ORIGINAL

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May 24, 2001

Ms. Dorothy M. Gunn, Clerk of the Board
ILLINOIS POLLUTION CONTROL BOARD
100 West Randolph Street, Suite 11-500
James R. Thompson Center
Chicago, IL 60601

Re: Prairie Rivers Network v. Illinois EPA & Black Beauty Coal Co: PCB 01-112 (Appeal From IEPA Decision Granting NPDES Permit)

Dear Ms. Gunn:

Enclosed please find an original and nine copies of **Post-Hearing Memorandum by Vermilion Coal Company *(Amicus Curiae)*** and **Notice of Filing** said Post-Hearing Memorandum in the above cause.

Sincerely yours,

Fred L. Hubbard

FLH:jml
enc:Post-Hearing Memorandum (Original & 9 Copies
:Notice of Filing (Original & 9 Copies)

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PRAIRIE RIVERS NETWORK Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and BLACK BEAUTY COAL COMPANY Respondents.	)	PCB 01-112 (APPEAL FROM IEPA DECISION GRANTING NPDES PERMIT)

NOTICE OF FILING

PLEASE TAKE NOTICE that on this date, May 24, 2001, I filed with Ms. Dorothy M. Gunn, Clerk of the ILLINOIS POLLUTION CONTROL BOARD, James R. Thompson Center, 100 West Randolph Street, Suite #11-500, Chicago, IL 60601, the attached **POST-HEARING MEMORANDUM BY VERMILION COAL COMPANY *(AMICUS CURIAE)***, which document was filed by mail.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PRAIRIE RIVERS NETWORK	)	
	)	
Petitioner,	)	
	)	PCB 01-112
v.	)	(APPEAL FROM IEPA
	)	DECISION GRANTING
ILLINOIS ENVIRONMENTAL PROTECTION	)	NPDES PERMIT)
AGENCY and BLACK BEAUTY COAL	)	
COMPANY	)	
	)	
Respondents.	)	

POST-HEARING MEMORANDUM BY

VERMILION COAL COMPANY *(AMICUS CURIAE)*

VERMILION COAL COMPANY cites the following facts, history, legal authorities and arguments with the intent to aid the Illinois Pollution Control Board in resolving the issues before it in this matter pursuant to the Petition of Prairie Rivers Network.

References:

PRAIRIE RIVERS NETWORK: An Illinois not-for-profit corporation referred to in this Memorandum as PRAIRIE RIVERS. The corporation has among its stated purposes the conservation and preservation of waterways in the State of Illinois.

BLACK BEAUTY COAL COMPANY: Referred to in this Memorandum as BLACK BEAUTY. A corporation having its principal office in the State of Indiana and being authorized to do business in the State of Illinois, including the mining of coal. BLACK BEAUTY is the applicant for a series of permits to permit the operation of a coal mine in Vermilion County, Illinois, known as the VERMILION GROVE MINE. The NPDES Permit related to that mine is the subject of this proceeding.

VERMILION COAL COMPANY: A corporation authorized to do business in the State of Illinois which owns the coal subject to the Permit in this matter to be mined by BLACK BEAUTY. VERMILION COAL also owns one or more surface sites and has sought to intervene in this proceeding. That intervention was denied. In this Memorandum, VERMILION COAL COMPANY shall be referred to as VERMILION COAL.

ILLINOIS EPA: The ILLINOIS ENVIRONMENTAL PROTECTION AGENCY is the agency having the principal responsibility of investigating, reviewing, conducting hearings, receiving comments and, otherwise, issuing any permit pursuant to the NPDES rules. For the purpose of this Memorandum, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY is referred to as the AGENCY.

U. S. EPA: The national agency responsible for implementation of environmental laws, including the Clean Water Act and the Clean Air Act, is referred to in this Memorandum as U. S. EPA.

ILLINOIS POLLUTION CONTROL BOARD: The ILLINOIS POLLUTION CONTROL BOARD is referred to in this Memorandum as THE BOARD.

History:

BLACK BEAUTY filed an application for a surface coal mining and reclamation operations permit dated March 8, 2000, received by the AGENCY May 15, 2000 (R.616-632). The Permit includes 447.6 acres in Vermilion County, Illinois, near an unincorporated Village of Vermilion Grove. That Permit was addressed to the provisions of Subtitle D of Title 35 of the

Illinois Administrative Code, being the section entitled "Mine Related Water Pollution". An NPDES Draft Permit was issued. The Draft Permit appears as IEPA Exhibit 4(R.10-21 and R.759). Notices were given. Public hearing was held and comments were received by the AGENCY. The issues raised by PRAIRIE RIVERS in their petition in this matter were set forth in a letter dated October 27, 2000, directed to the AGENCY designated as IEPA Exhibit 59(R.388-393). Substantial economic benefit and need was shown (R.320 and R.933). On October 30, 2000, the U. S. EPA communicated an objection to the Permit (R.931). On December 22, 2000, the U. S. EPA sent a letter to the AGENCY withdrawing its October 30, 2000, objection conditioned on a Final Permit being identical to a draft sent December 12, 2000 (R.942-951). The Final Permit was issued in the form approved by the U. S. EPA and PRAIRIE RIVERS appealed that decision to THE BOARD. Throughout this process, numerous comments, correspondence, reports and documents of every kind and nature were received by the AGENCY and made a part of the record, consisting of approximately one thousand pages. After PRAIRIE RIVER'S appeal, a hearing was scheduled. Numerous depositions were taken. Two days of testimony were received into evidence, along with substantial evidentiary depositions and exhibits.

Standing:

The Environmental Protection Act provides, with regard to an appeal of this type that a third party may appeal a determination by the AGENCY (EPA) with a petition pursuant to Section 40(e)(1) and (2). The petition must be filed within thirty-five (35) days of the date of the AGENCY'S decision and must include:

"A. a demonstration that the petitioner raised the issues contained within the petition during the public notice period or during the public hearing on the NPDES permit application, if a public hearing was held; and

B. A demonstration that the petitioner is so situated as to be affected by the permitted facility."

The language "so situated as to be affected by the permitted facility" has not been determined in any court. While several of the members of PRAIRIE RIVERS would appear to have individual interests that might be affected in that their residences are near the mine site, some of them are connected to the Georgetown public water supply, and some

of them have testified with regard to recreational use of the Little Vermilion River, there is no testimony that PRAIRIE RIVERS itself, as a corporation, is so situated as to be affected by the permitted facility. PRAIRIE RIVERS, as appears from the record, is headquartered in Champaign, Illinois, which is not within the watershed of the Little Vermilion River as appears from ordinary maps, including those admitted into evidence in this matter. There is no evidence that PRAIRIE RIVERS is or was created by a group of affected citizens. Post cards received in this case by THE BOARD indicate that PRAIRIE RIVERS members reside at all boundaries of the state. The only way in which PRAIRIE RIVERS is affected by the permitted facility is the same way that all concerned citizens are affected by any mine and its attendant operations. If the Legislature intended that the concern most of us have in a desire for a clean environment, including water and air, is sufficient to permit an appeal, the language should probably have been written as "interested party". To interpret the word "affected" as suggested by PRAIRIE RIVERS is to permit every person, firm or entity to seek an appeal. It is suggested that the Legislature intended something more than a general public interest or interest in clean air and water and endangered species, particularly, as an interest that was "affected"

sufficient to permit an appeal. To define as being "affected" as liberally as would be required to permit the PRAIRIE RIVERS' petition could inundate the AGENCY and THE BOARD with numerous and conflicting appeals.

Draft Permit.

The application (R.616-632) and the draft permit (R.759-765) that were issued were both filed and issued pursuant to 35 Ill. Adm. Code Part 406 in addition to other parts of the Code. Part 406 of Title 35 Subtitle D includes the rules and regulations promulgated by THE BOARD with regard to mine waste effluent and water quality standards. VERMILION COAL contends that Subtitle D is the law governing the issuance of the permit. A permit issued within the standards set forth in Part 406 would appear to comply with the applicable law, including rules and regulations. In this case, because of concerns raised by other governmental agencies, departments, commissions and concerns raised by the public and other persons commenting, including PRAIRIE RIVERS, the AGENCY modified the Final Permit in a more restrictive way to decrease certain discharges and to impose special conditions developed in conjunction with the U. S. EPA (R.942, R.972). The Final Permit (R.972 at 973) still references 35 Ill. Adm. Code Part 406. The fact that more

restrictive language from other parts of Title 35 was used in the Final Permit does not mean that Part 406 does not continue to apply. Because standards may have been used from Subtitle C does not mean that all provisions from that Subtitle must be applied to the Final Permit.

Biological or Toxicity Monitoring.

There is nothing in 35 Ill. Adm. Code SubTitle D that requires any prescribed biological or toxicity monitoring except that provided by Section 406.102. That monitoring is included within the Permit. In urging requirement for biological or toxicity monitoring, PRAIRIE RIVERS is attempting to impose requirements not contained within the Administrative Code as adopted by THE BOARD. More particularly, there is no scientific evidence that such testing would improve water quality.

The Record Supports The Final Permit as Issued.

PRAIRIE RIVERS has not introduced any evidence in contradiction of any point in the record on which the Permit relies. Evidence in support of a petition is well-documented, such as statements of economic and social impact (R.612 and R.320), the Stormwater Mixing Zone Evaluation (R.981 and R.596) and the AGENCY'S Public Hearing

Responsiveness Summary (R.555). The petition raises drafting questions, factual interpretation questions, and whether or not analyses were complete or adequate. PRAIRIE RIVERS introduced no evidence as to any proper mixing zone.

It introduced no evidence as to proper assumptions if any assumptions were wrong. It assumed there would be violations without any evidence to that effect. If the anti-degradation analysis was incomplete and inadequate, there was no evidence showing how it was incomplete or inadequate and what a complete and adequate analysis might have revealed. There is no evidence as to the exacerbation of water quality for the water supply of the City of Georgetown. The record includes many statements of objection and raises numerous questions.

The Hearing in May, 2001, added little to PRAIRIE RIVER'S evidence. The testimony in support of the PRAIRIE RIVERS petition consisted of testimony by Mr. Moore and testimony by Rosa Ellis. Mr. Moore's testimony was to the effect that other permits in other jurisdictions have, from time to time, had different requirements or conditions and that he thinks that adequate testing and supervision is important. His testimony did not show any expertise on his part with

regard to proper mixing zones, proper analyses and evaluation. There has been no testimony whatsoever with regard to an adverse impact on the water supply for the City of Georgetown other than guess and conjecture. The only way Mr. Moore's testimony could be construed as commenting on the impact on the water supply of the City of Georgetown is that he discussed water quality generally (Testimony Transcript R.12-43). The other witness on behalf of PRAIRIE RIVERS was Rosa Ellis whose testimony was quite brief and consisted of a comment that she saw frothy-looking water on April 5th and April 11th (2001). There is no issue or evidence that suggests this facility is not of substantial economic benefit to the area and a source of coal for needed electrical generation.

Burden of Proof:

PRAIRIE RIVERS concedes that it has the burden of proof. (Prairie Rivers Brief 212, 415 ILCS 5/40(e)(3). PRAIRIE RIVERS' attempts to pass that burden of proof to BLACK BEAUTY by asserting that the underlying record and regulations do not support the Permit. PRAIRIE RIVERS cites no authority that the burden of proof shifts. The Permit was applied for under standards set forth in 35 Ill. Adm. Code, Subtitle D, the applicable regulatory section.

The Draft Permit was issued subject to 35 Ill. Adm. Code 406.106, 406.202 and with specific reference to 406.203. The Final Permit had additional modifications and conditions incorporating further protective measures for the Little Vermilion River, its tributaries, and flora and fauna in the area. While there are conflicting positions taken by the witnesses and advocates, the Advent Report (R.981) and the AGENCY'S investigations, expertise, experiences and analyses as reflected in the Final Permit (R.968), Responsiveness Summary (R.555) and approved by U. S. EPA (R.942), are all substantial evidence of a supporting record. The Permit was clearly issued within the evidence and in compliance with the applicable regulations.

Mixing Zone.

PRAIRIE RIVERS contends that no adequately defined mixing zone is described in the Permit and, therefore, violates 35 Ill. Adm. Code 302.102(D)(6) and (10). The point is not well taken in the following respects. Discharge is to be extremely intermittent only under conditions of more than three to one dilution and in an extremely rare rainfall event. For that reason, the zone of passage is available a majority of the time completely unimpeded. 35 Ill. Adm. Code 302.102(b)(6) does not state that the zone of passage

must be allowed one hundred percent of the time. 35 Ill. Adm. Code 302.102(b)(10) is cited for the proposition that the single outfall would be used totally for the mixing. In this case, a reference to a standard topographical map, of which numerous copies are in the record (R.997, R.760; Black Beauty Coal Exhibit from Hearing 43; Black Beauty Coal Hearing Exhibit 49; and Black Beauty Coal Hearing Exhibit 62 (denied admission, but attached to VERMILION COAL's Comment), all show that the unnamed tributary designated 003 extends approximately three miles from its opening into the Little Vermilion River and that the point of discharge, when discharge occurs, is approximately one-half mile from the mouth of the tributary. Accordingly, it would appear that the tributary is not totally used for mixing as to its volume and that it is not totally used for mixing on a time basis. It is not totally used for mixing since at least a three to one ratio is required for discharge. The Permit, therefore, does not violate the terms and provisions of 35 Ill. Adm. Code 302.102(b).

Antidegradation.

The AGENCY wrote two non-degradation analyses (R.710, R.766). While these were criticized, there was no counter evidence introduced as to any specific flaws in the analyses

with accompanying evidence as to what a correct analysis would have been. The Advent Report (R.981) is not evidence that the first two analyses were inadequate or incorrect. The fact that BLACK BEAUTY's analysis corroborated the AGENCY'S analyses, or supplemented them, is evidence of a sufficient record to support the Permit. PRAIRIE RIVERS then proceeds to argue that pending changes in Illinois antidegradation procedures should be considered. The law is well settled that changes in substance should be prospective only and not take effect until they are adopted. Orlicki vs. McCarthy, 4 Ill.2d 342, 122 N.E.2d 513 (1954).

Laws, rules, and regulations restricting common law rights should be construed consistently and with a clear intent according to generally accepted and consistent meanings. Moran v. Katsinas, 16 Ill.2d 169, 157 N.E.2d 38 (1959). Laws that impose penalties such as violations of the Clean Water Act should be definite and certain so that persons may know what liability that they may be expected to meet. To suggest that a Permit should be issued based upon regulations that have not yet been adopted for a particular use is contrary to the principle that laws should be applied fairly and equally. It is contrary to the principle that the public ought to know and understand the terms and

conditions that they are expected to meet.

Monitoring:

The AGENCY, using its skill and expertise, has imposed monitoring standards. PRAIRIE RIVERS requests different monitoring standards. Under the terms and conditions of the Permit, discharge is only to occur during heavy rain activity so as to meet the three to one mixing ratio. There is an additional provision to permit discharge for a precipitation event in a twenty-four hour period greater than the ten-year twenty-four hour precipitation event, which is considered to be 4.26 inches. Any monitoring required under applicable regulations is found in 35 Ill. Adm. Code 406.102. PRAIRIE RIVERS cites no authority requiring further and additional monitoring and does not suggest what that monitoring might be other than to grant it further authority to review and continue to review each and every draft and modification in the Permit. Unlike the Sauget case, **Village of Sauget v. Illinois Pollution Control Board, 207 Ill.App.3d 974, 566 N.E.2d 724, 152 Ill.Dec. 847 (5th Dist. 1990)**, the appellant in this case has participated in the hearings, the comment process, and now in the appeal. It can hardly be found that the Hearing in this case was inadequate with the substantial volume, time

involved, comment period, and the extensive record. PRAIRIE RIVERS made its positions known prior to the issuance of the Final Permit. The fact that PRAIRIE RIVERS is even permitted to participate in a third party appeal is predicated on the fact that it did, indeed, raise these issues prior to the issuance of the Permit. To suggest that there should be further hearings and comment periods after the AGENCY has acted on all of the evidence, studies, testimony, documents and arguments is to suggest a never-ending process until a Permit is issued in language acceptable to all of the participants, or an impasse declared. There are no rules regarding an impasse. The permit process would totally break down if the applicant and each and every person, firm or entity "affected by the permitted facility" had the opportunity to have further hearings and further input as to the language adopted. It may be suggested that only major differences or changes in the permit should be so considered for further hearing, comment or input. One person's major is another person's minor and vice-versa. The skill and expertise of the AGENCY personnel must be given some credibility. PRAIRIE RIVERS raised all of the questions considered by the Final Permit and they, undoubtedly, were considered by the AGENCY. PRAIRIE RIVERS had its hearing participation under the

Sauget case, **Village of Sauget v. Illinois Pollution Control Board, 207 Ill.App.3d 974, 566 N.E.2d 724 (5th Dist. 1990**. The result is the Permit as issued.

For the reasons set forth in this Memorandum of Law, VERMILION COAL suggests that the Permit was properly issued in final form and that THE BOARD should enter a finding to that effect.

RESPECTFULLY SUBMITTED,

VERMILION COAL COMPANY

BY 

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