

FILED

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CTR-4

Anthony P. ... Clerk of the Circuit Court

IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

LISA MADIGAN, ATTORNEY GENERAL)
OF THE STATE OF ILLINOIS,)

Plaintiff,)

vs.)

No. 12-MR-706

ILLINOIS DEPARTMENT OF NATURAL)
RESOURCES; MICHAEL WOODS, ACTING)
DIRECTOR, OFFICE OF MINES AND)
MINERALS; CAPITAL RESOURCES)
DEVELOPMENT COMPANY, LLC;)
JOYCE BLUMENSHINE on behalf of the)
SIERRA CLUB; SHEILA and JOSEPH COOK;)
KENNETH FULLER on behalf of the VILLAGE)
OF BANNER; RICHARD FULLER;)
ELIZABETH GRAY; KENNETH GRIGSBY;)
MIKE GRIGSBY; JOHN GRIGSBY, SR.;)
RUDY HABBEN on behalf of the SIERRA)
CLUB; TERRENCE INGRAM on behalf of the)
EAGLE NATURE FOUNDATION; JANE)
JOHNSON; JANIS KING; NAOMI and)
WILLIAM LOTT; MARGARET MITCHELL;)
DR. RICHARD STOUT; ROBERT WILLIAMS;)
and JEAN and LAVERN YESKE;)

Defendants.)

AGREED ORDER

This Agreed Order is entered with the consent of Lisa Madigan, Attorney General of the State of Illinois, and the Illinois Department of Natural Resources ("Department") (collectively, "Parties"), to resolve all matters relating to the above-captioned Administrative Review action regarding Permit #355 issued on November 15, 2007 to Capital Resources Development Company, LLC, the hearing officer's proposed decision issued on September 15, 2009, and the Department's final administrative decision issued on July 19, 2012, from which the Attorney General brought this action. The Parties enter into this Agreed Order for the purpose of resolving

the contested issues in this matter without incurring further litigation risk and expenses, and to create greater certainty for the people of the State of Illinois and persons affected by the statutes and rules referred to herein. Capital Resources Development Company, LLC, has made judicial admissions that it no longer has any interest in the subject property and has argued that the Administrative Review action is therefore moot; hence, it has no standing to object to this resolution. The remaining defendants were joined as nominal parties and any remaining interests they have are adequately represented by the Attorney General.

The Parties' intent by this Agreed Order is to modify procedures and practices of the Department and its Office of Mines and Minerals in a manner that the Parties agree will conform to the requirements of the federal Surface Mining Control and Reclamation Act of 1977 ("SMCRA" or "federal Act"), 30 U.S.C. 1201 *et seq.*, and the Illinois Surface Coal Mining Land Conservation and Reclamation Act ("Mining Act" or "State Act"), 225 ILCS 720/1.01 *et seq.* In furtherance of that purpose, the Parties agree that revisions and amendments to certain Department administrative rules will be proposed, and that they will collaborate in drafting such revisions and amendments before the Department seeks approval from the federal Office of Surface Mining of the proposed modified rules. The Parties acknowledge and agree that the Department does not have unilateral authority to amend its rules, but must subject any proposed rules to a public rulemaking process and a hearing before the Joint Committee on Administrative Rules of the Illinois General Assembly.

WHEREFORE, Lisa Madigan, Attorney General of the State of Illinois, and the Illinois Department of Natural Resources stipulate to the following findings and terms, and agree that this Court should adopt and approve the same, vacate the Department's final administrative decision issued on July 19, 2012, and enter an Order in accordance with the following:

Permit Application Review

1. Section 2.04(a) of the Mining Act provides: "At the time of submission of a permit application, the applicant shall (1) place a public notice of the application in a local newspaper . . . , and (2) file the application for public inspection. . . ." The Department agrees to treat the applicant's timely provision of the mandated statutory notice and filing as a prerequisite of the permit application. Section 2.04(c) of the Mining Act provides: "When a permit application is received, the Department shall notify various local governmental bodies, [and] planning agencies. . . ." The Department shall do so. The Department will propose amendments to the rule at 62 Ill. Adm. Code 1773.13(a), which currently does not require any such notifications until an application is deemed to be administratively complete, to be consistent with the two aforesaid statutes and assure that notice is provided when the application is received.

2. Section 2.05 of the Mining Act provides: "A permit application shall be accompanied by a fee based on the number of surface acres of land to be affected by the proposed operation." The Department will propose an amendment to the rule at 62 Ill. Adm. Code 1777.17(b), which currently does not require any such fees to be paid until the permit application is approved, to assure that applicants pay the statutorily required permit application fees at the time the permit application is submitted.

3. Section 2.04(d) of the Mining Act provides: "Any person having an interest which is or may be adversely affected or any person who is an officer of any government agency, or the county board of a county to be affected under a proposed permit, may file written objections to a permit application and may request an informal conference with the Department." Federal regulations adopted by the federal Office of Surface Mining, 30 C.F.R. § 773.6, also provide for an informational, non-adversarial hearing. Section 2.04(d) of the Mining Act also provides that

the same persons who may request an informal conference “may request a public hearing within 80 days after the first newspaper notice required by subsection (a) of this Section.” Section 2.04(e) of the Mining Act authorizes the Department to promulgate procedural rules regarding notice and testimony.

The Department’s existing rule, 62 Ill. Adm. Code 1773.14(d), essentially combines the informal conference and public hearing as related parts of a process, providing that “[t]he hearing shall be informal.” This informal hearing has no provision for questioning and cross-examination by interested parties, and generates a record consisting only of comments and not evidence or testimony. The Department then provides additional process by way of a second opportunity for hearing to adversely affected persons following the initial permit decision. *See* 62 Ill. Adm. Code 1847.1 *et seq.*

The Illinois Supreme Court has held in other contexts that a “permit” is a “license” pursuant to the Illinois Administrative Procedure Act, and that permit application review proceedings are “contested cases.” *Pioneer Processing, Inc. v. Environmental Protection Agency*, 102 Ill. 2d 119, 141 (1984). The Department, without conceding that full contested case formality is either required or appropriate at the pre-permit-decision phase, agrees to propose an amendment to its rule on informal hearings that will require the permit applicant to appear at the public hearing provided for in Section 1773.14, and to be prepared to answer questions relating to the written objections filed as to a permit application, upon examination by any person who has requested a hearing or by the hearing officer. In addition, the proposed Section 1773.14 will provide that the hearing officer shall accept and consider such evidence, including testimony, as well as comment, if requested by a party.

4. Section 2.04(f) of the Mining Act requires “a complete record of the hearings and

all testimony. . . . Such record shall be maintained and shall be accessible to the public. . . .” The rule at 62 Ill. Adm. Code 1773.14(d) currently provides that “Copies of the transcript shall be furnished, at cost, upon request to the court reporter.” Although the Mining Act is silent as to cost, and Illinois law directs the Department to recover costs as part of its revenue stream, the Parties agree that in this situation transparency and access values outweigh fiscal concerns, and the Department will propose an amendment to its rules to allow free access to the transcript of any public hearing conducted under Section 2.04 of the Mining Act.

Consultation under Part 1075 Regulations

5. The administrative rules at 17 Ill. Adm. Code Part 1075, implementing Section 17 of the Illinois Natural Areas Preservation Act, 525 ILCS 30/17 (“NAPA”), and Section 11(b) of the Illinois Endangered Species Protection Act, 520 ILCS 10/11(b), provide the Consultation Procedures for Assessing Impacts of Agency Actions on Endangered and Threatened Species and Natural Areas, require reporting and review processes, and allow provisions to be made for public involvement. The Office of Mines and Minerals is an “agency” as defined at Section 1075.20. Mining is an action requiring review for consultation because it involves one or more of the activities set forth in Section 1075.30(a). Part 1075 is applicable to the Office of Mines and Minerals where any mining permit would authorize construction, land management, or other activities that will result in a change to the existing environmental conditions, or that may have a cumulative, direct, or indirect adverse impact on a listed species or its essential habitat, or that otherwise jeopardizes the survival of that species, or that may have a cumulative, direct, or indirect adverse impact on a Natural Area as defined in NAPA. The Department agrees that the Office of Mines and Minerals will timely submit the permit application to the Department’s Division of Ecosystems and Environment during preliminary review of any mining permit

application. The Department shall not deem any permit application administratively complete until the Department's Division of Ecosystems and Environment completes its impact assessment. Any written finding by the Department pursuant thereto shall be made available upon request to all parties prior to any public hearing provided for in Section 1773.14. The Department will consider revisions and amendments to Part 1075 to more efficiently implement the statutory mandates.

Permit Decision Review

6. Section 2.11(c) of the Mining Act provides: "Within 30 days after the applicant is notified of the final decision of the Department on the permit application, the applicant or any person with an interest that is or may be adversely affected may request a hearing on the reasons for the final determination. The Department shall hold a hearing within 30 days after this request and notify all interested parties at the time that the applicant is notified." The rule at 62 Ill. Adm. Code 1847.3(l)(1)(B) affords the right to seek judicial review of the final administrative decision if "the hearing officer or Department failed to act within the time limits specified in the Surface Mining Control and Reclamation Act of 1977 (30 USC 1201 *et seq.*), the Surface Coal Mining Land Conservation and Reclamation Act (State Act) or this Section."

Under the existing rules at 62 Ill. Adm. Code 1847.3(c) and 1848.7, a party may request a pre-hearing conference, which tolls the 30-day hearing requirement. The Department agrees that it will not request any pre-hearing conference, and that it will timely commence any hearing to review a final permit action. The Department agrees to make available the administrative record of decision regarding the review and approval of the permit application.

7. The Department's participation in any hearing to review a final permit action is limited by State and federal law. The Seventh Circuit Court of Appeals in *Illinois South Project*,

Inc. v. Hodel, 844 F.2d 1286, 1294 (7th Cir. 1988), addressed the participation of the regulatory agency in permit review proceedings: "In administrative proceedings the 'parties' include the mine operator and any intervenors; the agency (state or federal) is not a 'party' to the proceeding in which it is adjudicator." The Illinois Supreme Court has held that a quasi-judicial proceeding held before an administrative body is not an adversarial proceeding but, instead, an investigation to ascertain and make findings of fact; in such a proceeding the administrative agency cannot be said to represent one party against another or to be arrayed on one side against a party thereto. See, e.g., *Illinois Central Railroad v. Illinois Commerce Commission* (1948), 399 Ill. 67; *Inter-State Water Co. v. City of Danville* (1942), 379 Ill. 41. As a nominal party, however, an administrative agency may defend the rationale for its decisions. *Shaw v. Department of Employment Security*, 2013 WL 4525753 (Aug. 26, 2013).

The Department agrees that it will not participate as an adversarial party in permit review proceedings. The Department will appear as a necessary nominal party, and shall be available at the request of the Hearing Officer, or any party, to provide testimony or evidence in order to develop a clear and complete record, including explanation of the rationale for Department actions, and may where appropriate act to clarify the proceedings or correct the record. The Department shall be entitled to notice of all proceedings.

The Parties expressly agree that this Agreed Order neither addresses nor admits, and is without precedent or prejudice as to, any question of the Attorney General's standing to intervene in the permitting decision of an executive branch agency.

8. Section 2.11(c) of the Mining Act provides that a hearing may be requested by any person with an interest that is or may be adversely affected. The rule at 62 Ill. Adm. Code 1847.3(b) provides that a request for hearing must contain certain information including "the

petitioner's interests which is or may be adversely affected by the Department's final decision" and "each specific alleged error in the Department's final decision, including reference to the statutory and/or regulatory provisions allegedly violated." The rule at 62 Ill. Adm. Code 1848.19 provides that the Department's hearing officer "may dismiss at any time a request for hearing which fails to state a claim upon which administrative relief may be granted." The federal rule at 43 C.F.R. § 4.1363(c) provides that a request for review may be amended.

The Department agrees that it will not, in ordinary course of permit review proceedings, file motions to dismiss petitions or hearing requests on the grounds of failure to state a cause of action, lack of legal standing and pleading defects, nor object to reasonable motions to amend the petition or hearing requests filed before the hearing officer.

9. Section 2.11(g) of the Mining Act provides: "A verbatim record of each hearing under this Section shall be made, and a transcript shall be made available on the motion of any party or by order of the Department." The rule at 62 Ill. Adm. Code 1847.3(f) provides: "A complete record of the hearing and all testimony shall be made by the Department and recorded stenographically. Such record shall be maintained and shall be available to the public until at least 60 days after the final decision. . . ." As with the hearing transcripts addressed in paragraph 4, *supra*, the Department agrees to allow free access to the transcript of any hearing conducted under Section 2.11(c) of the Mining Act.

10. Section 2.11(c) of the Mining Act provides: "Within 30 days after the hearing, the Department shall issue, and furnish the applicant; local government officials in the area of the affected land, and all persons who participated in the hearing, its written decision granting or denying the permit in whole or in part and stating the reasons for its decision." Section 9.04 of the Mining Act provides: "The Department may delegate responsibilities, other than final action

on permits, to other State agencies with the authority and technical expertise to carry out such responsibilities, with the consent of such agencies.” The written decision granting or denying the permit in whole or in part following a review proceeding is a final action on the permit and cannot be delegated by the Department. The rule at 62 Ill. Adm. Code 1847.3(h) (“the hearing officer shall issue and serve, by certified mail, each party who participated in the hearing with a proposed decision consisting of proposed written findings of fact, conclusions of law and an order adjudicating the hearing request”) is consistent with Section 10-45 of the Administrative Procedure Act, 5 ILCS 100/10-45, which governs the proposal for decision in contested cases. However, the provisions of Section 1847.3, amended in 1996, delegate authority for final adjudication to the hearing officer. The Department will propose amendments to the rule to ensure it is consistent with Sections 2.11(c) and 9.04 of the Mining Act and reserves final decision to the Director of the Department. The Department agrees to timely issue a final decision after completion of any permit review proceeding.

11. Counsel for the Attorney General and the Department certify by their signatures below that each is fully authorized by the party he or she represents to enter into the terms and conditions of this Agreed Order, and that that Party does so knowingly and without duress.

12. The Department’s final administrative decision issued on July 19, 2012 shall be and hereby is VACATED.

13. This case is hereby DISMISSED without prejudice as moot, each party to bear its own costs and fees.

AGREED:

LISA MADIGAN, Attorney General
of the State of Illinois

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Matthew J. Dunn, Chief
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Dated: 3/4/14

ILLINOIS DEPARTMENT OF
NATURAL RESOURCES

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SO ORDERED: John Schmidt

/s/ Judge John Schmidt

21 March 2014