

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

BEFORE THE ILLINOIS
POLLUTION CONTROL BOARD

IN RE:)
PRAIRIE RIVERS NETWORK,)
versus) NO. PCB 01-112
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY and)
BLACK BEAUTY COAL COMPANY,)

The following is a transcript of proceedings from the hearing held in the above-entitled matter, taken stenographically by ROSEMARIE LAMANTIA, CSR, a notary public within and for the County of Cook and State of Illinois, before ELAINA C. KEZELIS, Hearing Officer, at 100 West Randolph Drive, Room 9-040, Chicago, Illinois, on the 12th day of July 2001, A.D., scheduled to commence at the hour of 10:00 a.m.

1 A P P E A R A N C E S:

2 HEARING TAKEN BEFORE:

3

4 ILLINOIS POLLUTION CONTROL BOARD,

5 100 West Randolph Drive

6 Room 9-040

7 Chicago, Illinois 60601

8 BY: ELAINA C. KEZELIS , HEARING OFFICER

9

10 MEMBERS OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

11 AS WELL AS OTHER INTERESTED ENTITIES AND AUDIENCE

12 MEMBERS WERE PRESENT AT THE HEARING, BUT NOT LISTED ON

13 THIS APPEARANCE PAGE.

14

15

16

17

18

19

20

21

22

23

24

1 MS. KEZELIS: Now, having approached the hour of
2 10:00 o'clock, we'll begin.

3 Good morning. Prairie Rivers Network versus
4 Illinois Environmental Protection Agency and Black
5 Beauty Coal Company, PCB 01-112. This is the oral
6 argument in this matter.

7 Good morning. Welcome to those members of the
8 public who are here today to observe the oral arguments,
9 which will be held in this case.

10 I am board member Elaina Kezelis and I'll be
11 proceeding over the argument this morning. Today's
12 argument will take place before the entire board with
13 the exception of members Dr. Flemal and Nicholas Melas,
14 who, unfortunately, have scheduled commitments elsewhere
15 and are unable to be with us today.

16 On June 21st, 2001, the board entered an order
17 granting Black Beauty's request for oral argument.
18 Because this case has a decision deadline of August 10,
19 2001, we scheduled the oral argument for the next
20 available board meeting date, which is today. As
21 specified in our order, only the three named parties
22 will be permitted to make argument to the board.
23 Similarly, only the board members will be asking
24 questions of the parties.

1 Furthermore, as provided in Section 101.7 under
2 the board's procedural rules, the purpose of this oral
3 argument is to address legal questions only, not new
4 facts.

5 The argument shall be timed with 25 minutes
6 allotted to the Petitioner for argument and rebuttal in
7 total and 25 minutes to be divided among the
8 Respondents.

9 In a moment, I'll ask the parties to make their
10 appearances for the record and to identify how they will
11 be allotting their 25 minutes time.

12 The court reporter is present and will be
13 preparing an expedited transcript of these proceedings.
14 If anyone desires a copy of the transcript, you may
15 obtain a copy from the board's clerk office at a cost of
16 75 cents per page or you may obtain a copy directly from
17 the court reporter.

18 I believe we shall be ready to proceed
19 momentarily. First, I'll ask each of the three
20 attorneys to rise and identify themselves and who they
21 represent for the court reporter, as well as indicate
22 the allotment of time by which each of you shall conduct
23 yourselves this morning.

24 MR. ETTINGER: I'm Albert Ettinger. I'm

1 representing the appellant, Prairie Rivers Network here
2 today. I believe the best way to do this is to go 15
3 minutes initially and then save 10 minutes for rebuttal
4 or reply.

5 MR. SOFAT: I'm Sanjay Sofat and I will
6 represent the Illinois Environmental Protection Agency
7 and I will be taking 10 minutes out of 25 minutes
8 allotted to the Respondents.

9 MR. BLANTON: I am W.C. Blanton. I represent
10 Black Beauty Coal Company. I will be using the 15
11 minutes Mr. Sofat which has left.

12 MS. KEZELIS: Thank you.

13 Madam Chairman, would you care to make any
14 additional comment?

15 CHAIRMAN MANNING: Thank you. Thank you, Member
16 Kezelis, for presiding over this proceeding. She is the
17 author of this particular decision that we're about to
18 make.

19 The board looks forward, I don't know how many
20 of you know this, but this is actually the board's first
21 oral argument ever in its history. And we look forward
22 to hearing from the parties as to any procedures to have
23 these oral arguments. We felt this was an important
24 issue being the first third-party permit appeal that

1 looks as if it is going to go to decision. We've had
2 them before but they've been -- actually drawn or
3 dismissed prior to actually the board making a decision
4 on them. So we look forward to hearing the argument of
5 the parties. Listen carefully and we -- one other
6 announcement, we have with us this morning a very new
7 board member, Tom Johnson from Urbana, Illinois. This
8 is Tom's -- Member Johnson's first official action with
9 the board to be with us this morning. Welcome.

10 MR. JOHNSON: Thank you.

11 MS. KEZELIS: Thank you, Madam Chairman. No
12 further matters before us, we shall begin.

13 Madam clerk, Mrs. Gunn, will be maintaining our
14 time keeping for us. She'll notify you only when your
15 time is up.

16 Thank you. You may begin, Mr. Ettinger.

17 MR. ETTINGER: I think I'll test the capacities
18 of my new bifocals by standing today.

19 I'd like to, first of all, say that it is very
20 good that we are able to have oral argument in this
21 case. It is a very important case and it raises a lot
22 of novel issues.

23 It's important, first of all, because of the
24 importance of Little Vermilion River, which is going to

1 receive the discharge from this permit.

2 It's also important because of the novel legal
3 issues, as board Member Kezelis mentioned, that are
4 raised by it.

5 I think the best thing for me to do now is to
6 answer the board's questions and go directly to the four
7 issues that were posed in the board order and deal with
8 those and I hope there will be follow-up questions.
9 There was a lot of paper filed in this case but I think
10 it is important that we be clear here because of the
11 precedent setting nature of this case. All board cases
12 are important, of course, but here we're -- I'm making a
13 mold that may apply to a lot of other cases and it is
14 certainly even more important that we get this one
15 thought through.

16 Going then to that question, question 1, the
17 burden of proof in standard of review in third-party
18 national pollutant discharge elimination system permit
19 appeals.

20 I think the burden here is pretty clear. The
21 Petitioner must show that there were legal errors or
22 that a factual -- or that factual determinations were
23 made that were not supported by substantial evidence in
24 the record. I think this is the normal sort of standard

1 that would be applied in this sort of case. I think the
2 point here though is we, the Petitioner, have the burden
3 at this proceeding but our burden is informed by the
4 burden that went on below. And I think the best analogy
5 here is to look at a case in which it is more drastic
6 that there is a burden share, say a criminal case below
7 in which in the trial court the prosecution has to prove
8 beyond a reasonable doubt that the defendant is guilty.
9 When it comes to an appeal, it's not then -- it's now
10 the defendant has lost in the trial below, he doesn't
11 have to prove beyond a reasonable doubt that he is
12 innocent at this point. What he has to prove is that
13 there is no evidence in the record below showing that he
14 is guilty beyond a reasonable doubt. He is down, you
15 know. He is down, but still the burden above is
16 informed by what the burden was below.

17 And in this case, the burden below was on the
18 applicant, Black Beauty Mining Company, to prove that it
19 qualified, that it was eligible for the permit it
20 received.

21 We maintain that the record in this case doesn't
22 support that, first of all, because there were legal
23 errors made and on the law it is clear to us that the

24 board -- will get down to the standard of review, these

L.A. REPORTING (312) 419-9292

9

1 two questions sort of mold into each other, on the
2 standard of review, the board really should make its own
3 decision as to the law. This board, of course, is
4 specifically designed to handle just these sorts of
5 legal questions and thus these sorts of scientific legal
6 questions. And so there really is no reason for the
7 board to give any particular deference to the agency,
8 just as an appellate court doesn't give a particular
9 deference to a trial court on legal questions. The
10 appellate court is set up to handle legal questions.
11 This board is set up to interpret its own rules and
12 certainly would be very strange if the PCB would give
13 deference to the Illinois Environmental Protection
14 Agency in interpreting Pollution Control board rules.

15 So, I think that handles the first question.

16 I'd like to look then at what I think is really
17 the key point in the case. And this really -- I
18 believe, we believe determines the appeal, which is the
19 extent of the public participation that should have been
20 allowed on this permit.

21 I think what happened here is that basically the
22 agency came in with a fundamentally defective permit.
23 It was a sort of generic mining permit that applied

24 though that lease -- the -- the lease that was

L.A. REPORTING (312) 419-9292

10

1 absolutely mandated but they ignored in this case that
2 this was not an ordinary stream, that this was an
3 extremely important water that this was discharging into
4 and that furthermore. So, US Environmental Protection
5 Agency agreed, and, actually, the agency came to agree
6 to some extent, too, and they substantially rewrote the
7 permit.

8 Well, then they come back and then that permit,
9 that substantially rewritten permit, which is improved
10 in theory, though, unfortunately, not in practice, that
11 then goes final immediately without allowing another set
12 of comments.

13 If I may be permitted a slightly melodramatic
14 analogy but one that I think illustrates the point.

15 Let's say, for example, that a contractor came
16 in or a construction and sought a permit to knock down a
17 homeowner's house, fortunately, we don't have permits
18 like that but let's say he asked for a permit to knock
19 down a house. The homeowner comes in and says, oh, my
20 God, don't do that, I need my house, and, furthermore, I
21 need notice so I can get my stuff out of there. The
22 agency that is looking at this permit says, okay, you're

23 right. Contractor, we're going to make a condition on
24 your house knocking down permit that you have to supply

L.A. REPORTING (312) 419-9292

11

1 this guy with a pop tent and you have to give him at
2 least 10 minutes' notice. At that point, I think, the
3 homeowner would want to say, wait a minute. I need more
4 than a pop tent here and 10 minutes' notice won't allow
5 me to get my stuff out, but that is not what happened
6 here, the permit went immediately to final before the
7 homeowner got his other chance to point out that while
8 perhaps in some sense the permit was improved, it wasn't
9 improved nearly enough to meet his needs or, in this
10 case, the need of the environment. And that is
11 basically what happened here.

12 Now, we're not saying, of course, that every
13 permit has to be renoticed after there are changes to
14 it. If it has been fully aired, in the first situation,
15 as to what should be done, then there are to be changes.
16 Some cases I've commented on, there have been permits
17 that have been commented on in which it is just clear
18 there was a typo in the permit, you know, you say .01,
19 you mean .001 in the permit. Obviously, they don't have
20 to renotify that just to correct that sort of a problem,
21 but when you totally rewrite the permit, change the
22 whole theory of the permit, you got to look at it and

23 see that this thing was done correctly. And it is
24 important in this case because it wasn't done correctly.

L.A. REPORTING (312) 419-9292

12

1 The key monitoring terms and some of the other terms in
2 this permit were not handled in a way that is going to
3 make the permit conditions work in our view, but we're
4 not asking, by the way, this board to go back and fix
5 the permit. That is not what we see as the board's role
6 in this situation. The role of the board in this
7 situation is to go back to the agency and say, go back,
8 and do what you should have done in the last place, last
9 time, renote it for public participation, follow the
10 clean water acts, strong, strong policy in favor of
11 public participation on permits, renote this, let the
12 public take a look at it and then if you see fit, make
13 some of these changes to the monitoring and other
14 elements of the permit that were -- are flaws in the
15 current permit. That strikes us as the proper way to
16 proceed.

17 The second thing that has gone on with this
18 permit that is particularly interesting, and
19 particularly dangerous, is that as to the key monitoring
20 terms that they not only changed the terms after the
21 close of the public comment period without given Prairie

22 Rivers a chance to comment on those changes, but they
23 left some of these things totally open. They issued the
24 permit and said, Black Beauty and the agency six months

L.A. REPORTING (312) 419-9292

13

1 later are supposed to work out these terms. Now, that
2 is totally unacceptable. What -- imagine, if you will,
3 that they issued a blank permit or not quite blank
4 permit, the permit says, in six months we'll work out a
5 protective permit. Does that allow public
6 participation, if all we've got to do is comment or look
7 at a permit that says to be continued, to be worked out
8 in private six months after the issuance of the permit.
9 That clearly frustrates public participation. And in
10 this case it was on the key monitoring terms, the
11 operations term for the monitoring of the permit that
12 was put off for this period.

13 So I think as far to answer the board's question
14 or summarize we should have been allowed to comment on
15 the revised permit and no major terms should have been
16 left to be worked out six months into the future of the
17 permit without allowing public participation. The
18 homework has got to be done up front. A permit that is
19 basically what is going to go final is what has to be
20 presented to the public, otherwise the public is
21 essentially cut out of the process.

22 CHAIRMAN MANNING: If I might, when would you
23 suggest and how would the Environmental Protection
24 Agency decide when it needs to go back to the public for

L.A. REPORTING (312) 419-9292

14

1 further review, if it's going to make any changes at all
2 or if those changes are substantive in nature? Or what
3 tests or what sort of advice would you give to the
4 agency in terms of whether it needs to go back to the
5 public or it doesn't need to go back to the public on
6 review of public participation?

7 MR. ETTINGER: It's going to be a judgment call
8 in every case. I think there will be very easy cases in
9 which people point out a typo, they can correct the typo
10 without going to a public notice again. There will be
11 other cases in which it will be difficult or, you know,
12 it will be a close question, there was some debate,
13 maybe somebody raised it during the hearing but they
14 don't really feel it was aired sufficiently by the
15 public on this particular issue and they should raise it
16 again or give the public another chance to look at it.
17 And then there will be very clear cases like we think
18 this one is in which major elements of the permit and
19 the whole theory of the permit in the sense was changed
20 and new monitoring terms were put in in order to take

21 care of this or address these changes that the public
22 has never seen at all before. It seems clear to us in
23 that case it has to be noticed. The board has got a lot
24 of experience in this itself. You're in a good position

L.A. REPORTING (312) 419-9292

15

1 to give the agency advice on this but, of course, the
2 board issues draft regulations and a judgment has to be
3 made as to whether they have to be going back to public
4 notice again or whether they're ready -- and the board
5 makes these sorts of judgment all the time. And in some
6 cases, if the board feels it has heard enough on this
7 subject, there is no point in getting further public
8 discussion. I would be very surprised though if the
9 board came up with whole new sections of a proposed
10 regulation and then went directly to second notice
11 without giving the public another shot at least
12 discussing the entirely new portions of a regulation or
13 other action by the board.

14 MS. GUNN: His time is up.

15 MR. ETTINGER: I'll have to handle the last two
16 later.

17 MR. SOFAT: May I please the board, I am Sanjay
18 Sofat.

19 The agency asserts that the Black Beauty Coal
20 Company NPDES permit issued by the agency complies with

21 all the applicable laws and is protective of existing
22 users.

23 Now, the agency would like to answer the four
24 specific questions as follows:

L.A. REPORTING (312) 419-9292

16

1 Regarding question number 4, the agency
2 apologizes for the typographical error. The word "not"
3 should follow the word typically in that sentence.

4 Now, the agency would like to address the burden
5 of proof and standard of review issues.

6 Regarding burden of proof, the general rule
7 believes that -- the agency believes is that an agency
8 may issue a permit in accordance with the regulations of
9 the board and the agency. Also, the administrative
10 agencies are required to apply their rules without
11 making ad hoc exceptions.

12 MS. KEZELIS: Sorry for the interruption.

13 MR. SOFAT: In this case, the agency, based on
14 the information provided by the applicants, provided by
15 this state and federal agencies and the public, issued a
16 permit that is consistent with the board regulations
17 that are applicable to the mine discharges. The permit
18 was issued upon the agency's determination that the
19 applicant has met the requisite burden of Section 39(a)

20 of the act, that is the permit will not cause violation
21 of the act or the regulation. Further, according to
22 this section, it is the duty of the agency to issue such
23 the permit upon truth by the applicant that the facility
24 will not cause a violation of the act or the

L.A. REPORTING (312) 419-9292

17

1 regulations.

2 As Section 40(e) of the act states, the burden
3 is on the petitioner now. Therefore, for the petitioner
4 to bring a third-party permit appeal at a bear minimum
5 it must provide some evidence to show that the permit as
6 issued will cause a violation of the act or the
7 regulations. The petitioner has done everything except
8 that. The petitioner has been very diligent in making
9 the allegations but all of them fall short of proving
10 that the issued permit will cause violation of the
11 applicable regulations. Mere dislike of the permit
12 conditions or alleging that the permit could have been
13 written in a different fashion is not the kind of burden
14 of proof required by Section 40(e)(3) of the act.

15 Now, the agency will go through petitioner's
16 issues and will attempt to show that the petitioner has
17 failed to meet the requisite burden.

18 The first issues is petitioner argues that the
19 permit, issued permit violates the board's mixing

20 regulations. However, to meet Section 40(e)(3), burden
21 of proof requirement, the petitioner must show that the
22 application of the mixing regulations in this case is
23 mandatory or is required by the law and, therefore, the
24 agency's failure to apply them in this case causes the

L.A. REPORTING (312) 419-9292

18

1 violation of the applicable regulations. Since the
2 petitioner makes no such showing, it has not met the
3 requisite burden of proof.

4 Next issue, the petitioner argues that since the
5 Advent study has numerous flaws in it the permit issued
6 by the agency is also flawed, however, to me Section
7 40(e)(3), burden of proof requirement, petitioner must
8 show how those deficiencies, if any at all, will cause
9 the violation of the applicable regulations. Since the
10 petitioner makes no such showing it has not met the
11 requisite burden of proof.

12 Third, the petitioner argues that since the
13 permit does not require continuous monitoring of the
14 discharge it violates Sections 309.141(d) and 146(c) of
15 the board regulations and 40 CFR 122.48. However, to
16 meet Section 40(e)(3), burden of proof requirement the
17 petitioner must show that the continuous monitoring is
18 required by these regulations under all circumstances.

19 For example, 40 CFR 122.48, specifically states that
20 "all permit shall specify the requirements concerning
21 the proper use, maintenance and installation, when
22 appropriate, of monitoring equipment or methods." The
23 agency in this case determined that the continuous
24 monitoring is not appropriate because of the infrequent

L.A. REPORTING (312) 419-9292

19

1 nature of the discharge, which is 8 to 9 times a year,
2 therefore, the petitioner has not met the requisite
3 burden of proof.

4 Fourth, that the petitioner argues that the
5 agency's non-degradation analysis was not open to
6 public, however, to me Section 40(e)(3), burden of proof
7 requirement, the petitioner must show that the agency's
8 non-degradation analysis violates the requirements of
9 Section 302.105 of the board regulations. Since the
10 petitioner makes no such showing it has not met the
11 requisite burden of proof.

12 Last argument, the petitioner argues that the
13 permit is in violation of the applicable regulations as
14 the whole effluent toxicity testing was not applied in
15 this case, however, to meet Section 40(e)(3), burden of
16 proof requirement, the petitioner must show that the
17 whole effluent toxicity testing is an acceptable method
18 for wet weather discharges. It is well accepted among

19 the professionals that such testing is not appropriate
20 for wet weather discharges.

21 In summary, the petitioner's mere belief not
22 based on any scientific findings that the water quality
23 standards would not be met, that the limits in the
24 permit are not stringent enough to protect existing uses

L.A. REPORTING (312) 419-9292

20

1 and that certain regulations would be violated is not
2 the kind of burden of proof Section 40(e)(3) demands in
3 the third-party permit appeal. The board should not
4 entertain a third-party permit appeal that lacks the
5 most basic element of a permit appeal, the requisite
6 burden of proof. Otherwise, both the board and the
7 agency would have to expend their limited resources on
8 such frivolous appeals.

9 Under standard of review the agency believes
10 that the plain language of the statute should be
11 followed, which states, "The board shall hear the
12 petitioner exclusively on the basis of the record before
13 the agency." However, any evidence that helps illustrate
14 or explain the information considered by the agency
15 during the permit review process should be allowed under
16 this section.

17 Now, the agency addresses the second question,

18 the extent to which the public should have been allowed
19 to participate.

20 The agency argues basically two ways.

21 First, the applicable law does not allow
22 additional public participation.

23 Second, the petitioner argues that the final
24 permit is fundamentally different and, therefore, it

L.A. REPORTING (312) 419-9292

21

1 should have been given another opportunity to comment.

2 The agency will now go through all the changes that were
3 made to the draft permit and we're trying to show that
4 even under their own standards the changes were not
5 fundamentally different.

6 The first change was that effluent limitations
7 for sulfates were reduced. The agency does not believe
8 that such a change amounts to the petitioner's
9 fundamentally different level and thus does not require
10 additional participation.

11 The second change that was made, a statement
12 that could have allowed the Black Beauty Coal Company to
13 request the removal of sulfate and chloride monitoring
14 from its permit was removed. The agency not does not
15 believe that such a change amounts to the petitioner's
16 fundamentally different level and thus does not require
17 additional participation.

18 Third, the discharge monitoring requirements
19 were increased from one sample per stormwater discharge
20 with a total requirement of three per quarter to daily
21 monitoring of stormwater discharge events with analysis
22 of all mine related constituents. The agency does not
23 believe that such a change amounts to the petitioner's
24 fundamentally different level and thus does not require

L.A. REPORTING (312) 419-9292

22

1 additional participation.

2 Fourth, all references to discharge from the
3 mine facility being exempt from water quality standards
4 were removed from the permit. The agency does not
5 believe that such a change amounts to the petitioner's
6 fundamentally different level and thus does not require
7 additional participation. This change was made pursuant
8 to the comments received from United States
9 Environmental Protection Agency.

10 Fifth change, additional sedimentation pond
11 operation and maintenance restrictions were incorporated
12 into the permit. The agency does not believe that such
13 a change amounts to the petitioner's fundamentally
14 different level and thus does not require additional
15 participation.

16 The last, additional provisions in the permit

17 regarding biological inventory and water quality
18 monitoring of the Little Vermilion River and the unnamed
19 tributary were added. The sole basis for this change
20 was to accommodate the comments made by the petitioner,
21 state agencies, United States Environmental Protection
22 Agency and the public, therefore, the agency believes
23 that none of these changes were so fundamentally
24 different that they required additional public

L.A. REPORTING (312) 419-9292

23

1 participation. The petitioner cites village of Sauget
2 to support their argument, but the agency believes that
3 that case can be distinguished here. In that case, the
4 parties were, the petitioners were denied right to
5 comment on the additional conditions, and also they lost
6 the opportunity to ask for public hearing, and,
7 therefore, they lost their right to reserve the issue
8 for appeal. So those were the --

9 MS. GUNN: Time.

10 MR. SOFAT: -- those were the conditions.

11 MS. KEZELIS: I have one question. Thank you.

12 Section 40(e)(3) of the act specifies as you
13 quoted that the board's review is to be based
14 exclusively on the basis of the record before the
15 agency. There has been some argument in the briefs with
16 respect to supplementation by agreement of the parties

17 based on what transpires at the hearing.

18 My question to you is this, if supplementation
19 is not permitted based on Section 40(e)(3) as opposed to
20 40(d), which applies to clean air act cases, can you
21 point to any evidence in the record before the agency
22 regarding any potential effect on the receiving stream
23 and the unnamed tributary of the Little Vermilion River
24 as a result of magnes concentrations in the. . .

L.A. REPORTING (312) 419-9292

24

1 MR. SOFAT: Board Member Kezelis, I think I
2 would have to look into the record to find that.

3 MS. KEZELIS: All right. That's fair. Thank
4 you.

5 MR. SOFAT: Thank you.

6 MR. BLANTON: May it please the members of the
7 board. My name is W.C. Blanton. I represent Black
8 Beauty.

9 I thank you for the opportunity to present oral
10 argument.

11 I will advise you that the reason I asked for
12 oral argument is that this is a big record with lots of
13 issues and it's a complicated case in many ways, in many
14 ways it is simple. There are numerous issues and many
15 of them are first impression and, frankly, I wanted to

16 be here to answer your questions, not to give a speech.
17 So I would encourage you to set the agenda for me at any
18 point or steer me to what you want to talk about.

19 I would like -- because of the way this case has
20 come up and because the amount of interest in it and
21 because of the involvement of United States
22 Environmental Protection Agency and the commission and
23 the department of natural resources, I think it is easy
24 to get lost in the trees and not see what is really

L.A. REPORTING (312) 419-9292

25

1 going on in this case. And I would like to bring the
2 board back to some contents of what is going on here.
3 We are talking here about an intermittent stormwater
4 discharge from the surface coal mine that will occur in
5 all likelihood fewer than 10 times a year and it is a
6 discharge that is no different in amount or quality from
7 any other surface coal mine stormwater discharge that
8 this board and this agency have been dealing with for
9 the past 30 years or so. This is not impending doom
10 from asteroids from space that nobody knows anything
11 about. It is just a coal mine surface water. We've got
12 ditches around the mine that collect the run off and
13 hold it in sediment basins until the solids settle out
14 and it goes on into the stream that has no constituents
15 of any particular unusual quality and has constituents

16 that are the same ones that this board addressed first
17 in its temporary rule and then its final rule in 1983,
18 1984 when the board decided that these types of
19 discharges are sufficiently innocuous that coal mines
20 are entitled across the board in this state, absent
21 proof of unusual circumstances that they don't have the
22 same water quality standards and requirements that other
23 industrial discharges have. We're under the subtitle
24 (d) regulations, not (c), as a matter of law, based on

L.A. REPORTING (312) 419-9292

26

1 this board's familiarity and understanding of these
2 discharges, which are nothing unusual at all. What
3 is -- because of that and because of the law, the
4 Environmental Protection Agency gave us the standard,
5 not the lowest level, not a trash permit, not a junk
6 permit. They gave us the permit that this board mandate
7 in the subtitle (d) regulations we get. Section 406.203
8 says, if you check the right box in your application,
9 you get 406.203 regulations and effluent standards and
10 conditions, not the Part 302 and 303 rules that the
11 petitioner wants in this permit.

12 This was an ordinary case until the citizens who
13 oppose the mine generally on the usual grounds that
14 people don't like coal mines in the neighborhood. If

15 you look at the news articles and the comments in the
16 record, what you're going to find is the local folks
17 understandably, I can see, I work at a coal company,
18 there is noise, there is dust, there is traffic. They
19 have a problem with train loads. They're upset by a
20 coal mine.

21 What happened was that they got Prairie Rivers
22 involved in this. We're near a stream. And I think it
23 is clear from the issues in this case that Prairie
24 Rivers has its own agenda. Mr. Ettinger is very

L.A. REPORTING (312) 419-9292

27

1 straightforward about it. He wants increased public
2 participation. He wants the differences between coal
3 mine regulations and the rest of the regulations changed
4 and this is his vehicle to try to change law, not have
5 you apply it.

6 When you read the Prairie Rivers's brief and you
7 listen to their argument they want two things. They
8 want citizen's role in this permit and all permits
9 beyond those prescribed by this board's rules. They
10 want things that these rules have been set up by this
11 agency do not provide them. They want that expanded.
12 And they want the difference. And they don't want us to
13 have the right to subtitle (d) regulations. They want
14 to use 40(e) to pull all of the subtitle (c) regulations

15 back into the mining program. This permit is not the
16 place to do it because we're here to ask you to apply
17 the law on our permit with the law as it is written.
18 That is the context. It's very important. I'd like for
19 you to those keep in mind.

20 On the four issues, I can take them out of
21 order, I won't comment on the agency's typo.

22 On the procedures, Mr. Sofat has mentioned and
23 the agency's brief that spoke very clearly, the role of
24 the public and the steps that are taken in a permit are

L.A. REPORTING (312) 419-9292

28

1 established by Illinois regulations and I can't quote
2 them, I'm not an Illinois practitioner, but in sequence
3 what happens is a draft permit is issued, and we were
4 issued exactly the draft permit we were entitled to
5 under the law. The public is entitled to comment, if
6 there is sufficient interested, and if there is enough
7 interest on important enough issues, they get a hearing,
8 which they got. After that, the agency is mandated to
9 issue a permit based upon the comments that it has
10 received and that is what it did. And if anybody is not
11 happy with the permit terms that they write at that
12 point, their remedy is what we're doing now, is to get a
13 right to take an appeal. There is nothing else in

14 Illinois law that provides an opportunity for the public
15 to participate. What they want is unlawful.

16 Black Beauty as an applicant is entitled to have
17 the agency process its application in accordance with
18 the regulations. It's entitled to not have the agency
19 make up the rules because there happens to be a lot of
20 interest in the permit and because the agency, frankly,
21 responded to the comments by putting conditions in the
22 permit and terms in the permit beyond those that we
23 believe the agency was authorized to do.

24 Now, the case that is critical on this that

L.A. REPORTING (312) 419-9292

29

1 Prairie Rivers relies on is the Sauget case. It's
2 important to know that the reason why there was a
3 problem there were three fold as Mr. Sofat pointed out.

4 One, the applicant, the comment period for
5 United States Environmental Protection Agency was 30
6 days and they blew the deadline. They were not entitled
7 to have their comments heard because they turned them in
8 after the comment period closed. The regulations say
9 you get 30 days. United States Environmental Protection
10 Agency took longer. The applicant was entitled to rely
11 upon the regulation that says we can't get hammered with
12 something that comes in after the public comment.

13 The second regulation that was violated, not

14 principle, not due process, not I would like this to be
15 the law, the law was violated because the applicant was
16 entitled to get a copy of the comment and they didn't
17 get them. The agency violated the regulations.

18 And third, because of that it lost its right to
19 have an appeal. That's why the case doesn't apply.
20 What the case says is follow the regulations. That's
21 what we want you to hear on procedure, they don't get
22 another bite of the apple because the regulations don't
23 give it to them.

24 Substantively, do the subtitle (c) regulations

L.A. REPORTING (312) 419-9292

30

1 apply, it's easy, no, they don't. Section 406.203 says
2 if you check the right box, they don't apply. We
3 checked the box. They don't apply. Prairie Rivers
4 tries to bring them in through 406.203(e) saying this
5 general mandate in the permit has to protect the
6 environment trumps our checking the box. That cannot be
7 on the face of it and on this record. 406.203 says
8 there is a presumption that if you apply the 406.203
9 regs, it does protect the environment. There is not one
10 shred of evidence in this case that says that
11 presumption is not fully enforced. There is no evidence
12 in this record to imply that. There are letters,

13 comment, public comments, briefs, speeches saying, we're
14 worried about this. We don't like what you're doing
15 about it. There is not one shred of evidence before the
16 agency or in this board's hearing that says the
17 presumption doesn't apply. And I will concede that if
18 they had some evidence that linked the endangered
19 species and the quality of the river to anything that
20 we're going to put in the waters, if they had one bit of
21 evidence that says, sulfate at 1,000 is bad for mussels;
22 if they have one shred of evidence that magnes is bad
23 for the drinking water; if they have one piece of
24 evidence that linked what they're concerned about to

L.A. REPORTING (312) 419-9292

31

1 what we're doing, then you might get to 406.203(e), but
2 if you do this, the record answers it. That is the only
3 excuse this agency can possibly have for putting any of
4 those six additional terms in this permit. And what
5 they have done is essentially make us comply with the
6 water quality regulations. We are stuck with Section
7 302.208, general use water quality regs. Those
8 regulations on their face say these water quality
9 standards protect aquatic life. It doesn't say they
10 protect all aquatic life except these three species of
11 fish and mussels. It says these standards do protect
12 aquatic life.

13 To answer Ms. Kezelis' question, when you look
14 at this board's rulemaking in proceeding R 836 back in
15 1984, the issue of magnes as an effluent from surface
16 coal mines was specifically addressed. This board
17 recognized in its final order, which was issued on June
18 29, 1984, which is one of the appendices to our brief,
19 that if you have magnes at 2.0 based upon studies done
20 in this state by a scientist that this board was
21 familiar with, it will not harm aquatic life. That
22 specific question was answered 17 years ago by this
23 board.

24 So, subtitle (d) -- there were also studies done

L.A. REPORTING (312) 419-9292

32

1 when subtitle (d) was adopted in that proceeding
2 generally that says sulfates aren't a problem for these
3 critters, fluorides aren't a problem, magnes isn't a
4 problem. There is nothing else in this effluent. Iron,
5 they treat it the same as magnes. So when we meet the
6 regular quality standards, as this permit requires us,
7 we have met 406.203(e). We also are required to
8 monitor, to check up specifically to see if those
9 presumptions are not true, to see if the water quality
10 standards somehow don't be protective enough. That is
11 an additional term that has been added.

12 In the face of all of that, Prairie Rivers has
13 produced not one piece of evidence at all, not in
14 comment, not in hearing, not in the brief, not in the
15 hearing we had in May, not one piece of evidence. How
16 in the world, whatever the burden of proof is, can it be
17 met with nothing? We don't have to reach whether it is
18 substantial evidence in this review. We don't have to
19 reach whether we have to prove something or they have to
20 prove something. We know from the statute, we know from
21 the Amron case, they have to prove something. And they
22 need evidence to prove things. You can't just sit and
23 say we're unhappy.

24 Yes, ma'am?

L.A. REPORTING (312) 419-9292

33

1 MS. KEZELIS: Should the board view the burden
2 of proof for the standard of review differently because
3 this is a third-party NPDES permit?

4 MR. BLANTON: Different from?

5 MS. KEZELIS: Any differently from situations
6 where the petitioner is the permit holder.

7 MR. BLANTON: No, I think the Amron answers
8 that straight up. I understand there was a question
9 when it was decided on whether or not you could even
10 have a third-party appeal and ultimately the court said
11 no, then the statute came in and said yes, but the

12 rational, I mean, you thought you had one back then and
13 you declared that the burdens of proof is the same. You
14 know, the case, your precedent says they must prove that
15 this permit as written will cause a violation of
16 Illinois law. That is the test, that is the standard
17 you've established.

18 Now, I think it is fair to look at the nature of
19 the proceedings because, frankly, we've been wrestling
20 with this from the beginning. We had a fight with the
21 AG's office about whether we could take the depositions.
22 We've had ongoing discussion about whether we can have
23 an evidentiary hearing at all, and, frankly, I think our
24 brief touches on what I now have thought, you know, sort

L.A. REPORTING (312) 419-9292

34

1 of focus as the day comes, here is what I think the
2 statute means when it says a hearing on the
3 administrative record, I don't think it means
4 administrative review or intra-agency review of the
5 administrative record. If it did, Mr. Ettinger would be
6 right. That is the test that if what you're doing is
7 administrative review of the record, but that is not the
8 language that the statute uses. The statute says a
9 hearing on the record and it doesn't say oral argument
10 on the record. If you have a hearing, American

11 jurisprudence, that means you're having an argument and
12 you have witnesses and the cases that are cited in the
13 Amicus briefs and in our briefs say this is the only
14 chance we as an applicant and, frankly, Prairie Rivers
15 as the public has a chance to exercise its due process
16 rights to cross-examine and otherwise test the evidence
17 on which the permit was done. How can I cross-examine
18 on nothing if this statute doesn't give me a chance to
19 put a witness in a chair and put him under oath? I'm
20 not getting a hearing and I'm not getting my
21 constitutional right. Now, I have come sadly to the
22 conclusion that I don't get anything I want. I think it
23 is clear that this is not a de nova proceeding, but a
24 hearing on the record I think means this, in the

L.A. REPORTING (312) 419-9292

35

1 responsiveness summary Environmental Protection Agency
2 says --

3 MRS. GUNN: Time.

4 MR. BLANTON: -- we have met your --

5 MS. KEZELIS: We'll let him answer the question.

6 MR. BLANTON: -- we believe that your concern
7 is not valid because, I think at the hearing, the agency
8 and I are entitled to put Mr. Frederick on the stand and
9 say, what did you mean by that and why, because the
10 point is in the record, the issue is in the record. You

11 cannot put everything this agency knows over the last 40
12 years in a responsive summary. You have to -- so if you
13 limit it, if somebody says, where did you get this idea
14 about instantaneous mixing, in the Advent study, I think
15 I'm entailed to have the author say, out of your
16 regulations. And that is what we did. 90 percent of
17 the evidentiary hearing you saw was focused entirely on
18 the agency record. It explained it. It challenged it.
19 It wrapped it up. And if that is the nature of the
20 hearing, then the burdens of proof makes sense. When
21 that hearing is done, they have to prove that this
22 permit violates the law based on the evidence, not just
23 that they're unhappy.

24 CHAIRMAN MANNING: To follow up on that, if

L.A. REPORTING (312) 419-9292

36

1 Prairie Rivers has any evidence that the permit will
2 violate the act, is it your opinion that it is
3 appropriately presented, the evidence is appropriately
4 presented at the board hearing on the agency
5 determination or is it more appropriately presented to
6 the agency during the review of the permit?

7 MR. BLANTON: I think that they're entitled,
8 they're clearly entitled to do it -- sorry, I may not
9 have heard it correctly, the hearing before the board --

10 CHAIRMAN MANNING: Right, the hearing before the
11 board, the decision of the agency, is it appropriate at
12 that time for Prairie Rivers to present evidence at the
13 board hearing that they believe that the permit as
14 issued by the agency would cause a violation of the act
15 and present whatever or is it more appropriate or only
16 appropriate that they present such evidence before the
17 agency prior to the agency's determination?

18 MR. BLANTON: I think they like we should be
19 safe by trying to put it up in the first place. I view
20 the public hearing before the agency as a consciousness
21 fact issue raising process primarily. If you know -- if
22 you know what is going on enough to put in evidence, you
23 probably should, but, yes, I think they were perfectly
24 entitled to call an expert witness who would say, Dean

L.A. REPORTING (312) 419-9292

37

1 Hofa(phonetic) of Advent knows nothing. The people that
2 reviewed this with the agency know nothing. Ms.
3 Blacher's(phonetic) letter is absolutely correct about
4 the first time. They brought in an expert to supply
5 this sort of thing that Mr. Lloyd Hemer(phonetic) talked
6 about, I think that would be perfectly fair game, so
7 long as we're talking about issues that were raised
8 before the agency and we're talking about basic factual
9 disputes on that agency record. I mean, if there is a

10 factual dispute that says, does it matter that we are
11 going to be 12 percent of the discharge for an unnamed
12 tributary but only half a percent for the Little
13 Vermilion River and what does that mean to the
14 Georgetown River supply, that -- Georgetown water
15 supply, that issue is on the table in public hearing
16 before the agency, you bet ya, I think they have just as
17 much right as we do to bring in witnesses.

18 CHAIRMAN MANNING: At the board hearing?

19 MR. BLANTON: At the board hearing. I
20 understand that leads to the conclusion that the board
21 winds up in this particular instance in large measure a
22 fact-finder. I understand that that is the necessary
23 implication, can't do anything about it. The only way I
24 can make sense out of what does a hearing on the record

L.A. REPORTING (312) 419-9292

38

1 mean.

2 MR. ETTINGER: As always in these affairs I have
3 a hundred things I'd like to react to but I think I
4 would like to answer the question the board posed first
5 of all. And the next one related directly to the
6 relationship between the subtitle (d) or 406 regs and
7 the 302 regulations.

8 And I think here the main thing to focus on here

9 is that the 302 regulations weren't passed by the board
10 for sport. They were basically designed in order to
11 establish protective conditions for NPDES permits and
12 protective conditions for aquatic life.

13 What the 406 rules, in our view do, is they do
14 not incorporate all of those rules verbatim, but they
15 do -- at least you have to look to those rules, to the
16 302, 303 rules. And if you're way off the track from
17 them, if you're doing things that totally violate them,
18 then I think you certainly have not set conditions
19 necessary under 406.203(e).

20 And I just want to note on there, Mr. Blanton
21 reads a lot of things into this statute with language
22 regarding presumptions and language in the board's
23 opinion that I didn't see there, so you just have to
24 read the statute for yourself.

L.A. REPORTING (312) 419-9292

39

1 In that opinion that the board did, setting up
2 the subtitle (d) regulations, the mining industry did
3 ask for a blank check. They did not want this (e)
4 language here and the board said no. So it was the
5 agency's obligation to write conditions on this permit,
6 which would assure and this is the language, necessary
7 to insure that there is no adverse effect on the
8 environment in and around the receiving stream. That is

9 the board's language as to what a mining permit should
10 do. So, no, every jot and tittle of the 203 -- I mean
11 303, 302 regs are not necessary here, but if you're
12 varying from them very much, as they are in this case by
13 using an entire tributary for mixing or are doing a
14 number of other things, which clearly would not be
15 allowed under the mixing rules, or they're doing a
16 number of things, which they're not looking at existing
17 conditions, there has been no biological monitoring of
18 the unnamed tributary, if you're varying very much from
19 those rules, you need to do a lot more than what was
20 done in this case. And you certainly need to explain
21 each and every one of them. And that is not what
22 happened here.

23 The other -- the last question, to get to the
24 questions again, on the wet testing, the last of the

L.A. REPORTING (312) 419-9292

40

1 board's, United States Environmental Protection Agency
2 in a document that was recognized by Black Beauty's
3 expert as definitive, United States Environmental
4 Protection Agency technical support document for water
5 quality bases toxics control, points out that wet
6 testing is one of three parts of an integrated approach
7 to water quality protection, biological monitor,

8 mechanical monitoring --

9 MR. BLANTON: I'm sorry. I hate to object.
10 Your order specifically said that you were not going to
11 consider things that were brought into this record after
12 this closed. This is the first time we have ever heard
13 anything about this. They had no evidence to support
14 wet testing in the hearing or before the agency's
15 hearing --

16 MR. ETTINGER: I'm referring to his evidence in
17 the hearing and this is a document which is a treatise.

18 The point remains, the point remains that wet
19 testing is recognized and it could be done in this case,
20 even as to an intermittent condition. What you do, they
21 say that in the permit there is a 3 to 1 dilution, it
22 doesn't take a genius to take the discharge from the
23 Riola Mine, which is nearby, or later from this mine,
24 put it in with a 3 to 1 dilution, and then do the whole

L.A. REPORTING (312) 419-9292

41

1 effluent toxicity testing on that basis, and this
2 certainly could be done.

3 Finally, they, as I said, a large number of
4 points that Mr. Blanton and Mr. Sofat made, but we've
5 got to close sometime, I want to make one major point,
6 which is that they say we have to prove that this will
7 case a violation. Well, that can't be the standard.

8 First of all, that would allow them to blow off all of
9 the procedural protections entirely, not hold a hearing
10 at all, because then at that point it would be our job
11 to prove that the permit, even though none of the proper
12 procedures were used, nonetheless caused the violation,
13 but then furthermore this cause language, it does
14 exactly what I said is wrong here. It's not the -- it's
15 not the job of the criminal, or the guy who is convicted
16 in a lower court to prove beyond a reasonable doubt that
17 he was innocent or even at that point to prove by a
18 preponderance of the evidence that he was innocent.
19 What he has to show is there wasn't evidence introduced
20 in the trial below by which it could be found beyond a
21 reasonable doubt that he was guilty. The question
22 before the board now is whether this record shows that
23 Black Beauty sustained its burden. And we can't. The
24 third-party obviously are not in a position to refute in

L.A. REPORTING (312) 419-9292

42

1 most cases a showing. For that matter, you know, a
2 permit never causes a violation of the law. They don't
3 have to discharge as much as they're permitted to do.
4 You have to look at what the permit allows and then
5 based on that, look at what that will do. That is part
6 of the problem with the Advent study. They based it on

7 what they presumed they're going to discharge but they
8 don't look at the permit limit. All through this we
9 have to look at the permit limits and assume that is
10 what they're going to discharge because that is what
11 they're allowed to do. They don't have to be as bad as
12 they're allowed to be but for the purposes of the third
13 party, for purposes of permit writing, we have to assume
14 that. We have to assume that in doing the
15 anti-degradation analysis. We have to do that in
16 analyzing the permit. So this notion that we have to
17 prove that they will -- that this will cause a violation
18 is -- just makes no sense at all and can't be the rule.

19 Mr. Blanton's suggestion that the word hearing
20 in this opens up the board proceeding to all of this new
21 evidence at the board level, I think he is just reading
22 too much in that word. There are all types of hearings.
23 This is a hearing in a sense. I don't think that you
24 necessarily read into the idea of the word hearing that

L.A. REPORTING (312) 419-9292

43

1 you're going to allow all of this new evidence in,
2 particularly when the statute specifically says that it
3 is going to be reviewed on the agency record.

4 And the board -- basically, what we need to do
5 and what we see as the whole process is, is that there
6 is all sorts of informal contacts, all sorts of informal

7 discussions between the permit applicant and the agency
8 before they write the draft permit. They can talk as
9 much as they want. That doesn't have to be on the
10 record. Then it is pencils down, boys. You've got to
11 come in with a draft permit, which is protective. And
12 then there is a 30 day limit for everybody's comments
13 and that includes the applicant. They're not allowed to
14 go back and rewrite the permit either. In this case
15 they say one of the reasons that Sauget was wrong was
16 that United States Environmental Protection Agency was
17 allowed to comment after 30 days. Black Beauty was
18 allowed to comment after 30 days in this permit. We
19 never got another look at that permit after the record
20 was closed but they did. So what we -- so Sauget is
21 precisely applicable to this case for all of the same
22 reasons.

23 So the way we visualize this process is, is that
24 the agency does its homework before for the public

L.A. REPORTING (312) 419-9292

44

1 hearing, the public comments. If the public points out
2 major things, then they'll correct it. If they have
3 been -- if the matter has been adequately aired in the
4 public hearing, then fine, you can issue a public -- a
5 final permit. If there are totally new changes to the

6 permit, and in this case, we simple disagree with Mr.
7 Sofat and the agency as to the -- the theory is changed.
8 The theory of -- the original theory of the permit was
9 basically that they were going to give them the subtitle
10 (d) limits, when it was pointed out to them that these
11 may not be adequate in this case, then put in some other
12 terms in some ways that we can determine it, in other
13 ways they strengthened the permit, but the places that
14 they tried to fix it, we think needed to have more
15 public participation, just like the homeowner needed
16 another crack to say, hey, a pop tent isn't good enough
17 for me. We had to have a chance to say, okay, you've
18 given me a pop tent that we didn't have before, but that
19 is not going to work. It is not adequate to protect one
20 of the highest quality streams in the midwest.

21 MS. KEZELIS: I have a question, back to your
22 public participation position, after issuance of the
23 draft permit and the final permit was issued, you
24 believe, your client believes that additional public

L.A. REPORTING (312) 419-9292

45

1 participation was warranted. Can you provide the board
2 with guidance with respect to what circumstances under
3 which additional public participation should be
4 warranted because the statute is solid? You will agree
5 there, will you not?

6 MR. ETTINGER: I would agree the statute doesn't
7 say anything and from nothing implies nothing.

8 MS. KEZELIS: So from where do you draw this?

9 MR. ETTINGER: Yes, the statute doesn't say --

10 MS. KEZELIS: And what post, what mile post or
11 guidemarks would you offer the board for guidance?

12 MR. ETTINGER: I would say, the statute and the
13 board's rule are silent as to when you might have a
14 second ruling, a second hearing.

15 What I did provide in my briefs was United
16 States Environmental Protection Agency rule, which I
17 think is a fairly good rule and gives a fairly good
18 guidance or some guidance as to what it is. It's always
19 going to be a judgment call, but if you've substantially
20 changed the permit, if you've tried to fix something by
21 substituting something else, you've got to give people a
22 chance to look and see whether that something else
23 really fixes the problem. If it is a relatively minor
24 change and if it is thoroughly aired in the agency

L.A. REPORTING (312) 419-9292

46

1 hearing where the people had a chance to look at it,
2 because it was in the public notice in the first place,
3 then that is fine, but the problem here, of course, is
4 we come into a public hearing, everybody is outraged

5 because it has none of these monitoring protections that
6 we're asking for. Then they come back after the public
7 hearing and they give us something, which on its face is
8 part of what we want, but it just doesn't do the trick.
9 And we needed to have another chance to fix the permit
10 and really take care of the problems that we pointed out
11 in the public hearing, but we were never given that
12 chance to go ahead and fix the permit and assure that it
13 really does what I believe U.S. Environmental Protection
14 Agency and IEPA were trying to do, which was to set
15 limits on the permit that would protect the Little
16 Vermilion River and the unnamed tributary, both of which
17 are very high quality streams.

18 MS. KEZELIS: No other questions. Thank you
19 very much for your participation today and for the
20 public for appearing and attending. Thank you very
21 much. The oral arguments is concluded.

22
23
24

L.A. REPORTING (312) 419-9292

47

1 STATE OF ILLINOIS)
)SS:
2 COUNTY OF DU PAGE)

3 I, ROSEMARIE LA MANTIA, being first duly sworn,
4 on oath says that she is a court reporter doing business

5 in the City of Chicago; that she reported in shorthand
6 the proceedings given at the taking of said hearing, and
7 that the foregoing is a true and correct transcript of
8 her shorthand notes so taken as aforesaid, and contains
9 all the proceedings given at said hearing.

10

11

12

ROSEMARIE LA MANTIA, CSR
License No. 84 - 2661

13

14

Subscribed and sworn to before me
this day of , 2001.

15

16

Notary Public

17

18

19

20

21

22

23

24