

BEFORE THE RECLAMATION COMMISSION

SIDWELL MATERIALS, INC.,	:	Case No. RC-13-012
	:	
Appellant,	:	Review of Chief's Order 7355 -
	:	Modified; Permit D-2261
-vs-	:	
	:	
	:	
DIVISION OF MINERAL RESOURCES	:	<u>ORDER OF THE</u>
MANAGEMENT,	:	<u>COMMISSION DENYING</u>
	:	<u>APPELLANT'S MOTION</u>
	:	<u>FOR SUMMARY JUDGMENT</u>
Appellee.	:	

Appearances: Scott Eickelberger, Ryan Linn, Counsel for Appellant Sidwell Materials, Inc.; Brian Ball, Kristina Tonn, Assistant Attorneys General, Counsel for Appellee Division of Mineral Resources Management.

On December 16, 2013, Appellant Sidwell Materials, Inc. ["Sidwell"] filed with the Reclamation Commission a notice of appeal from modified Chief's Order 7355. This Chief's order alleges that mining operations, conducted by Sidwell pursuant to coal mining and reclamation permit D-2261, have proximately caused a diminution in certain agricultural / recreational water supplies located on the Brian McGary property. The Chief's issuance of modified Order 7355 was based upon reports generated by two Division hydrogeologists (the January 15, 2013 report of Hydrogeologist Laura Bibey and the September 13, 2013 report of Supervising Hydrogeologist and Remining Coordinator Cheryl Socotch).

Modified Chief's Order 7355 required Sidwell to:

1. Provide a temporary agricultural source of water to livestock located on the McGary property,
2. Submit, within 45 days, a written plan detailing measures that Sidwell will take to replace the McGary water supplies, and
3. Implement, within 180 days of Division approval, a water replacement plan and establish permanent water replacement on the McGary property.

Accompanying Sidwell's notice of appeal was a *Request for Temporary Relief*. On January 8, 2014, a site view and hearing on Temporary Relief was conducted. On January 14, 2014, the Commission Chair **granted** Sidwell Temporary Relief from the requirement to submit a written water replacement plan for the McGary water supplies within 45 days of Sidwell's receipt of modified Chief's Order 7355. Temporary relief was issued for a limited period, and will expire on **June 4, 2014**. Temporary Relief was **conditioned** upon Sidwell's continued provision of a temporary agricultural water supply for the McGary livestock.

This matter is scheduled for merit hearing on May 7, 2014.

On March 3, 2014, Sidwell filed a *Motion for Summary Judgment*, asking the Commission to vacate modified Chief's Order 7355, and to remand this matter to the Chief for further investigation. The Division responded to Sidwell's motion on March 17, 2014, and Sidwell replied on March 24, 2014.

The Commission's procedural rules do not specifically provide for the filing of motions for summary judgment. However, Ohio Civil Rule 56 allows for such motions, and provides guidance in the Commission's review of summary judgment motions. To receive summary judgment in its favor, Sidwell must establish:

1. That there is no genuine issue as to any material fact;
2. That Sidwell is entitled to judgment as a matter of law; and
3. That reasonable minds can come to but one conclusion, and – even construing any evidence most strongly in favor of the Division – that conclusion would be in Sidwell's favor.

Summary judgment is a procedural device to terminate litigation, and, thus, it must be awarded with caution and with any doubts resolved in the non-movant's favor. *Osborne v. Lyles* (1992) 63 Ohio St.3d 326.

Through its Motion for Summary Judgment, Sidwell argues that the Division's investigation of the McGary water loss complaint was flawed or unsubstantiated, and that the Division has not established a clear hydrologic connection between Sidwell's mining and the loss of water in the McGary ponds. Specifically, Sidwell argues:

There is not substantial evidence or principled reasoning to conclude that any diminution of McGary's ponds is the proximate result or proximately caused by Sidwell's operations. More importantly, the little evidence proffered by the State is rooted in an unclear methodology resulting in unclear results. From this, it is impossible for Sidwell to develop an effective, efficient, and working remediation plan. The Chief's Order should be vacated and remanded to allow further proceedings. The parties need to conduct additional testing to determine if there is a definitive connection to Sidwell's operations, where that connection originates, what is causing the alleged diminution, and how it can be fixed. The Chief's Order, as it presently stands, is not based on substantial evidence that addresses these fundamental concerns.

(See Sidwell's Motion for Summary Judgment, page 7.) Sidwell maintains that the issuance of modified Chief's Order 7355 was premature, unsupported and unsubstantiated. Notably, the question of whether modified Chief's Order 7355 was properly issued, and whether it is supported by evidence, are precisely the issues that this Commission would address at a merit hearing.

The Division argues that Sidwell's desire for additional information, or further investigation, does not establish entitlement to summary judgment. Attached to the Division's filing on summary judgment is an affidavit of Division Hydrogeologist Cheryl Socotch. Ms. Socotch is familiar with the McGary water loss complaint, and produced one of the reports relied upon by the Chief in his issuance of modified Chief's Order 7355. In her affidavit, Ms. Socotch states:

13. Based on these and other facts, it is my conclusion that the mining activities of Sidwell Industries caused the diminution in supply to Mr. McGary's recreational and agricultural water supply in violation of R.C. 1513.162 and Ohio Adm. 1501:13-9-04. Accordingly, the Chief of the Division acted lawfully in issuing Chief's Order 7355 to Sidwell.

(See Affidavit of Cheryl Socotch attached to Division's Memorandum in Opposition to Sidwell's Motion for Summary Judgment.)

Under Ohio law, Sidwell has a duty to preserve the hydrologic balance on permitted areas and on adjacent off-site areas. (*See O.R.C. §1513.16(A)(10).*) An operator must prevent material damage to the hydrologic balance and must ensure that any affected water supplies are appropriately restored or replaced. (*See O.R.C. §1513.162; O.A.C. §1501:13-9-04(P).*) Indeed, Ohio law places an absolute obligation upon "[t]he operator of a coal mining operation [to] replace [a] water supply ... where the supply has been affected by contamination, diminution, or interruption proximately resulting from [a] coal mining operation ...". (*See O.R.C. §1513.162.*)

Modified Chief's Order 7355, and the Socotch Affidavit, conclude that Sidwell's mining operations (which came to within 500 feet of the McGary property) caused the drop in pond elevations identified by Mr. McGary. However, Sidwell disputes that a hydrologic connection has been established between its operations and the water levels in the McGary ponds. The pleadings, and the parties' filings, unequivocally set forth material factual disputes regarding the McGary water loss complaint. Thus, there exists in this appeal a genuine dispute regarding the material facts.

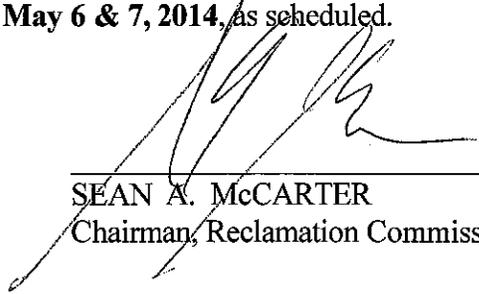
In its request for summary judgment, Sidwell cautions the Commission not to "defer to *post hoc* rationales" in its review of modified Chief's Order 7355. (*See* Sidwell's Motion for Summary Judgment, page 6, *citing Nichols v. Unum Life Ins. Co. of Am.*, 2005 U.S. Dist. LEXIS 37017 (S.D. Ohio July 18, 2005).) Sidwell fails to recognize that the Commission's jurisdiction is *de novo* in nature. The Commission's review is not limited to a "record" developed before the Division Chief. Thus, the Commission may hear and consider information that was not available to, or considered by, the Chief at that time of his issuance of the order under appeal. At hearing, the parties may develop facts that were not considered by the Chief, but which support or refute the Chief's ultimate findings.

Having reviewed and considered the filings of the parties, the Commission **FINDS** that significant factual issues remain in this appeal, and that Appellant Sidwell has not demonstrated an entitlement to summary judgment in its favor as a matter of law.

ORDER

Wherefore, Appellant's Motion for Summary Judgment is hereby **DENIED**, and this matter shall proceed to hearing upon its merits on **May 6 & 7, 2014**, as scheduled.

4/16/14
DATE



SEAN A. McCARTER
Chairman, Reclamation Commission

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