

STATE OF ILLINOIS
DEPARTMENT OF MINES AND MINERALS
LAND RECLAMATION DIVISION

CLYDE BURNS,)	
)	
Petitioner,)	
)	
vs.)	
)	
ZEIGLER COAL COMPANY,)	
)	ZEIGLER COAL COMPANY
Applicant,)	PERMIT NO. 225, REQUEST
)	FOR ADMINISTRATIVE
and)	REVIEW
)	
ILLINOIS DEPARTMENT OF MINES)	
AND MINERALS, LAND RECLAMATION)	
DIVISION,)	
)	
Respondent.)	

ORDER AND DECISION

This matter comes to me pursuant to Motions to Dismiss the Petitioner's Request for Administrative Review, filed by both the Illinois Department of Mines and Minerals, Land Reclamation Division (hereinafter "Department") and Zeigler Coal Company (hereinafter "Zeigler"), and the Petitioner having failed to respond to said Motions to Dismiss, I find as follows:

By letter dated June 2, 1989, Petitioner, Clyde Burns, by his attorney, Richard Brown, requested review of the Department's decision approving Zeigler's Permit No. 225. Said letter stated, in part:

I am writing to give you notice that Clyde Burns hereby requests an administrative hearing with the Department of Mines and Minerals concerning Zeigler Coal Company's request to build a coal slurry pond. The proposed slurry pond would be located near the real estate owned by Clyde Burns and occupied by him as a residence. At present there is an existing coal slurry pond owned by Zeigler Coal Company located in the same area and has caused a

great detriment to the Clyde Burns residential property in that slurry dust blows across the Clyde Burns property to such an extent that outdoor activities must be eliminated when the wind is blowing. Clyde Burns fears that this condition will continue and even be worse if the proposed slurry pond is constructed. Therefore, Clyde Burns is requesting that the Department of Mines and Minerals deny Zeigler Coal Company's request for a permit to construct the proposed coal slurry pond.

Subsequent to the filing of this letter and request, both the Department and Zeigler filed their respective Motions to Dismiss. The Department states that the Petitioner's request for administrative review fails to state a claim upon which relief may be granted under 62 Ill. Adm. Code §1775.11(a). §1775.11(a) provides that:

[w]ithin thirty (30) days after an applicant is mailed written notice of the Department's final decision concerning an application for approval of exploration required under 62 Ill. Adm. Code 1772, a permit for surface coal mining and reclamation operations, a permit revision, a permit renewal, or a transfer, assignment, or sale of permit rights, the applicant, or any person with an interest which is or may be adversely affected, may request a hearing on the reasons for the decision. This hearing shall be conducted in accordance with Sections 10 through 15 of The Illinois Administrative Procedure Act (Ill. Rev. Stat. 1985, ch. 127, pars. 1010-1015), with Sections 2.11 and 8.09 of the Surface Coal Mining Land Conservation and Reclamation Act (Ill. Rev. Stat. 1985, ch. 96½, pars. 7902.11 and 7908.09) (State Act) and in accordance with this Section.

The Department asserts several reasons for its Motion to Dismiss:

(a) that the purported existence of "slurry dust" caused by Zeigler's current operation is not related to the decisional process envisioned by §1775.11 of the Department's regulations; (b) that the Petitioner is attempting to adjudicate his complaints concerning an existing "slurry dust" problem in the context of the

issues raised by Zeigler's permit application, a request the Department asserts is improper and beyond the scope of the Hearing Officer's jurisdictional powers.

Zeigler, too, asserts that the Petitioner fails to "identify any deficiencies in Zeigler's permit application or to specify how the granting of such permit will adversely affect [Petitioner's] property..." (See, Zeigler's Motion To Dismiss, ¶3, p.2) Both Zeigler and the Department assert that Petitioner's Complaint is in the nature of a citizen's complaint under 62 Ill.Adm.Code §1840.15 and should be addressed in proceedings initiated under that section of the regulations so as to allow both parties the opportunity to develop evidence to determine whether the existing coal slurry pond owned by Zeigler is, in fact, adversely affecting Petitioner's property. (See, Zeigler's "Motion To Dismiss", ¶4, p.3; Department's "Memorandum In Support of Motion To Dismiss", p.4) §1840.15 of the Department's regulations, entitled "Citizen's Request for State Inspections", provides in part that:

[a] person may request a State inspection under Section 8.06(a) of the State Act, by furnishing to the Department a signed, written statement (or an oral report followed by a signed, written statement) giving the authorized representative of the Department reason to believe that a violation, condition, or practice of any requirement of the State Act or any permit condition required by the State Act exists and setting forth a phone number and address where the citizen can be contacted. (62 Ill.Adm.Code §1840.15)

In this regard, the Department urges that:

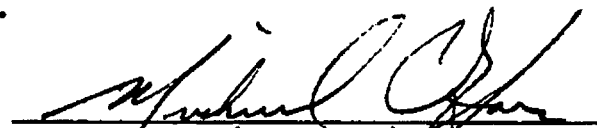
[t]he fact that no slurry dust has been generated by Permit No. 225 further precludes the [Illinois Department of Mines and Minerals] for granting the relief requested by the Petitioner. Zeigler will have to comply with Section 1817.97 of the [Department's] rules if Permit No.

225 is issued. The [Department] will enforce this regulatory performance standard during the operation and subsequent reclamation of Zeigler's proposed slurry pond. In the event that Zeigler violates this rule, the [Department] will take the appropriate enforcement action. Thus, the Petitioner's claim, even if raised in the proper forum, is not yet ripe for adjudication; the slurry dust of concern to the Petitioner has not yet been generated by Zeigler. (See, Department's "Memorandum In Support of Motion To Dismiss", p.5)

There is much merit to the Department's and Zeigler's Motions To Dismiss. I, too, am of the opinion that the basic complaint which Petitioner raises concerns slurry dust which is not even tangentially connected to the review process of Permit No. 225. And even if it is determined to be so, the "dust problem identified by Petitioner is prospective in nature with respect to the Permit application at issue before me. The sole proper means for the Department to address such potential, prospective problem is to condition the approval of the Permit upon compliance with the regulatory section which prohibits the dust to which Petitioner objects. The Department states in its Memorandum that the approval of Permit No. 225 is conditioned upon Zeigler's compliance with §1817.97 of the Department's regulations, and the Department unequivocally state that it will enforce such Section of the regulations in conjunction with the Zeigler's proposed operations under the permit application. Thus, I am granting the Department's and Zeigler's Motions To Dismiss. However, to assure myself that I have not misconstrued Petitioner's complaint, I am going to allow the Petitioner leave to further clarify his position with respect to his request for administrative review. Petitioner will have ten

(10) days from the date of this Order and Decision to file with me an amended request for administrative review, setting forth with particularity the bases of his objections to the Department's approval of Permit Application No. 225. Failure to file such an amended request will be deemed an assent as to the approval previously issued by the Department as to this particular permit application. Should the Petitioner file such a timely amended request for administrative review, the Department and Zeigler will have an additional ten (10) days from the receipt of the same to file any motions, dispositive or otherwise, with respect to such amended request. It is so Ordered.

Dated: 8/14/89


Hearing Examiner

STATE OF ILLINOIS
DEPARTMENT OF MINES AND MINERALS
LAND RECLAMATION DIVISION

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ILLINOIS DEPARTMENT OF MINES AND MINERALS'
MOTION TO DISMISS PETITIONER'S REQUEST FOR ADMINISTRATIVE REVIEW

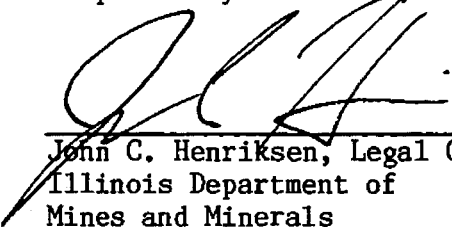
The Illinois Department of Mines and Minerals, Land Reclamation Division ("IDMM"), moves the Hearing Officer for an order dismissing Petitioner Clyde Burns' ("Petitioner") June 2, 1989 Request for Administrative Review of the IDMM's decision approving Zeigler Coal Company's ("Zeigler") Permit No. 225. The grounds for the IDMM's motion are as follows:

1. The Petitioner's request for administrative review fails to state a claim upon which relief may be granted under 62 Ill. Adm. Code 1775.11(a). The Petitioner's basis for requesting review, the purported existence of "slurry dust" caused by Zeigler, is unrelated to the IDMM's reasons for approving Permit No. 225.
2. The Hearing Officer lacks the requisite subject matter jurisdiction to render the relief sought in the Petitioner's request for administrative review under 62 Ill. Adm.

Code 1775.11(a). The Petitioner is improperly attempting to litigate his "slurry dust" complaint against Zeigler by filing a permit challenge, pursuant to Section 1775.11, instead of initiating a citizens' request for State inspection pursuant to 62 Ill. Adm. Code 1840.15.

The attached memorandum is submitted in support of the Illinois Department of Mines and Minerals motion to dismiss the Petitioner's request for administrative review of the decision to issue Permit No. 225.

Respectfully submitted,



John C. Henriksen, Legal Counsel
Illinois Department of
Mines and Minerals

CERTIFICATE OF SERVICE

I, John C. Henriksen, certify that I caused copies of the foregoing ILLINOIS DEPARTMENT OF MINES AND MINERALS' MOTION TO DISMISS PETITIONER'S REQUEST FOR ADMINISTRATIVE REVIEW and MEMORANDUM IN SUPPORT OF MOTION TO DISMISS to be served on Richard A. Brown, Attorney-at-Law, First Bank of Chester Building, Chester, Illinois 62233, and on Roger Seibert, Attorney-at-Law, Hohlt, House, DeMoss & Johnson, 1 North Main Street, Pinckneyville, Illinois 62274, by enclosing the same in an envelope addressed as shown above, with postage fully prepaid, and by depositing said envelope into a U.S. mail box in Springfield, Illinois on this the 29th day of June, 1989.



John C. Henriksen

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The Illinois Department of Mines and Minerals, Land Reclamation Division ("IDMM"), by counsel, submits the following memorandum in support of its motion to dismiss the above-captioned request for administrative review.

I. INTRODUCTION

On May 9, 1989, the IDMM issued a decision approving the permit application ("Permit No. 225") Zeigler Coal Company ("Zeigler") submitted for a coal processing plant associated with its underground mine located in Randolph County, Illinois. A copy of the IDMM's decision approving Permit No. 225 is attached as Exhibit No. 1. Permit No. 225, as approved, includes 89.7 acres of land Zeigler plans to use for coal processing waste (slurry) disposal. Exhibit No. 1, Part I, page 1.

On June 2, 1989, Petitioner Clyde Burns ("Petitioner") filed a request for administrative review of the IDMM's decision to issue Permit No. 225.

A copy of the Petitioner's request for administrative review is attached as Exhibit No. 2. The Petitioner's request for administrative review appears to be grounded on his concern that the proposed coal processing waste disposal area included within Permit No. 225 will exacerbate an existing "slurry dust" problem purportedly caused by an existing Zeigler slurry pond. See Exhibit No. 2. The IDMM submits the following arguments in support of its motion to dismiss the Petitioner's request for administrative review.

II. ARGUMENTS

- A. The Petitioner's request for administrative review fails to state a claim upon which relief may be granted under 62 Ill. Adm. Code 1775.11(a).

62 Ill. Adm. Code 1775.11(a) provides in relevant part that "...any person with an interest which is or may be adversely affected [by the IDMM's final decision concerning a permit application] may request a hearing on the reasons for the decision." Given the clarity of Section 1775.11(a), it seems apparent that the Petitioner's request for administrative review must specifically challenge one or more of the IDMM's reasons for approving the issuance of Permit No. 225.

As indicated above, the Petitioner alleges that constructing the slurry pond proposed under Permit No. 225 will somehow exacerbate a slurry dust problem caused by an existing Zeigler slurry pond. What the Petitioner fails to allege is how Permit No. 225, as approved, will add to this problem. Specifically, the Petitioner fails to identify how Zeigler's active use of the Permit No. 225 slurry pond, as outlined in the approved operations plan for this site, will generate slurry dust. The Petitioner's failure to do so undoubtedly stems from the fact that slurry ponds are, by definition, wet (i.e., non-dusty) while in active use. Moreover, the

Petitioner fails to specify how this proposed slurry pond will generate dust during the reclamation of Permit No. 225. Given that the approved reclamation plan for Permit No. 225 calls for the slurry pond in question to be covered with four (4) feet of clay, it is equally apparent that the Petitioner is unable to allege, let alone prove, that slurry dust will be generated during the reclamation of this site. See Exhibit No. 1, Appendix A, page 2.

The operations and reclamation plans submitted by Zeigler constitute part of the IDMM's "reasons" for approving Permit No. 225. See 62 Ill. Adm. Code 1784.11, 1784.13. Although the Petitioner's slurry dust complaint may be of great importance to him, the Petitioner has failed to allege that such problem is even remotely linked to any part of the IDMM's decision-making process relating to Permit No. 225, as required by 62 Ill. Adm. Code 1775.11(a). In fact, the Petitioner has failed to allege any error in the IDMM's reasons for the decision to approve Permit No. 225. The basis for the Petitioner's request for administrative review is totally unrelated to the Department's reasons for issuing Permit No. 225; the Petitioner's request for administrative review fails to state a claim upon which relief may be granted under Section 1775.11(a).

- B. The hearing officer lacks the requisite subject matter jurisdiction to render the relief sought in the Petitioner's request for administrative review under 62 Ill. Adm. Code 1775.11.

As stated above, the Petitioner's basis for requesting administrative review of the IDMM's decision approving Permit No. 225 stems from a slurry dust problem allegedly caused by an existing Zeigler slurry pond. As set forth below, the hearing officer lacks the requisite subject matter

jurisdiction to adjudicate a slurry dust complaint in the context of a proceeding to challenge the IDMM's decision to issue Permit No. 225.

1. The Petitioner's slurry dust complaint, even if ripe for adjudication, is not being raised in the proper forum.

The IDMM's rules governing underground mining operations are found at 62 Ill. Adm. Code 1817. These regulations were approved by the Secretary of the United States Department of the Interior on October 25, 1988. (See 53 Fed. Reg. 43112). Zeigler must comply with the performance standards contained in Part 1817 of the IDMM's regulations, including those standards regarding air pollution attendant to wind erosion (dust) set forth in Section 1817.97. The Petitioner has the right to file a citizen's request for State inspection, pursuant to 62 Ill. Adm. Code 1840.15, in the event Zeigler is alleged to have violated any of the IDMM's rules, including Section 1817.97.

The Petitioner's request for administrative review is apparently grounded on Zeigler's purported violation of the air pollution limits set forth in 62 Ill. Adm. Code 1817.97. As indicated above, the Petitioner has the right to file a citizens' request for State inspection in the event of a suspected violation of the IDMM's air pollution rules. The enforcement procedures set forth in Section 1840.15 of the IDMM's rules, in conjunction with the review procedures set forth in Sections 1840.16 and 1840.17, provide the Petitioner with a comprehensive administrative process designed to address alleged violations of the IDMM's rules in a prompt and uniform manner. The Petitioner's slurry dust complaint, even if ripe for adjudication, is not being raised in the proper forum. In short, the Petitioner should utilize the citizens' complaint process provided by the

IDMM's rules instead of improperly filing a request for administrative review of the IDMM's decision to issue Permit No. 225.

2. The Petitioner's claim that the issuance of Permit No. 225 will generate slurry dust is not yet ripe for adjudication given that Zeigler has not begun active coal processing operations within this site.

The fact that no slurry dust has been generated by Permit No. 225 further precludes the IDMM from granting the relief requested by the Petitioner. Zeigler will have to comply with Section 1817.97 of the IDMM's rules if Permit No. 225 is issued. The IDMM will enforce this regulatory performance standard during the operation and subsequent reclamation of Zeigler's proposed slurry pond. In the event that Zeigler violates this rule, the IDMM will take the appropriate enforcement action. Thus, the Petitioner's claim, even if raised in the proper forum, is not yet ripe for adjudication; the slurry dust of concern to the Petitioner has not yet been generated by Zeigler.

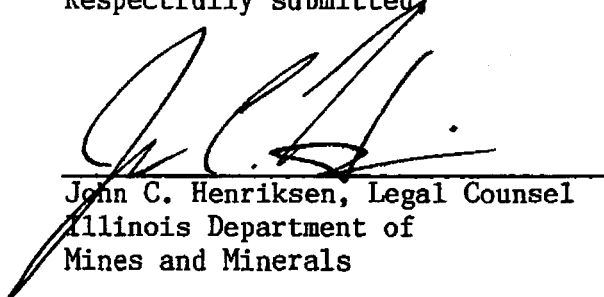
3. Summary.

The Petitioner's slurry dust complaint, even if ripe, is properly the subject of a citizens' request for State inspection under Section 1840.15 of the IDMM's rules rather than the subject of an administrative review proceeding under Section 1775.11. Moreover, it is equally apparent that the Petitioner's complaint is not yet ripe for adjudication since any slurry dust that might be caused by Permit No. 225 has yet to be generated. The hearing officer clearly lacks the requisite subject matter jurisdiction to adjudicate the Petitioner's slurry dust complaint in an administrative review proceeding requested pursuant to 62 Ill. Adm. Code 1775.11.

III. CONCLUSION

The Petitioner has not identified any error in the IDMM's decision approving Permit No. 225 reviewable under 62 Ill. Adm. Code 1775.11(a). The Petitioner's request for administrative review fails to state a claim upon which relief may be granted since the Petitioner's basis for requesting review, the purported generation of "slurry dust" by an existing Zeigler slurry pond, is unrelated to the IDMM's reasons for approving Permit No. 225. Moreover, the hearing officer lacks the requisite subject matter jurisdiction to hear this request for administrative review. The Petitioner is improperly attempting to litigate his "slurry dust" complaint against Zeigler by filing a permit challenge rather than initiating a citizens' request for State inspection when such claim is ripe for adjudication, pursuant to 62 Ill. Adm. Code 1840.15. Consequently, the Petitioner's request for administrative review should be dismissed.

Respectfully submitted,



John C. Henriksen, Legal Counsel
Illinois Department of
Mines and Minerals