

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

R. LEE SCHRAUT,)	
CATHERINE EDMISTON, and)	
MARY BATES, Petitioners,)	
)	
and)	Deer Run revision No. 1 to Permit 399
)	
ILLINOIS DEPARTMENT OF NATURAL RESOURCES,)	
OFFICE OF MINES AND MINERALS, Respondent,)	
)	
and,)	
HILLSBORO ENERGY, LLC, Intervener)	

ORDER

This matter having come before me on a Motion to Reconsider filed by Intervener after an Order issued following the presentation of Petitioner’s case, with a Response from Petitioner, no filing by Respondent. Intervener’s Motion is based on the allegation that Petitioner lacks standing to proceed with this matter as no proof of damages to Petitioner was forthcoming in her case. Petitioner argues that the original Order in finding that **any** damage is sufficient for standing, and the Motion to reconsider should be denied.

The original Motion for Dismissal filed by Intervener was in three parts: 1) Petitioner lacks standing to proceed as she has failed to show she is more likely to be damaged than not; 2) she has failed to show by a preponderance of the evidence that the design of the impoundment was somehow improper and a violation of the applicable rules, and; 3) that she has failed to show that the proposed reclamation plan violates the rules, and that therefor the permit was issued in error.

I found as follows:

STANDING. The evidence before me is that Catherine Edmiston owns property that is flooded on a regular basis by Shoal Creek, and that the leachate from the Deer Run Mine flows, eventually, into Shoal Creek. I accept that this will cause her damage sufficient to bring this matter to hearing, although there has been no evidence as to the amount of damage – i.e. whether any such pollution would exceed state and federal standards of allowable pollution. Motion to Dismiss based upon Complainant’s standing is therefor DENIED.

DESIGN OF IMPOUNDMENT STRUCTURE. By Petitioner’s own witness, the design of the impoundment structure is the type of structure contemplated by the rules, and is within the parameters defined by the rules. Therefor, the Motion to Dismiss as to the legal issue of the design of the impoundment structure is GRANTED.

MUST THE STRUCTURE BE REMOVED. The Petitioner has shown, and Intervener agrees, the what currently exists is a coal mine waste impounding structure. The only evidence before me at this time is that, without being dewatered, it will remain an impounding structure after reclamation and this

is prohibited by rule. It appears from the permit application and both testimony and questions during this hearing and argument made to support this Motion, that the intent is to convert the impoundment area into wildlife habitat during the reclamation, without removing or breaching the dam and without dewatering. Petitioner's attorney argues this is not permitted, and cites to 62 I.A.C. 1817.84b)1) which clearly states the structure may not be retained permanently as part of the approved post-mining land use.

Upon reconsideration, and after researching case law, I find that no evidence was presented showing the design of the impoundment was improper, and in fact Petitioner's expert witness testified that the design did meet the necessary standards. (See Sperado, Testimony transcript, p. 54.) The Original Order stands as to that element.

I find that whether the impoundment must or must not be removed is a question of first impression in Illinois, and must be resolved by looking at the language of the administrative rule. There is no doubt that we are dealing with an "impounding structure" and an "impoundment" as defined in 62 Ill. Adm. Code 1701. Petitioner emphasizes that 62 Ill. Adm. Code 1817.84b)1) states that "such (impounding) structures may not be retained permanently", and argues that the reclamation plan allows the permanent retention of the impounding structure, as it will continue to impound coal mine waste slurry. Intervener, via questioning of Petitioner's expert witnesses, emphasizes that the rule states that such structures may not be retained permanently as part of the post-mining land use. All parties agree that the specified post-mining land use for the structure is to cap it and use it for herbaceous wildlife habitat. The issue then, is what does "post mining land use" mean in this rule. "Land use" as defined in the rule means specific uses or management-related activities, rather than the vegetative cover of the land. Intervener asks doesn't the reclamation plan designate the post-mining land use as wildlife habitat? Petitioner's witnesses reply that regardless of what the reclamation plan says, the structure will still be an impoundment. Looking at statutory construction, we have to assume that the agency knew what it meant when the language was proposed and that the Joint Committee on Administrative Rules and the Federal government felt including the phrase "post-mining land use" meant something and was important enough to be included. If the phrase is meaningless, it should not be included. (It should be noted that the language in the administrative rule is word for word that same language as in the Federal Regulation.) In order to make any sense of the addition of the land use phrase, we can only conclude that what was intended was that after reclamation the specific use or management related activity must, in this instance, be something other than retention of coal mine waste. In other words, that the purpose of this plot of land be something other than retention of coal mine waste. All the evidence is that the structure will retain coal mine waste, but the purpose of the land will be for wildlife habitat. The testimony by Mr. Sparado that it is probably an accurate statement that there are hundreds of impounding structures reclaimed and left in place in this country is probably an accurate statement, and realizing that the Federal Regulations state exactly the same words as the Illinois Administrative Code, leaves the only logical determination that allowing such structures to remain after reclamation was the intent of the authors of both the Federal Regulations and the Illinois Administrative Code. Intervenor's Motion to Dismiss for failure to state a claim upon which administrative relief can be granted is Granted, as Petitioner's arguments ignore the controlling phrase.

I further find that Intervener is correct in the assertion that Petitioner must show actual damage, and such damage must be beyond the bounds of the damage permitted by government agencies. While I have little doubt that Petitioner's land will, more likely than not, eventually be polluted by waste from Deer Run Mine, a certain amount of waste pollution is allowed by law, and there was no evidence that any pollution will probably exceed such allowance.

Intervener's Motion to Reconsider is GRANTED in its entirety, and this matter is therefor DISMISSED.

01 Sept 2015

Entered

Jack L. Price

Hearing Officer

This is a Final Order of the Illinois Department of Natural Resources and appealable to the Circuit Court pursuant to the Administrative Review Law.

Electronically transmitted to the following September 1, 2015:

Robert Mool
Illinois Department of Natural Resources
Bob.mool@illinois.gov

Nick San Diego
Illinois Department of Natural Resources
Nick_SanDiego@illinois.gov

Bailey & Glasser, LLP
Elizabeth Hoskins Dow
ldow@baileyglasser.com

Kimberly Fladhammer
kfladhammer@baileyglasser.com

David L. Wentworth II
dwentworth@hgsuw.com

Jack L. Price

Hearing Officer