

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

**RECEIVED**

SEP 22 2009

IN RE: )  
)  
PRAIRIE STATE GENERATING )  
COMPANY, LLC, )  
)  
Permittee, )  
)  
and )  
ILLINOIS DEPARTMENT OF NATURAL )  
RESOURCES, OFFICE OF MINES AND )  
MINERALS, )  
)  
Respondent, )  
)  
and )  
DALE WOJTKOWSKI,<sup>1</sup> )  
)  
Petitioner. )

Dept. of Natural Resources  
OFFICE OF LEGAL COUNSEL

Prairie State Generating  
Company, LLC  
Lively Grove Mine  
Revision No.1 to  
Permit No. 373

**ORDER DISMISSING PETITION WITH LEAVE TO FILE  
AMENDED PETITION**

This Matter comes to me pursuant to a “Motion to Dismiss for Failure to State a Claim,” filed by the Illinois Department of Natural Resources, Office of Mines and Minerals, Land Reclamation Division (hereinafter “Department”), requesting that I issue an “Order for Dismissal *with prejudice* of request for administrative review, and/or with Finding, and also with such other relief as the Hearing Officer deems necessary and just.” (See, Department’s Motion, p.3) (Emphasis added) In addition, Prairie State Generating Company, LLC (hereinafter referred to as “PSGC”), pursuant to 62 Ill.Adm.Code 1848.19, requests “that the Petition filed by Dale

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<sup>1</sup> Mr. Wojtkowski spells his name with a “t”. The Department omitted such in the caption and subsequent references to the Petitioner. I have corrected the same in this Order and direct the Department to do likewise.

Wojtkowski be dismissed with prejudice for failure to state a claim.” The Motions were evidently precipitated by a letter, dated August 12, 2009, sent by Petitioner Dale Wojtkowski to Mr. Scott Fowler, Supervisor, Land Reclamation Division of the Department, stating as follows:

[p]ursuant to 62 Ill. Adm. Code 1847.3, I am requesting an Administrative Review of the Prairie State Generating Company, LLC, Revision No. 1 to Permit No. 373, for the Lively Grove Mine. I will be adversely affected by this revision in several ways and as a local resident near the mine processing plant, I want an Administrative Review of this permit.

My well-being and that of my family are affected by the coal processing plant for this mine. Adding 7,200 acres of underground mining will continue the life of this mine for a long time and continue the adverse impacts on my life as well.

I think the Revision No. 1 application was not complete and that important information about the impacts of all this additional mining were left out. I am concerned about water issues with this mine and adverse impacts I and my neighbors may have as this mine progresses.

There are also inconsistencies between Permit No. 373 and the Revision No. 1 which should not be there. The Revision makes statements that mining under churches and cemeteries will be avoided if possible. The original permit allowed mining under the Biddleborn church and cemetery. It was never clarified if the statement in the revision also applied to the Biddleborn church and cemetery. I feel that no mining should be allowed under either church or cemetery.

There is already local talk that a new mine entrance will be made approximately three miles north of the current shaft. The Revision No. 1 to Permit No. 373 is not complete because it has nothing about any additional surface structures for the whole 7,200 acres being added to the mine shadow area. How that much additional underground mining can be permitted by your agency without the mine company specifying any kind of additional surface structures is hard to believe is accurate.

There are other issues which concern me and which I wish to have brought forward in an Administrative Review.

Sincerely,  
[signed]  
Dale Wojtkowski

The Department, within its Motion to Dismiss, takes exception to Mr. Wojtkowski's letter by

indicating that 62 Ill. Adm. Code 1848.3 requires the following information to be contained within a request for hearing:

- a. The petitioner's name and address;
- b. A clear statement of the facts entitling the petitioner to relief, including the petitioner's interest which is or may be adversely affected by the Department's final decision;
- c. How the Department's final decision may or will adversely affect the interests specified;
- d. An explanation of each specific alleged error in the Department's final decision, including reference to the statutory and/or regulatory provision allegedly violated;
- e. The specific relief sought from the Department; and
- f. Any other relevant information.

The Department asserts that Mr. Wojtkowski's letter to Scott Fowler fails to comply with 62 Ill. Adm. Code 1847.3, inasmuch as the letter:

- a.  fails to state a clear statement of facts or the interests that may be adversely affected;
- b.  fails to state an explanation of each specific alleged error in the Department's final decision with reference to the statutory and regulatory provisions allegedly violated;
- c.  fails to state the specific relief sought from the Department; and
- d.  [t]he written request generally references "adverse impacts" with no further information concerning the specific facts to support this allegation. (See,

Department's Motion, ¶4)

PSGC's Motion to Dismiss is essentially the same as the Department's Motion. I concur with the Department and with PSGC in most respects as to the substantive infirmities as to the content of Mr. Wojtkowski's letter. The letter sent by Mr. Wojtkowski fails in many respects to comport with the minimum requirements of 62 Ill. Adm. Code 1847.3. However, only because Mr. Wojtkowski filed his letter *pro se*, and because this is one of the first Motions to Dismiss that I have had to address concerning the regulatory requirements of Section 1847.3, I am going to permit Mr. Wojtkowski's attorney leave to file an amended petition.

Subsequent to the filing of the Department's and PSGC's motions, an attorney (Ms. Penni S. Livingston) filed an appearance and pleadings on behalf of Petitioner, Dale Wojtkowski, and within the Petitioner's "Response to Motions to Dismiss and Motion for Leave to Amend Petition for Administrative Hearing," states:

[p]ursuant to 62 Ill. Adm. Code 1848, dismissal is only appropriate when a request for review "fails to state a claim upon which administrative relief may be granted." This is not the case here where the Petitioner's Request for Administrative Hearing in this action contains plain and concise statements of the Petitioner's concerns regarding the permit revision granted by IDNR to PSGC. These are:

- a. Adverse impacts to surface landowners as a result of mining operations.
- b. Inconsistencies with respect to undermining requirements beneath churches and cemeteries.
- c. Water issues.
- d. Surface structures.

[ ] The fact the Petitioner, a lay person, did not state the exact regulations being violated by the issuance of the permit revision is not fatal to his request for administrative review. These sections are cited in the public comments document by IDNR such that IDNR and PSGC both know what the applicable regulations are for the stated concern. Clearly, IDNR and PSGC know what regulations cover what issues, so there is no failure to inform of the concerns they will be called to address in the permit appeal. Petitioner simply seeks compliance with the applicable regulations as permit requirements. (See,

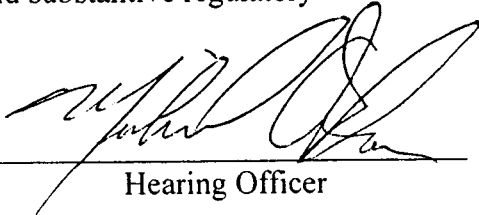
“Response...”, pp.2-3)

I don't agree with the Petitioner's attorney. Indeed, if Petitioner's initial filing was not filed by a *pro se* litigant, my ruling as to this matter would be a lot different. In fact, I don't agree that the concerns delineated above (*i.e.*, (a) through (d)) are actually articulated with specificity within the Petitioner's Petition. Nor do I agree with the Petitioner's attorney's argument that because “Petitioner simply seeks compliance with the applicable regulations as permit requirements,” the original Petition must somehow satisfy the substantive requirements of the Department's regulations.

Let me very frank. *This* petition is dismissed, and on *this* particular occasion, I am going to allow the Petitioner's attorney to file an Amended Petition....but prospective litigants are now placed on notice that failure of petitioners to strictly and timely comply with the regulatory requisites for initiating a petition under 62 Ill.Adm.Code 1848.3 will result in summary dismissal of the petition *with prejudice*. And that applies to litigants that are represented by attorneys and those who file their petitions *pro se*.

The content requirements imposed by Section 1848.3 are not so onerous as to impose a hardship on those seeking to have an approved permit application reviewed. Therefore, any subsequent motions to dismiss in prospective dockets premised upon the notion that a petitioner has failed to comport with the substantive requirements of Section 1847.3 will be strictly scrutinized, and any petition failing to timely comply with said substantive regulatory requirements shall be dismissed with prejudice.

**IT IS SO ORDERED.**



Hearing Officer

**PROOF OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing **Order Dismissing Petition with Leave to File Amended Petition** was mailed to the following at the last know addresses of:

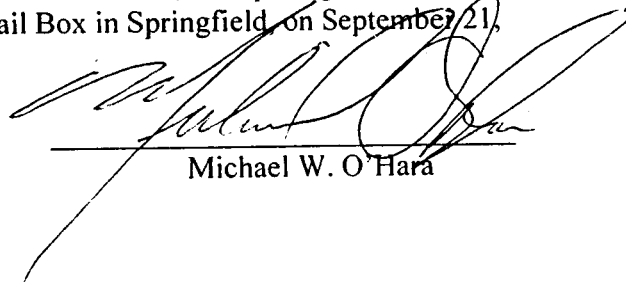
Scott Fowler  
Ill. Department of Natural Resources  
Office of Mines and Minerals  
Land Reclamation Division  
One Natural Resources Way  
Springfield, Illinois 62702-1271

Ms. Virginia Yang  
Ill. Department of Natural Resources  
Deputy Legal Counsel  
One Natural Resources Way  
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Mathew R. Hortenstine  
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Effingham, Illinois 62401

Penni S. Livingston  
Livingston Law Firm  
5701 Perrin Road  
Fairview Heights, Illinois 62208

by enclosing the same in an envelope addressed to them as shown above, with postage fully prepaid, and by depositing said envelope into a U.S. Post Office Mail Box in Springfield, on September 21, 2009.



Michael W. O'Hara

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