In The Circuit Court
For The Seventh Judicial Circuit of Illinois
Sangamon County, Springfield, Illinois

PROOF OF SERVICE

JEFF HERRICK

VS

Case No: 2008 MR 000356

SPRINGFIELD COAL COMPANY

The undersigned certifies that service of the foregoing, together with a copy of the :
Docket Entry Dated 8/06/2009
Order

referred to herein, was made by enclosing a true copy thereof in an envelope plainly addressed to :

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FILED

AUG 1 1 2009 **FAM-7**

Anthony P. Lieber, Jr. **Clerk of the Circuit Court**

and depositing the same in the U. S. Mail postage pre-paid on the August 11, 2009

7th JUDICIAL CIRCUIT SEAL SANGAMON COUNTY, ILLINOIS

Anthony P. Lieber, Jr.
CIRCUIT CLERK

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POS

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

JEFF HERRICK and KIM SEDGWICK,

Plaintiff,

-vs-

THE ILLINOIS DEPARTMENT OF NATURAL RESOURCES; THE ILLINOIS DEPARTMENT OF NATURAL RESOURCES, SAM FLOOD, Acting Director; THE ILLINOIS DEPARTMENT OF NATURAL RESOURCES, OFFICE OF MINES AND MINERALS, JOE ANGLETON, Director; and THE ILLINOIS DEPARTMENT OF NATURAL RESOURCES, OFFICE OF MINES AND MINERALS, LAND RECLAMATION DIVISION, SCOTT K. FOWLER, Supervisor; MICHAEL O'HARA, Hearing Officer; and SPRINGFIELD COAL COMPANY, LLC,

Defendants.

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Clerk of the Circuit Court

ORDER

This cause coming before the Court pursuant to the Illinois Administrative Review Law, 735 ILCS 5/3-100 et seq., the Court having read the parties' briefs and heard argument, hereby finds as follows:

1. Plaintiffs' complaint for administrative review challenges the defendant Illinois Department of Natural Resources' decision to issue a surface coal mining permit to Freeman United Coal Mining Company, n/k/a Springfield Coal Company, LLC. Plaintiffs make two arguments: 1. That the administrative record is so deficient that the Court cannot determine whether IDNR's decision was supported by the manifest weight of the evidence (Brief in Support of Complaint, p. 4), and 2. That the agency decision was contrary to the

manifest weight of the evidence because evidence exists that would have supported a decision to deny the permit (Brief in Support of Complaint, p. 10).

2. "[A] court reviewing an administrative decision is limited to ascertaining whether the decision of the administrative agency is against the manifest weight of the evidence and is also limited to a consideration of the evidence submitted in the administrative hearing; the court may not itself hear additional evidence or conduct a hearing de novo." Rodriguez v. Du Page County Sheriff's Merit Com'n, 328 Ill.App.3d 899, 903 (2nd Dist. 2002). The record contains the transcript of the hearing before the Administrative Law Judge, the exhibits entered into evidence in the hearing, and the parties' post-hearing briefs. For the Court to find that the inadequacy of the record prevents it from determining whether the Department's decision was against the manifest weight of the evidence, plaintiffs must show prejudice as a result of the record's inadequacy. Express Valet, Inc. v. City of Chicago, 373 Ill.App.3d 838, 848 (1st Dist. 2007) (rejecting petitioners' argument that the record was inadequate because the transcript of proceedings contained "inaudible" portions because petitioners did not show how they were prejudiced). Because the record contains all parts necessary to review the administrative law judge's decision, the Court finds that the plaintiffs cannot show any prejudice as a result of the record's alleged inadequacy.

3. The Plaintiffs ask the Court to watch the video of the 2002 public hearing. Plaintiff's Brief, p. 11. Plaintiffs believe that, on the video, the Department "gives the appearance of being the ally of the industry it is charged with regulating, instead of the impartial arbiter it should be." Plaintiffs' Brief, p. 12. Even if this issue had been raised at the administrative hearing, this request is inappropriate because the Court cannot reweigh

the evidence or substitute its judgment for the Department's by making its own credibility determinations. Cinkus, at 210.

4. "It is quite established that if an argument, issue, or defense is not presented in an administrative hearing, it is procedurally defaulted and may not be raised for the first time before the circuit court on administrative review." Cinkus v. Village of Stickney Municipal Officers Electoral Bd., 228 Ill.2d 200, 212 (2008). The issues the plaintiffs raise in this action were not presented to the Administrative Law Judge. Therefore, the doctrine of procedural default prohibits the Court from considering these issues.

5. Even if the Court were to find that the doctrine of procedural default does not prohibit the plaintiffs from raising the issues they now present, the Court would find in favor of the Department as follows:

a. Plaintiffs claim that the Department should have reopened the public comment period after it proposed permit modifications. This issue presents a question of law and is subject to a de novo standard of review. Cinkus, at 210. Plaintiffs fail to cite any law or regulation to support their position. Under the pertinent regulations (62 Ill. Adm. Code 1777.13, 1773.15), an application review cannot proceed further until after the public comment period, therefore modifications of the permit application cannot be requested until after the public comment period is closed. An administrative hearing is available to any interested person to contest the Department's proposed modifications. Finally, requiring an opportunity for public comment on every requested modification could result in a never ending permit application process. For these reasons the Court finds that the Department does not have to reopen the public comment period after it proposes permit

modifications.

b. The remaining issues plaintiffs now raise question whether the permit's terms are adequate to protect the environment. These issues attack the Department's factual determinations which can only be overturned if they are against the manifest weight of the evidence. Cinkus, at 210. "An administrative agency's factual determinations are against the manifest weight of the evidence if the opposite conclusion is clearly evident." Id. Plaintiffs' specific claims are addressed in turn.

i. Plaintiffs claim that the permit's reforestation requirements are insufficient because planting seedlings could not replace the existing mature forest. Plaintiff's Brief, p. 11. In its review of the permit, the Department addressed comments made at the public hearing regarding reforestation of the mine site. See, Appendix to Plaintiffs' Brief, pp. 91, 92, 97, 100. Specifically, the Department pointed out that it has required woodlands on the mine site to be replanted to "Forestry" standards as part of the post-mining land use plan in accordance with the regulations governing tree planting found in 62 Ill. Adm. Code 1816.111 and 1816.117. The plaintiffs do not propose an alternative solution and have not provided any evidence that the permit's reforestation requirements violate the pertinent laws or regulations. Accordingly, the Court is unable to determine that it is clearly evident that the permit's reforestation requirements are inadequate. The Court finds that the plaintiffs have failed to show that the Department's decision on this issue is against the manifest weight of the evidence.

ii. Plaintiffs argue that the Department's required methods of protecting the Indiana bat are insufficient. Plaintiffs' Brief, pp. 13-14. The Department prohibited the permit applicant from cutting trees from April 1 through September 30. Plaintiffs claim that the "no-cut" period should have been extended to allow cutting only when the bat hibernates. The Department received public comment on this issue and received comments from the U.S. Fish & Wildlife Service. Appendix to Plaintiffs' Brief, p. 88. The permit applicant submitted a response to these concerns in which it gives a detailed explanation of how its mining practices will be tailored to protect the Indiana bat. Exhibit 3 to State Defendants' Response Brief, p. 4. Based on the evidence in the record, the Court is unable to determine that it is clearly evident that the Department's required methods to protect the Indiana bat are insufficient. The Court finds that the plaintiffs have failed to show that the Department's decision on this issue is against the manifest weight of the evidence.

iii. Plaintiffs claim that the Department should have required a longer "no-cut" period in order to protect the great blue heron. Plaintiff's Brief, pp. 14-15. The Department received public comment on this issue (A. 98) and the permit applicant responded (Exhibit 3, p. 2-3). The permit applicant noted that commenters said that blue heron nesting sites had been active in the permit location for decades. The applicant further noted that mining was conducted within 330 feet of the nearest nesting tree during the early 1980's. This means that even after significant long-term mining activity

within a few hundred feet, nesting locations were not abandoned. The permit provides for a buffer zone of fully developed woodland and wetland areas extending over 1,000 feet between the anticipated clearing line within the proposed permit areas and the nearest nesting tree. Given that 330 feet was a sufficient buffer zone in the past, the permit applicant believed that a 1,000 foot buffer would be sufficient to protect the heron. See, Exhibit 3 to State Defendants' Response Brief, p. 2. Based on the evidence in the record, the Court is unable to determine that it is clearly evident that the "no cut" period required by the permit is inadequate to protect the great blue heron. The Court finds that the plaintiffs have failed to show that the Department's decision on this issue is against the manifest weight of the evidence.

Based on the foregoing findings, the Court hereby orders that judgment be entered in favor of the defendants and against the plaintiffs.

Entered: 8/6/09

John R. Kelly
Judge