

48. As a result, Mr. Langenhorst admits that only reclamation operations have been ongoing at Mine No. 2 for the past eleven years. **See**, *id.*

49. Mr. Langenhorst admits that OSM specifically informed IDNR that it could reasonably determine within its discretion that the discharge pipeline was not an active, ongoing mining operation, but a reclamation-only operation. **See**, Langenhorst Depo. (Exh. B) at p.99, lines 5-25, p.100, lines 1-24.

50. Mr. Langenhorst admits that his interest in potential future damage to Germantown Township roads is unrelated to the IBR application or IDNR's approval of the IBR. **See**, Langenhorst Depo. (Exh. B) at p.81, lines 17-24.

51. The Germantown Township Road District expressly consented to the discharge pipeline in writing and has a legal, contractual right to force ExxonMobil Coal to repair damage to township roads. **See**, Serrapere Affidavit at ¶20; Langenhorst

Depo. (Exh. B) at p.76, lines 10-19; p. 79, lines 9-14; p.80. lines 14-25; p.81, lines 1-2; Escrow Agreement between Germantown Township Road Commissioner and ExxonMobil Coal's contractor dated August 11. 2004 (Ex.G) at 5; Permit from Germantown Township Road Commission to ExxonMobil Coal dated April 14, 2004 (Exh. H) at §4.

52. Mr. Langenhorst is proceeding *pro se* in this administrative action. **See**, Langenhorst Depo. (Ex. B) at 23, lines 5-8.

53. Robert Johnson is not licensed to practice law in the State of Illinois or elsewhere, and he was found to have improperly practice law in Mr. Langenhorst's prior administrative appeal. **See**, Langenhorst Depo. (Ex. B) at p.32, lines 4-25; April22, 2005 Order on the Parties' Cross Motions for Summary Judgment (Ex. I) at 4.

54. Despite the ruling in the prior administrative proceeding, Mr. Johnson continues to draft Mr. Langenhorst's pleadings and to give Mr. Langenhorst legal advice. **See**, Langenhorst Depo. (Ex. B) at 121-124.

55. Mr. Johnson has drafted *all* of Mr. Langenhorst's pleadings, memoranda, and correspondence in this proceeding. **See**, Langenhorst Depo. (Ex. B) at p.121-124. Mr. Johnson drafted Mr. Langenhorst's initial correspondence requesting this hearing, the Motion for Summary Judgment, Support of Motion for Summary Judgment, and Motion to Clarify Second Amended Discovery Schedule. **See**, Langenhorst Depo. (Ex. B) at p.121, lines 7-20, p.122, lines 19-25; p.123, lines 1-14; pp.23-25, lines 1-12.

56. Mr. Johnson has provided Mr. Langenhorst legal advice concerning these submittals, and Mr. Langenhorst has relied upon that advice. **See**, Langenhorst Depo. (Ex. B) at p.121, lines 21-24, p.122, lines 23-25, p.123, lines 9-16, p.124, lines 7-19.

57. Mr. Langenhorst has admitted that he is an accomplice to Mr. Johnson's "legal" activity, and that is has been his decision to continue to allow Mr. Johnson to perform that activity. **See**, Langenhorst Depo. (Ex. B) at p.125, lines 17-22.

ORDER

Petitioner, Don Langenhorst, purports to move for summary judgment pursuant to 62 Illinois Administrative Code §1848.12, alleging that "there is no genuine issue as to material fact, and Petitioners [sic] are entitled to judgment." (**See**, Petitioner's Motion for Summary Judgment, p.1) Petitioner asserts that:

> ....the record demonstrates that Respondent [*i.e.*, the Illinois Department of Natural Resources] failed to comply with the requirements set forth in 62 Ill.Adm.code 1700-1850 (Permanent Program Rules and Regulations) implementing the Surface Coal Mining Land Conservation and Reclamation Act (225 ILCS 720) and the Surface Mining Control and Reclamation Act of 1977 (SMCRA) in the review and approval process of a permit revision described in the Application for Surface Coal Mining and Reclamation Operations, Permit No. 57, Incidental Boundary Revision No. 6 (IBR), Monterey Coal Company (Monterey), No. 2 Mine, (the Application). The Application involves the construction and operation of pipeline conveying wastewaters from the mine to the Kaskaskia River watershed through an NPDES-permitted outfall.
>
> Due to Respondent's failure to comply with applicable requirements, the approval of the permit revision must be set aside. The Hearing Officer should grant summary judgment in favor of Petitioner because Respondent committed errors in its finding that the mining operations proposed in the Application are not being proposed for land from which mining activities are prohibited, as provided for under 62 Ill.Adm. Code 1761; (225 ILCS 720/7.01 Prohibited Mining; 30 U.S.C. 1272 Sec. 522 Designating Areas Unsuitable for Surface Coal Mining).

In support of this Motion, Petitioner relies on the administrative record in this action and the accompanying document entitled Support of Petitioner's Motion for Summary Judgment [] that provides a preponderance of evidence that the pipeline is a continuing mining operation and the Department's decision is in error. In particular are the following Findings in [sic] Fact:[4]

1. The IBR Application dated June 21, 2005 was submitted to Respondent.

[Intervenor ExxonMobil Coal admits that it submitted the Application for Incidental Boundary Revision No. 6 to Permit 57 ("IBR") to the Department. Said application was submitted to the Department on or about July 7, 2005. **See**, Deposition of D. Langenhorst dated May 10, 2007, at p.59, lines 20-25; p.60, lines 1-8; Affidavit of F. Serrapere at ¶30, Application of IBR No. 6 to Permit No.57 with cover letter dated July 7, 2005, attached to Intervenor's Memorandum at Exhibit K.]

2. On July 26, 2005, Petitioner properly requested a public hearing concerning the IBR.

[Intervenor denies that Petitioner properly requested a public hearing concerning the IBR on July 26, 2005 because 225 ILCS §720/7.01(b)-(c) and 62 Ill.Adm.Code §1761.14, which contain provisions for public hearings under certain circumstances, do not apply to the IBR. The Department and the United States Department of the Interior, Office of Surface Mining ("OSM"), the state and federal agencies charged with making such determinations, have recognized that 225 ILCS §720/7.01(b)-(c) and 62 Ill.Adms Code §1761.14, and the federal counterpart at 20 U.S.C. §1272(e) do not apply to the IBR and could be found to not apply to the IBR, respectively. **See**, Deposition of D. Langenhorst dated May 10, 2007, at p.99, lines 5-25; pp.100-106; p.107, lines 1-5; p.110, lines 8-25; p.111, lines 1-16; Affidavit of F. Serrapere at ¶¶44,45, 47; July 12, 2006 letter from OSM to IDNR at 1, 8-10, attached to Intervenor's Memorandum at Exhibit O; August 21, 2006 letter from IDNR to Mr. Langenhorst at ¶3, attached to Intervenor's Memorandum at Exhibit P.]

3. In a letter dated August 17, 2005, Petitioner recognized that the operations

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[4] Intervenor takes exception to Langenhorst's "Findings in Fact," asserting that 62 Ill.Adm.Code §1848.20 requires a movant to submit to the Hearing Officer a statement of undisputed material facts consisting of separate numbered paragraphs that are supported by accurate citations to the record. I concur with Intervenor that Mr. Langenhorst's "Findings" do not comply with the requirements of the Department. Petitioner's failure to properly cite to the record in this matter has exacerbated the legal work required of the Hearing Officer to address Petitioner's contentions. I will address Petitioner's failure to adhere to the rules later in the Order. However, I will delineate, verbatim, the Intervenor's responses to each of the "Findings" so that the parties' respective legal positions as to this controversy are unequivocally articulated.

proposed in the IBR Application are regulated under 62 Ill.Adm.Code 1761.

[Intervenor denies that Petitioner recognized that the operations proposed in the IBR application are regulated under 62 Ill.Adm.Code §1761. Petitioner is the elected Germantown Township Road Commissioner and does not have any authority under Federal law or Illinois law to determine whether any permit applications are governed by 62 Ill.Adm.Code §1761. **See**, 30 U.S.C.A. §1201, *et seq.*; 225 ILCS §720, *et seq.*; Langenhorst Dep. (Ex. B) at p.43, lines 6-9]

4. In a letter dated October 27, 2005, Respondent requested the federal Office of Surface Mining (OSM) to review legal arguments of Monterey's attorneys (the prohibitions of 522(e) of SMCRA and Section 7.01(b)-(c) do not apply to the operations described in the Application) and provide Respondent with OSM's opinion as to the validity of those arguments.

[Intervenor admits that on October 27, 2005, IDNR sent a letter to OSM requesting that OSM review certain legal arguments and thereafter lend guidance to IDNR as to whether 225 ILCS §720/7.01(b)-(c) and 62 Ill.Adm.Code §1761.14, and their federal counterpart at 30 U.S.C. §1272(e), apply to the IBR. Intervenor denies any other statements contained in paragraph 4 of Petitioner's "Findings in Fact" not expressly admitted herein. **See**, Deposition of D. Langenhorst dated May 10, 2007, at p.91, lines 14-25; p.92; lines 1-25; p.93, lines 1-19; Affidavit of F. Serrapere at ¶42; October 27, 2005 letter from IDNR to OSM, attached to Intervenor's Memorandum at Exhibit J]

5. In a letter dated May 12, 2005, Monterey's attorneys submitted more legal arguments about the matter to Respondent, and directly to OSM and to the federal Office of the Solicitor (Solicitor).

[Intervenor denies that its counsel submitted a letter dated May 12, 2005 to IDNR and OSM containing more legal arguments about the matter. Intervenor submitted a letter dated May 12, 2006 to IDNR and OSM stating that the operating permits for Mine No. 2 had expired or were about to expire and that both IDNR's and OSM's regulations expressly state that coal mining companies need not renew operating permits when only reclamation activities were ongoing. **See**, Deposition of Langenhorst at p.94, lines 14-25; p.95, lines 1-25; p.96, lines 1-19]

6. The response of OSM's review and opinion as to the validity of Monerey's attorney's legal arguments was [sic] provided to Respondent in the form of a Memorandum from the Solicitor dated July 12, 2006, that stated, in part:

   a. "The Solicitor effectively advised that the operation of the refuse area, including construction and operation of the pipeline, is an on-going aspect of the overall surface coal mining operation, and is

subject to the requirements of SMCRA section 522(e)." and

b. "(The Solicitors) [sic] have reviewed the operator's arguments....and find them unpersuasive."

[Intervenor denies that OSM made the statements as portrayed in paragraph 6 of Petitioner's "Findings in Fact" and the subparts contained therein. In fact, Petitioner now admits that the statements in paragraph 6 of Petitioner's "Findings in Fact" are inaccurate and misleading. **See**, Deposition of Langenhorst (Ex. 1) at p.114, lines 21-25; p.115, lines 1-25. The true findings of OSM are not in dispute. On or about July 12, 2006, OSM informed IDNR that: 1) the state under it primacy regimen must determine whether the discharge pipeline is an active, ongoing operation; 2) based upon the facts, IDNR in its discretion reasonably could determine that the discharge pipeline is a reclamation-only operation, an active mining operation, or a state groundwater law requirement that does not require an IDNR permit; and 3) only if IDNR determined that the discharge pipeline was an active, ongoing mining operation would the mining prohibitions and public hearing requirements apply to the IBR. Therefore, OSM established that IDNR could reasonably find that the IBR was solely a reclamation operation. **See**, Deposition of D. Langenhorst dated May 10, 2007, at p.97, lines 19-25; p.98, lines 1-23; p.99, lines 5-25; pp.100-106, 107, lines 1-5; Affidavit of F. Serrapere at ¶¶42,44, 45; July 12, 2006 letter from OSM to IDNR at 1, 8-10, attached to Intervenor's Memorandum at Exhibit O at p.1, lines 8-10.]

7. In Respondent's flawed decision dated December 11, 2006, Respondent completely ignored and neglected the proper findings of the Solicitor.

[Intervenor denies that IDNR's December 11, 2006 approval of the IBR completely ignored and neglected OSM's July 12, 2006 opinion as stated by the Office of the Solicitor. In fact, Petitioner admits that the statement in paragraph 7 of the "Findings in Fact" is an inaccurate and misleading statement. **See**, Deposition of D. Langenhorst dated May 10, 2007, at p.99, lines 5-25; p.100, lines 1-24; p.110, lines 8-25; p.111, lines 1-16; Affidavit of F. Serrapere at ¶47; August 21, 2006 letter from IDNR to Mr. Langenhorst at ¶3, attached to Intervenor's Memorandum at Exhibit P.]

Within its "Memorandum in Opposition to [the Department's] and Intervenor's Motions for Summary Judgment, the Petitioner raises the same argument that is articulated within his Motion for Summary Judgment, to wit: that "rules applying to continuing mining operations [] apply to the pipeline" at issue. (**See**, Petitioner's June 12, 2007 Memorandum, p.2)

However, I wholly agree with the Department that the Petitioner only offers partial

statements, clearly taken out of context, evidently extracted from the extensive legal opinion offered on the pipeline issue by the U.S. Office of the Solicitor for the U.S. Department of the Interior, Office of Surface Mining, in support of this contention. As urged by the Department:

> ...the Petitioner ignores *significant portions* of the Solicitor's Opinion regarding the regulatory status of the pipeline, including the Solicitor's statement that the Department holds legal and regulatory authority to issue its ruling on the merits. (**<u>See</u>**, Exhibit C - Letter from Solicitor, dated July 12, 2006.)

a. The Department notes that at paragraph 6-a of the Motion, the Petitioner cites a single incomplete sentence that is lifted out-of-context from the text of the Solitor's Opinion, p.3 of 11 at last sentance of last full paragraph) as follows:

> "the Solicitor effectively advised that the operation of the refuse area, including construction and operation of the pipeline, is an ongoing aspect of the overall surface coal mining operations, and is subject to th requirements of SMCRA section 522(e),"

If one reads this paragraph in full, it is clear that the Solicitor merely opines in response to various theoretical arguments submitted by the Intervenor that "no permit is required under the federal SMCRA for the pipeline." However[,] if one reads this sentence in full, the Petitioner's supposed intent is totally changes from its true meaning as follows: **"Rather, the Field Office of the Solicitor effectively advised that....**[emphasis added]...." This quotation, as stated in the Petitioner's Motion, is blatantly misleading and deceptive. In addition to being incomplete, on its face, it is not a statement by the Solicitor, but a statement by the technical Field Office for the Solicitor (*e.g.*, regional Solicitor, and which was, in fact, subsequently overruled by the Solicitor's Opinion.

b. The Department notes that the Petitioner at paragraph 6(b) of his Motion again includes another partial, and in fact, deceptive quote lifted from the Solicitor's Opinion (*e.g.*, "[The Solicitors] have reviewed the operator's arguments..., and find them unpersuasive.") This statement is again another single phrase, incompletely excerpted and cited out of context, from the text of Solicitor's detailed eleven [11] page opinion. After diligent search, the Department found this phrase located within a footnote passage from the Solicitor's Opinion, which in full reads as follows:

> **"<u>We</u>** have reviewed the operator's arguments **<u>concerning the legislative history of SMCRA</u>** [emphasis added], and find them unpersuasive."

The Department opines that "the legislative history of SMCRA" has [sic] irrelevant and has nothing to do [sic] the issue for this appeal (*e.g.*, the pipeline and its regulated status). The Department must conclude that the Petitioner is using such statements in a [sic] untruthful and deceptive manner. and thereby creating a mockery of this administrative proceeding. (**See**, Exhibit C - specifically. first sentence of Footnote 2 in Solicitor's Opinion at page 6 of page 11.)

c. The Department also notes that the Petitioner otherwise ignores the Solicitor's Opinion, in total, and its legal discussion of the three possible regulatory options available to the Department for determining the regulatory status of the pipeline: 1) a regulated surface coal mining operations, 2) that the pipeline is reclamation activity, or 3) the pipeline is neither reclamation nor a surface coal mining operation.

d. The Department then notes that the Petitioner fails to offer any explanation or opinion in objection to the Department's Decision and its rationale. Indeed, the Petitioner at paragraph 7 of [his] Motion summarily concludes that the Department's decision is "flawed." The Petitioner's conclusion begs the question of "why" so that the Department can understand the legal rationale for alleging error in the Department's Findings and Decision to grant Revision #6, Permit No. 57 for the Monterey #2 site, or if not, merely to respond to the Hearing Officer.

[]The Department further notes that as factual support for [his] Motion, Petitioner provided a confusing and completely unorganized collection of miscellaneous documents, indeed over 150 separate pages, without explanation, identification, or verification, undated, and/or dating from 2001 to the present, that provided absolutely no clue for understanding or supporting the Petitioner's rationale for [his] Motion. Notwithstanding the Petitioner's *pro se* status in this matter, Petitioner must nevertheless still provide a minimal indicia of evidence or knowable facts to support Petitioner's allegations, if only for the Department and the Intervenor to provide a logical responsive pleading for the Hearing Officer's consideration.

[] The Department finally notes that the Petitioner has not satisfied the requisite burden of proof to prevail in a motion for summary judgment under 62 Ill.Adm.Code 1848.2. The Petitioner has not verified any allegation of fact with supporting affidavits, deposition, answers to interrogatories, admissions or document produced to verify such allegations. The Petitioner has not submitted any statement or material fact to which there is not genuine issue. Indeed, as discuss above, the Petitioner has offered misleading statements of fact, none of which were [sic] supported by any of the documents that accompanies this Motion. The Department opines that the Petitioner has therefore, failed to satisfy the burden of proof with respect to the alleged issue of this administrative appeal. (**See**,

Department's "Motion for Denial of Petitioner's Motion for Summary Judgment and Dismissal of Appeal," pp. 3-5

Frankly, I am dismayed as to the Petitioner's tact in attempting to obtain a summary judgment in the context of this case. It is "black letter law" that:

> [a] party urging us to reverse a [] judgment has an obligation to argue why we should reverse that judgment, and to cite appropriate authority to support that argument. See, [*United States v.*] *Brown*, 899 F.2d at 679 n. 1; see also *Beard v. Whitley County REMC*, 840 F.2d 405, 408-09 (7th Cir.1988). "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C.Cir.1983) (Scalia, J.). It is not this court's responsibility to research and construct the parties' arguments. *Williams*, 877 F.2d at 518; *Beard*, 840 F.2d at 408-09. (*U.S. v. Berkowitz*, 927 F.2d 1376, 1384 (C.A.7 (Ill.),1991)

Just as the Department and Intervenor are frustrated by the Petitioner's evident contentment to "cherry-pick" certain phraseology from various quotations (and then, quoting only those portions that purport to support his desired end....this, even when such portions of the quotations wholly distort the original writer's intention), I am incredulous that Petitioner would try to take such stance with me. Even giving Mr. Langenhorst the benefit of the doubt as a non-lawyer and recognizing his disadvantage to proceed *pro se*, the "arguments" present by Petitioner appear to be *intentional* distortions of the facts in an attempt to gain an end.[5]

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[5] Frankly, I am not in the least bit persuaded by the Affidavit of Robert L. Johnson, who was evidently ruled to have improperly provided legal advice and/or legal services to the Petitioner in a prior, companion case, despite Mr. Johnson not having a license to practice law. I was not the Hearing Officer in that matter. The Affidavit of Mr. Johnson attached to Petitioner's Memorandum, dated June 12, 2007, asserts that Mr. Johnson had "been in contact with the federal attorney regarding the appeal [of the so-called companion case] [and] [s]uch contact determined that [Johnson's] activities concerning Monterey Mine No. 2 are not relevant to the issues and are not the subject of any on-going federal investigation or [sic] that specific appeal (Appeal CCA-MCR-05-1) Mr. Johnson's reference to what a non-identified "federal attorney" purported to say about a pending appeal is irrelevant (and constitutes patent hearsay) to the

As noted above, ExxonMobil not only denied Petitioner's assertion — that the Solicitor's Memorandum, dated July 12, 2006, indicated that the operations at issue herein were "subject to the requirements of SMCRA — but also affirmatively asserted that Petitioner *knew* such assertion was false and misleading. Further, Petitioner's assertion that the Solicitor reviewed the operator's legal arguments and found them "unpersuasive" is likewise denied by Intervenor, and once again it is asserted that Petitioner knew such assertion was misleading in the extreme. Here is what Langenhorst stated at this deposition, under oath:

Intevenor's Attorney:	And so in this footnote, Ms. Sylvestor (Office of the Solicitor and Attorney for OSM) is only saying with respect to *one* of the arguments suggested by ExxonMobil Coal that that one argument is unpersuasive[,] correct.
Langenhorst:	Yes.,
	....
Intervenor's Attorney:	....And in fact according to Mr. Sylvestor in her written opinion is Exhibit 21, the rest of the arguments advanced by ExxonMobile Coal were persuasive, is that correct?

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instant cause. However, I am concerned that Mr. Johnson was ruled to have improperly provided legal services in the last docket and now appears to have performed similar services for Mr. Langenhorst in the instant cause. Certainly I believe that drafting pleadings and memorandums of law constitute the practice of law, and if that is what Mr. Johnson is doing on behalf of either Mr. Langenshorst or the Germantown Township, Mr. Johnson may indeed be acting improperly and in derogation of applicable state law governing the un-licensed practice of law. Certainly such issue would not affect (and are not relevant to) the decisional process that is on-going in the aforementioned appeal, nor would a "federal attorney" have any standing to determine one way or the other whether Mr. Johnson's actions violate Illinois law. As the Hearing Officer in this matter, I do not believe it is incumbent upon me to report said alleged violation to the Illinois Attorney Registration and Disciplinary Commission. However, if the Department and/or the Intervenor and their respective legal counsels have a good faith belief that Mr. Johnson's actions constitute the unlawful practice of law (and certainly the attorneys for Intervenor ExxonMobil more than hint to such belief), then they have an obligation to report such to the appropriate authorities.

Langenhorst: Yes.

.....

Intervenor's Attorney: Now we've gone through today all of the correspondence and legal rationales set forth by IDNR and OSM, correct?

Langenhorst: Yes.

Intervenor's Attorney: And you've admitted on the record that OSM's directive to IDNR was that IDNR [had] discretion to make its own decision as to whether the public hearing requirements applied to the IBR and the discharge pipeline, correct?

Langenhorst: Yes.

Intervenor's Attorney: So that directly contradicts the principle that you're stating right here, doesn't it?

Langenhorst: Yes.

Intervenor's Attorney: And I'll draw your attention to page 3 of the motion. In paragraph 6b, can you read that into the record, please.

Langenhorst: The solicitors have reviewed the operator's arguments and find them unpersuasive.

Intervenor's Attorney: And, again, there's an ellipses there in the middle?

Langenhorst: Yes.

Intervenor's Attorney: And that's the same statement in your request for a public hearing that you said omitted the fact that OSM found only one out of the three or four legal arguments expressed by ExxonMobil to be unpersuasive, correct?

Langenhorst: Yes.

Intervenor's Attorney: So this is an accurate statement, is it not?

Langenshorst Yes. (**See**, Langenhorst Depo. (Ex.1), at p.108, lines 10-14, p.110, lines 1-5; p.114, lines 21-25; p.115, lines 1-25.

And as pointed out by the Intervenor within its Memorandum, Mr. Langenhorst went on to further acknowledge that his Memorandum *falsely* protrayed IDNR's December 11, 2006 approval of the IBR as having been made without consultation from OSM and IDNR's own legal staff. He testified as follows:

Intervenor's Attorney: I advance you to page 3, the second paragraph on page 3. This legal memo states, [t]here is no evidence that IDNR's decision is based upon quote, consultation with the department's legal staff and the Office[] of the Solicitor, unquote, as stated in their [sic] August 17, 2006 letter. So you see that statement?

Langenhorst: Yes.

Intervenor's Attorney: And based upon all of the correspondence and legal opinions and directives that we've gone through today, is this an inaccurate statement?

Langenhorst: Yes.

Intervenor's Attorney: The third paragraph on this page, [t]he only consultation that IDNR seems to be relying on are legal arguments that the solicitor found as being unpersuasive and contrary to the opinion requested by and provided to the department by the solicitor. Did I read that correctly?

Langenhorst: Yes.

Intervenor's Attorney: And. again, this is yet another inaccurate statement in your legal memo, correct?

Langenhorst: Yes. (**See**, Langenhorst Depo (Ex. 1) at p.118, lines 17-25; p.119, lines 1-13)

The admissions made by Langenhorst during the deposition, as cited above, wholly undermine the notion that Mr. Langenhorst was proceeding in good faith. Whether due to having Mr. Johnson draft all of his pleadings, or whether due to Mr. Langenhorst distorted belief that, by proceeding to contest the Department's Findings and Decision ("Decision") to grant Revision No. 6, Permit No. 57 ("Permit") for an incidental boundary revision at the ExxonMobile Coal Company Monterey #2 mine site ("Monterey #2 site") in order to include with the Permit jurisdiction an additional parcel of land used for an NPDES permitted underground waste water discharge pipeline, he was accomplishing the dilatory ends desired of Germantown Township, I find Mr. Langenhorst's actions were taken in bad faith. Indeed, as pointed out by the Intervenor, Mr. Langenhorst could not point to a single statutory or regulatory provision that IDNR had failed to follow in granting the Revision. Mr. Langenhorst testified, under oath, as follows:

Intervenor's Attorney: Sir, you've just reviewed — you've taken several minutes to review the Illinois mining law marked as Exhibit 3, correct?

Langenhorst: Yes.

Intervenor's Attorney: And can you pinpoint one statutory provision that you believe that IDNR and ExxonMobil have not followed in submitting and approving the IBR?

Langenhorst: No.

.....

Intervenor's Attorney:	If I understand you correctly, you've gone through all of these regulatory — all of the regulatory headings here, and you can't pinpoint for me one regulation that you believe IDNR and ExxonMobil Coal have not followed in submitting and approving the IBR?
Langenhorst:	Yes.
Intervenor's Attorney:	So, sir, tell me or explain to me, then, if you can't pinpoint one statute, one statutory provision or one regulatory provision how you can claim that the pipeline leading from Mine No. 2, in approving that, that IDNR and ExxonMobil Coal have not followed applicable mining statutory and regulatory requisites?
Langenhorst:	I don't know.
Intervenor's Attorney:	And, again, this is yet another inaccurate statement in your legal memo, correct?
Langenhorst:	Yes. (**See**, Langenhorst Depo (Ex. 1) at p.27, lines 14-22; p.29, lines 4-18)

Despite his failure to identify any statutory or regulatory basis for his claim, Mr. Langenhorst's pleadings and argument somehow point to 62 Ill.Adm.Code §1716.14 as the provision that IDNR did not allegedly follow. But as fully explicated within ExxonMobil Coal's Memorandum, and explicated as well within the Department's "Motion," the text, purpose, and legislative history of the federal and state mining acts demonstrate that the Department properly found that 225 ILCs §720/7.01(b)-(c) and 62 Ill.Adm.Code §1761.41 do not apply to the IBR Application. The State Act, as does the federal act, bifurcate the terms "mining operations" and "mining and reclamation operations." *Compare*, 28 U.S.C. §1291(27), (28) with 225 ILCS 720/1.03(10),(11).

The Department and OSM agree that the substantive text of 225 ILCS §720/2.01(b)-(c),

62 Ill.Adm.Code §1716.14, and their federal counterpart, 30 U.S.C.A. §1272.(e), on its face, does not apply to reclamation-only activities. Indeed, had IDNR interpreted the 225 ILCS §720/7.01(b)-(c) and 62 Ill.Adm.Code §1716.14 prohibitions to include the discharge pipeline as "surface mining operations" or "surface impact of underground mining operations," it would have rendered meaningless the Illinois General Assembly's separation and bifurcation of the definitions of "mining activities" and "mining and reclamation operations." Pursuant to 62 Ill.Adm.Code §1733.11(a) and 30 C.F.R. §773.4(a), mining operators "need not renew permits issued by the IDNR if no surface coal mining operations will be conducted under the permit and solely reclamation activities remain to be performed. It should be noted that the Petitioner *agrees* with the Department, OSM, and ExxonMobil Coal that only reclamation activities have been ongoing at Mine No. 2 since 1996. (**See**, Langenhorst Depo. (Ex. 1) at p.96, lines 20-25, p.97, lines 1-7) Such admission, coupled with the legal analysis above, leads to the inescapable conclusion the Mr. Langenhorst's claim that 62 Ill.Adm.Code §1761.14 applies to the IBR is without merit.

Correlatively, Mr. Langenhorst asserts that the IBR's discharge pipeline is an active, ongoing mining operation that is a continuation of prior activities performed during the operation of Mine No. 2. (**See**, Petitioner's Memorandum at p.3; Opposition Memorandum at p.3) As explained by the Intervenor:

> [t]his claim confuses the IBR's discharge pipeline to the Kaskaskia River with a permitted outfall to the Grassy Branch Creek that was used during mining operations. (**See**, Petitioner's Memorandum at p.3; Opposition Memorandum at p.3) The previous outfall to the Grassy Branch Creek and the IBR's discharge pipeline, however, are two different facilities, constructed at two different time, used for two different purposes, and used during two different phases of Mine No. 2's lifetime. (**See**, Serrapere Affidavit at ¶¶6, 8,12, 13,26. Active mining operations ceased at Mine No. 2 in 1996, and only

> reclamation activities have been ongoing since that time. (**See**. Langenhorst Depo. (Ex. 1) at p.96, lines 23-25, p.97, lines 1-7) The discharge pipeline was separately premitted by the Illinois Environmental Protection Agency ("IEPA") and IDNR in 2002 and 2004, well after Mine No. 2 had closed. [(**See**, Langenhorst Depo. (Ex. 1) at p.96, lines 23-25, p.97, lines 1-7)] It is a new facility constructed during 2004 to 2006 that is only related to reclamation of Mine No. 2. (**See**, Serrapere Affidavit at ¶¶6, 8, 12, 13, 26) The sole purpose of the discharge pipeline is to service treated water flows during and after reclamation at Mine No. 2. [(**See**, Serrapere Affidavit at ¶¶6, 8, 12, 13, 26)] The IBR's discharge pipeline, therefore, is a key element to the approved final reclamation plan of Mine No. 2. [(**See**, Serrapere Affidavit at ¶¶10,12] As a result, there is no legitimate dispute that the IBR's discharge pipeline is solely a reclamation activity that did not exist during active, ongoing mining operations. (Intervenor's Memorandum, pp.12, 13)

I give credence to the Intervenor's explanation, in light of the Petitioner not providing any evidence to counter such.

Petitioner, however, requests that I order ExxonMobil Coal to conduct a study to determine whether the groundwater management operations plan prevents material damage to the groundwater outside the permit area. (Petitioner's Motion at p.4; Memorandum at p.6) Not only was such issue raised and decided by the prior administrative proceeding involving these same parties (with Hearing Officer Daniel Maher presiding), I am not authorized by the statutes and/or regulatory provisions governing the Illinois Department of Natural Resources to mandate such drastic remedy. I concur with the Intervenor that Petitioner's request for a blanket hydrologic study is beyond the scope of this proceeding.

Equally beyond the scope of this proceeding is Mr. Langenhorst's request that I order ExxonMobil Coal to execute a new escrow funding account with the Germantown Township. Since Mr. Langenhorst has previously acknowleged, under oath, his belief that "any claim regarding the escrow agreement or the permit authorizing the placement of the discharge pipeline under the township constitutes a legal issue subject to litigation by means of judicial intervention

(as opposed to addressing such issues in the context of a formal administrative hearing, an avenue not patently available to the Petitioner), I am perplexed why Mr. Langenhorst would raise the issues herein. That is, Mr. Langenhorst is attempting to "bootstrap" his causes of action (causes of action that are appropriately addressed by a Circuit or Appellate Court), evidently attempting to obtain "two bites out of the apple" — once in the Circuit Court or Appellate Court, and once in the instant type of administrative hearing. Mr. Langenhorst conceded that these two areas of legal/judicial issues have absolutely nothing to do with the IBR.

Intervenor's Attorney: And so then you say in Exhibit No. 8, the damage will happen to the roads, in fact, through the escrow account and the permit that you executed, you have a legal remedy against ExxonMobil Coal should ExxonMobil Coal damage roads and not pay for it, correct?

Langenhorst: Yes.

Intervenor's Attorney: And that legal right to have ExxonMobile Coal pay for or repair the damage [to township roads] is contractual pursuant to Exhibits 12 [Escrow Agreement] and 13 [Permit], correct?

Langenhorst: I guess so.

Intervenor's Attorney: And so that had nothing to do with the IBR, does it?

Langenhorst: No.

....

Intervenor's Attorney: Well, you testified just a moment ago that damage to the township roads has nothing to do with the IBR, correct?

Langenhorst: Right.

Intervenor's Attorney:	Just like that, potential damage to the township roads has nothing to do with IDNR's approval of the IBR?
Langenhorst:	Correct. (**See**, Langenhort Depo. at p.80, lines 21-25; p.81, lines 1-2, 17-24.

I concur with the Intervenor that Mr. Langenhorst's Summary Judgment Motion is replete with inaccurate statements and refuted testimony. Not only are most of the remedies sought by Mr. Langenhorst by means of this formal administrative hearing beyond the scope of my quasi-adjudicatory authority under the Act, most of the issues raised by Mr. Langenhorst are without even a semblance of merit. The fact that Mr. Langenhorst is attempting to re-litigate issues already decided and encompassed by a previous administrative appeal makes me inclined to consider sanctions against Mr. Langenhorst. It is one thing to raise issues legitimately, even though those issues engender little hope of overturning the Department's assessment of those same issues. It is another thing altogether to put both the Department and the Intervenor through this administrative morass for the apparent purpose of dilatory tactics.

I am equally incredulous about Mr. Langenhorst's attempt to wrongly interpret my last "Discovery Schedule." There, I indicated:

> I will issue a ruling on any dispositive motion on or before Friday, July 13, 2007. Should I not grant the Petitioner his dispositive motion(s), a formal administrative hearing will *not* be conducted, as the Petitioner has affirmatively indicated that any and all arguments he intends to raise have been incorporated within his Motion for Summary Judgment. The Petitioner specifically indicated that he did not desire to proceed to a formal administrative hearing should I deny his Motion for Summary Judgment. (**See**, Discovery Schedule, dated April 23, 2007, ¶6)

Mr. Langenhorst feigns that he does not understand my indication that should I deny Mr. Langenhorst's Motion for Summary Judgment, no administrative hearing will be conducted (but,

rather, Intervenor's and the Department's legal positions will be affirmed). Mr. Langenhorst's states in his Motion to Clarify Second Amended Discovery Schedule that:

> ...[i]n your [*i.e.*, the Hearing Officer's] order, you say I [*i.e.*, Mr. Langenhorst] need to identify any expert witnesses I intend to call, but then the order says if you do not grant my Motion for Summary Judgment there won't be a formal administrative hearing.
>
> Are you saying that if you do grant my Motion for Summary Judgment there'll be a formal hearing. I don't understand why there might be a formal hearing if you grant the Motion but there won't be a formal hearing if you don't grant the motion. (**See**, Petitioner's "Motion to Clarify," ¶3)

As all of the parties know, when Mr. Langenhorst affirmatively stated, during the April 23rd telephone conference (with all of the parties participating), that he was waiving his right to have a formal administrative hearing, but rather would rely exclusively upon his legal arguments set forth within his Motion for Summary Judgment, I indicated (during that telephone conversation) that I would simply amend my last Discovery Schedule Order (*i.e.*, the "Second Amended Discovery Schedule") to reflect the Petitioner's affirmative waiver. That is the reason the language concerning the expert opinions was still included within the second Order.

The Petitioner then states within his "Motion to Clarify" that:

> [i]n [my] order, [I] said that the Motion of Summary Judgment raises "any and all arguments" that [Petitioner] intends to raise. While this may be true, [Petitioner] understand[s] that there may be any number of reasons why [I] might not grant Summary Judgment, issues that might still need to be resolved at a formal hearing. (**See**, Petitioner's "Motion to Clarify," ¶3)

This is disingenuous in the extreme on the Petitioner's part. There is absolutely no doubt that Petitioner articulated that which I attributed to him, to wit: that any and all arguments he intends to raise have been incorporated within his Motion for Summary Judgment [and that] [t]he

Petitioner specifically indicated that he did not desire to proceed to a formal administrative hearing should I deny his Motion for Summary Judgment. (**See**, Discovery Schedule, dated April 23, 2007, ¶6) Petitioner obviously is entitled to deny such at this juncture, but certainly such statement, attributed to Petitioner within the April 23rd Telephonic Pre-Hearing Conference, may be corroborated by both the Intervenor's legal counsel and the Department's legal counsel (both of whom participated in the phone conference).

I am going to resolve such issue in the following manner. Should, indeed, the Petitioner persist in demanding a formal administrative hearing (despite affirmatively indicating his intention to waive such and rely exclusively upon the arguments presented within his Motion for Summary Judgment), he will be afforded such hearing. However, if the evidence adduced at such formal administrative hearing constitutes the same arguments and evidence already presented and considered pursuant to Petitioner's Motion for Summary Judgment, I will entertain a motion for sanctions from either the Department and/or the Intervenor. By this ruling I do not intend to be overly punitive against the Petitioner. However, I will not countenance the utilization of the review process under the statute and Department regulations as dilatory tactics intending simply to unnecessarily prolong said review process. If, in fact, the Petitioner has additional, substantive arguments in support of his appeal (despite his affirmative statement in contravention of said assertion), so be it. But if such hearing is conducted and no new substantive arguments are broached and established by the Petitioner, sanctions are indeed appropriate.

Conclusions of Law:

1. Mr. Langenhorst's pleadings grossly mis-characterize both the Illinois Department of Natural Resources' and the federal Office of Surface Mining's analysis in evaluating and approving the Incidental Boundary Revision No. 6.

2. The federal Office of Surface Mining's legal opinion supports the Illinois Department of Natural Resources' analysis and approval of the Incidental Boundary Revision No. 6.

3. The Illinois Department of Natural Resources' approval of the Incidental Boundary Revision No. 6., and the correlative findings of fact and conclusions of law, are entitled to substantial deference under Illinois law. (**See**, *e.g.*, *City of First Chicago v. Illinois Commerce Commission*, 599 N.E.2d 991, 999 (Ill.App. Ct. 1992); *Milkowski v. Illinois Dept. of Labor*, 402 N.E.2d 646, 648 (Ill.App.Ct. 1980)

4. The Petitioner failed to identify with specificity any statutory or regulatory provision governing these proceedings that the Illinois Department of Natural Resources failed to adhere to in approving the Incidental Boundary Revision No. 6.

5. The statutory language and purpose of 225 ILCS §720/7.01(b)-(c) and the regulatory language and purpose of 62 Ill.Adm.Code §1761.14 fully support the finding of the Illinois Department of Natural Resources' that said provisions do not apply to the Incidental Boundary Revision No. 6.

6. Petitioner's assertion that the discharge pipeline at issue is a continuation of

active, on-going mining operations of Intervenor is hereby rejected *in toto*.

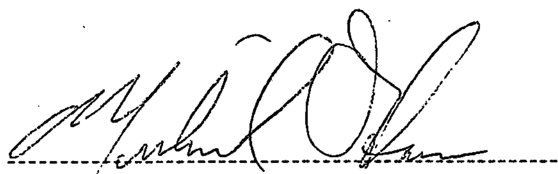
7. The Petitioner's Motion for Summary Judgment is hereby denied.

8. ExxonMobil Coal's Motion for Summary Decision is hereby granted.

9. The Department's Motion to Dismiss this appeal is hereby granted to the extent that Petitioner is placed on notice that should a formal administrative hearing ensue, and no additional, legitimate substantive evidence or arguments are presented and proven by him, I will favorably consider substantial sanctions (*i.e.*, the assessment of the Department's and Intervenor's attorney fees) to be appropriately levied against the Petitioner.

IT IS SO ORDERED.

Dated: July 18, 2007[6]



Hearing Officer

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[6] It was my stated intention to have this Order issued on or before Friday, July 13, 2007. (**See**, "Second Amended Discovery Schedule," ¶6) Because of the voluminous pleadings that needed to be considered as to the parties' cross-summary judgment motions, the drafting of this Order engaged me somewhat longer than I anticipated.