

## CLIENT ALERT

### CITIZEN SUIT WATCH: Supreme Court of Illinois Rejects Attack on Mining Permit Reclamation Plan

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On February 2, 2012, the Supreme Court of Illinois held that a plaintiff organization could not bring a citizen suit under the state's Surface Coal Mining Land Conservation and Reclamation Act ("Mining Act") or the Water Use Act to challenge site conditions or activities that conformed to the terms of a Mining Act permit and reclamation plan approved several years prior to the filing of the suit by the Illinois Department of Natural Resources ("IDNR"). The case, *Citizens Opposing Pollution v. ExxonMobil Coal U.S.A.*, involved surface and underground coal mining operations in Clinton County, Illinois. Because the plaintiff was not challenging the permit holder's compliance with any permit terms, but instead was alleging that the permit terms do not comply with the Mining Act, the Court held that the citizen suit amounted to an untimely collateral attack on the permit that was barred under the Mining Act.

#### Factual Background

The plaintiff, Citizens Opposing Pollution ("COP"), filed a citizen suit in an Illinois circuit court against ExxonMobil Coal U.S.A. ("Exxon") and the Illinois Environmental Protection Agency ("IEPA") challenging activities relating to coal mine reclamation work. Exxon conducted operations at the site pursuant to two separate IDNR permits that, in accordance with statutory requirements, contained reclamation plans that met IDNR's requirements. IDNR originally issued the permits to Exxon in 1984 and 1986. Many years after their issuance, IDNR approved a number of revisions to both permits. Most pertinently, in 2004, IDNR approved revisions to the permits following the IEPA's issuance of a violation notice to Exxon in 1999. Specifically, IEPA had alleged that Exxon's mining waste disposal areas violated several applicable groundwater quality standards. Exxon and IEPA worked together to develop a corrective action plan that included a groundwater management zone and set forth treatment, monitoring, and reporting requirements. That corrective action plan was incorporated into the IDNR permits in 2004 following a public hearing and comment period. IDNR also approved an incidental boundary revision to one of the permits in 2006.

Before COP filed its citizen suit, its founder (Don Langenhorst) had sought administrative review of both the 2004 and 2006 IDNR permit revisions. Neither challenge was sustained, but he chose not to seek judicial review of either decision. In addition, he filed a citizen complaint with the U.S. Department of the Interior's Office of Surface Mining and Reclamation and Enforcement in 2005, which was ultimately unsuccessful as well.

In August 2008, COP filed this citizen suit in an Illinois circuit court, alleging eighteen counts against Exxon, IEPA, and IDNR. After the dismissal of that complaint, COP filed a six-count amended complaint against Exxon and IEPA. In the amended complaint, COP alleged a number of violations of the Mining Act as well as a violation of the Water Use Act. In essence, COP sought to compel removal of two waste disposal areas at Exxon's site and disposal of the waste off site. COP also sought to compel immediate revocation of the IEPA-approved groundwater management zone and a declaratory judgment that any future management zone developed by IEPA must comply with the Mining Act. Finally, COP sought an order requiring Exxon to develop and implement a plan limiting groundwater extraction at the site.

The trial court dismissed the amended complaint in its entirety with prejudice, reasoning that: (i) IDNR approved the permits and reclamation plan only after finding that all statutory requirements of the Mining Act were satisfied; (ii) COP conceded that it had no evidence of any violations of the permit terms or the reclamation plan; (iii) the statutory deadline to challenge the permit and reclamation plan had expired and thus, COP could not use the Mining Act's citizen suit provision to circumvent that deadline; and (iv) the Water Use Act did not provide for a private right of action. The appellate court reversed on five of the six counts, finding that the citizen suit could proceed because COP was alleging ongoing violations of the Mining Act. As to the sixth count, the appellate court affirmed the dismissal to the extent that count constituted a collateral attack on previously issued permits. But, the appellate court modified that dismissal to be without prejudice.

### **The Illinois Supreme Court's Opinion**

The Supreme Court of Illinois affirmed the trial court's dismissal of COP's amended complaint and reversed the appellate court's decision. The Court examined both the citizen suit and the administrative review provisions of the Mining Act. Reading these two provisions together, the Court found that the administrative appeal process, which COP did not pursue to its conclusion, is the exclusive means to obtain circuit court review of the terms of IDNR Mining Act permits. By contrast, the Court found that claims challenging unpermitted activity or seeking to enforce the provisions of a permit can be brought in a citizen suit. The Court emphasized that the administrative review provision provides that *all* final administrative permit decisions "*shall* be subject to judicial review pursuant to the [Illinois] Administrative Review Law." In order for that provision to exist harmoniously with the citizen suit provision, the administrative appeal process must be the sole mechanism to obtain judicial review of permit terms. In the Court's view, COP's interpretation of these statutory provisions would "eviscerate" the term "shall" and "mak[e] adherence to the Administrative Review Law entirely optional and nonbinding in the case of a final permit determination by IDNR."

The Court clarified that COP was not challenging Exxon's compliance with any permit terms but instead was arguing that those terms did not comply with the Mining Act. But, those were claims that could have and should have been brought at the time of permit issuance. Indeed, because Langenhorst failed to seek timely judicial review of those permit terms following his failed administrative appeals in 2004 and 2006, the Court held that the citizen group he founded in 2008 could not now do so under the guise of a citizen suit. According to the Court, IDNR's permitting authority "would be undermined if we were to interpret [the citizen suit provision] as allowing a party to file an original cause of action in the circuit court challenging the terms of a mining permit" several years after the permit approval. Moreover, "[a] contrary construction of the statute would also impact legitimate reliance by a permittee, and create significant uncertainty by allowing the terms of a permit to be reopened and reconsidered at any time, even years after a reclamation project has been completed in accordance with a permit."

The Court made it clear that there are ways that a party can object to IDNR permit decisions and then seek judicial review. It explained, however, that such objections must be brought in a timely manner through the prescribed administrative review process, *not* through a citizen suit action. The Court further emphasized that IDNR must conduct periodic permit reviews and may decide that permits must be revised in order to ensure compliance with all Mining Act requirements. Moreover, if IDNR obtains information that it "improvidently" issued a permit, it must review the circumstances of the permit issuance and take remedial action, if necessary. Thus, there are proper mechanisms under the statute for a citizen plaintiff to obtain its day in court.

As for COP's Water Use Act claim, the Court determined that COP was essentially seeking the same injunctive relief under that claim (*i.e.*, removal of the waste disposal areas from the site) that the Court deemed would amount to an untimely collateral attack on Exxon's Mining Act permit. The Court concluded that the Water Use Act does not provide for a private right of action to challenge conduct that is specifically mandated by the terms of a Mining Act permit.

### **Implications**

As a result of this decision, citizen groups may begin erring on the side of caution and challenging more permits at the time of issuance given the Supreme Court of Illinois's emphasis that such a challenge is their exclusive means of obtaining judicial review of permit terms under the Mining Act. On the other hand, such groups may not be deterred by this decision from filing citizen suits, as they may simply attempt to characterize their claims as challenging unpermitted activities as opposed to challenging the terms of a permit as being contrary to the Mining Act.

The decision is helpful to mining operators and state regulatory authorities seeking to preserve certainty in reclamation plans adopted as part of state-issued permits. In states beyond Illinois with analogous regulatory schemes over mining permitting, the decision may have persuasive precedential impact.

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