THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

MARIE SMITH, ET. AL.

V. 14-CH-711

THE ILLINOIS DEPARTMENT OF NATURAL RESOURCES, ET. AL.

ORDER

The court heard plaintiffs' request for a preliminary injunction. Following argument, the court took the request under advisement to review the pleadings and authorities cited by counsel.

Summary of Holding:

The Court heard only whether to issue a preliminary injunction to prevent the rules adopted by the IDNR under the Hydraulic Fracturing Regulatory Act (225 ILCS 732/1-1) from going into effect. The plaintiffs had to establish they have 1) a clearly ascertainable right in need of protection, 2) irreparable injury unless the status quo is maintained by an injunction, 3) that they have no adequate remedy at law, and 4) a likelihood of success on the merits. The court does not decide the underlying lawsuit (which claims the regulations are invalid) at this stage. The plaintiffs did not establish irreparable injury. Failure to establish any of the elements means the preliminary injunction must be denied. The court therefore denies the Plaintiffs' Motion for Preliminary Relief.

Background:

The Hydraulic Fracturing Regulatory Act (HFRA) was signed into law in June 2013 (225 ILCS 732/1-1 et. seq.). It covers oil and gas operations. HFRA required the Illinois Department of Natural Resources (IDNR) to adopt rules to accomplish the purposes of the Act before HFRA permits could be issued. 225 ILCS 732/1-130.

The Illinois Administrative Procedure Act (5 ILCS 100/5) controls the process by which agencies adopt rules.

The First Notice of Proposed Rules was issued on November 15, 2013 and scheduled public hearings for November 26, 2013 in Chicago and December 3, 2013 in Ina. Those hearings occurred. Additional hearings were scheduled for December 5,

2013 in Effingham, December 17 in Decatur and December 19 in Carbondale. The Effingham hearing was changed to December 16. The three additional hearings occurred. Following the series of five public hearings and receipt of 38,000 public comments and some 43,000 pages of written comments, IDNR sent a Second Notice of revised proposed rules to the Joint Committee on Administrative Rules (JCAR), the legislative committee that has authority over the adoption of Rules. Included in that notice was a 361 page response to the public comments and a listing of over 200 sources IDNR reviewed in preparing the revised proposed rules.

The court understands that the rules were adopted by IDNR and filed with the Secretary of State on November 14, 2014, prior to the hearing on the Motion for Preliminary Injunction.

The Plaintiffs are residents of Illinois and anticipate that hydraulic fracturing will occur in their locales. They have filed a Complaint for Declaratory Judgment and Preliminary and Permanent Injunction challenging the process followed by IDNR when it adopted rules. Under the APA, failure to follow the correct procedures may render the rules invalid.

Plaintiffs allege that IDNR failed to follow the required statutory rulemaking procedures and therefore seek an order that the rules are invalid. Plaintiffs seek a preliminary injunction based upon those allegations. They allege a failure to follow Section 5-40 of the Act (5 ILCS 100/5-40). Plaintiffs claim that the finalization of the Proposed Rules causes irreparable harm to them and their rights.

Plaintiffs underlying complaint states in Count I that IDNR failed to comply with the procedural requirements of 5 ILCS 100/5-60 by failing to publish a regulatory agenda in the Illinois Register. Count II alleges a failure to comply with 5 ILCS 100/5-40 and Section 825.140 of the Illinois Administrative Code through inadequate notice of the hearing dates. Count III alleges IDNR violated 5 ILCS 100/5-40 by failing to have an agency official answer questions at the public hearings. Count IV alleges failure to comply with 5 ILCS 100/5-40 due to some citizens being denied admittance to the hearings and that some citizens were not allowed to speak in the hearings. Count V alleges that a failure to list the use of studies, reports or data in the First Notice violated 5/ILCS 100/5-40(b). Count VI alleges that the IDNA provided false statements to the public in violation of 5 ILCS 100/5-75. Count VII alleges a violation of the spirit and purpose of the Administrative Procedure Act by not publishing the transcript of the public hearings on IDNR's website until August 29, 2014. Count VIII alleges that the cumulative violations deprived the plaintiffs of their rights under the APA and therefore are a violation of IDNR's rulemaking duties under HFRA. Count IX alleges that IDNR

violated section 1-97 of HRFA by failing to submit a report to the General Assembly by February 1, 2014. Each count asks the court to declare that the rules are invalid and to prohibit IDNR and the Secretary of State from adopting and publishing the rules.

Preliminary Injunction:

Plaintiffs clearly stated that this request for preliminary injunction is based solely upon their allegations that mandatory procedural requirements governing how an agency adopts rules were violated. The court accepts the facts pleaded in the complaint as true for the purposes of a hearing on a request for preliminary injunction. The court also took judicial notice of regulations, public acts, and items printed on the Illinois Register. Plaintiffs assert that the issues before the court are primarily issues of law.

One issue raised is the meaning of Section 5-6 of the Illinois Administrative Procedure Act (5 ILCS 100/5-6). It provides that all rulemaking authority is conditioned on rules being adopted in accordance with the APA. Any rule not adopted through those procedures is "unauthorized". (See paragraph 21 of Plaintiffs' complaint). Section 5-35 allows a proceeding to contest any rule on the ground of non-compliance filed within two years of the adoption of the rule.

As plaintiffs have challenged the rules, plaintiffs ask the court to enjoin publishing the rules because it would be confusing to the public to allow applicants to file for permits if the rules are not valid.

One of the most important, if not the most important, aspect of the APA rules for validity is the public notice and comment requirements. Unless a rule conforms to the public notice and comment requirement of the Administrative Procedure Act, it is not valid or effective against any person or party and may not be invoked by an administrative agency for any purpose." *County of Du Page v. Illinois Labor Relations Bd., App. 2 Dist.2005, 294 Ill.Dec. 297, 358 Ill.App.3d 174, 830 N.E.2d 709, supplemented 296 Ill.Dec. 171, 359 Ill.App.3d 577, 834 N.E.2d 976, appeal denied 300 Ill.Dec. 364, 217 Ill.2d 560, 844 N.E.2d 36, appeal denied 298 Ill.Dec. 375, 216 Ill.2d 683, 839 N.E.2d 1022.* "Unless an administrative agency rule conforms to the public notice and comment requirements, it is not valid or effective against any person or party and may not be invoked by an administrative agency for any purpose." *Champaign-Urbana Public Health Dist. v. Illinois Labor Relations Bd., App. 4 Dist.2004, 290 Ill.Dec. 379, 354 Ill.App.3d 482, 821 N.E.2d 691, appeal denied 295 Ill.Dec. 519, 215 Ill.2d 594, 833 N.E.2d 1, appeal denied 298 Ill.Dec. 375, 216 Ill.2d 681, 839 N.E.2d 1022, appeal denied 303 Ill.Dec. 1, 218 Ill.2d 536, 850 N.E.2d 806.* "Unless a rule is promulgated in conformity with the public notice and comment requirements of the

Administrative Procedure Act and is filed with the Secretary of State, it is not valid or effective against any person or party, and may not be invoked by an administrative agency for any purpose." *R.L. Polk and Co. v. Ryan, App. 4 Dist.1998, 230 Ill.Dec. 749, 296 Ill.App.3d 132, 694 N.E.2d 1027, appeal denied 235 Ill.Dec. 576, 179 Ill.2d 617, 705 N.E.2d 449.*

The ability for the public to have input before rules are filed and published is crucial. The case law about what input is reasonable does not clearly define what an agency must do because each situation is different.

This is clearly a contentious issue. Plaintiffs allege they were prevented from meaningfully participating in the hearings. There were tens of thousands of comments and many interested parties. The court will need to look at IDNR's responses and how the comments were addressed. For example, regarding the people who were turned away from the hearings or who did not receive answers from a qualified representative at the hearings--initially this might seem fatal, but IDNR maintains that when looking at the circumstances here, their response was reasonable. Turning the public away from a hearing may not conform to the notice and comment requirements if there was only one hearing. However, there were five opportunities to be heard, albeit five two-hour hearings. The alleged failure to answer questions during any of the hearings was argued by one side as evidence of a violation of the rule to have a qualified person present and by the other as evidence of trying to allow more people to make comments at the hearings when there clearly would not be enough time for all to speak. See *Weyland v. Manning, 309 Ill.App.3d 542, 547 (2d Dist. 2000).* "Our holding that the Department's analysis was sufficient is limited to the facts before us. A determination of whether a particular agency's evaluation is acceptable must be done on a case-by-case basis." The fact that an outside group wishes the Department did more in creating these rules is not enough to invalidate them as long as they followed the letter of the law under the APA. See *R.L. Polk and Co. v. Ryan, 296 Ill.App.3d 132, 146 (4th Dist. 1998).* "Although the Secretary might have done more, it did what was necessary under the rulemaking statutes to promulgate this rule. The findings that the Secretary did not comply were against the manifest weight of the evidence." The court is unable to determine whether the IDNR allowed reasonable participation in a preliminary injunction hearing.

Plaintiffs criticize IDNR over other its procedures. Interpretation of 5 ILCS 100/5-40 regarding notice before hearing dates is at issue. IDNR denies it had to wait 20 days before the first or second hearing because those hearings were not held in response to a request. The IDNR had those first two dates selected and published with the first notice.

Similarly, Plaintiff's claim that IDNR violated Section 5-40 of the APA by not including published studies, reports, or sources of underlying data requires interpreting the APA. On its face, the rule doesn't require the Department to rely on any studies. Plaintiffs are obviously dismayed if IDNR did not, or else plaintiffs choose not to believe IDNR did its first set of proposed rules without consulting any studies. However, it is not clear that the answer "No" to whether IDNR used any studies or data violates the APA. The court will certainly allow discovery and briefing of this issue.

For a preliminary injunction to issue, plaintiffs must establish that: (1) they possesses a clear right or interest needing protection; (2) they have no adequate remedy at law; (3) irreparable harm will result if the preliminary injunction is not granted; and (4) there is a reasonable likelihood of success on the merits. *Stenstron Petroleum Services Group v. Mesch, 375 Ill.App.3d 1077, 1089, 874 N.E.2d 959, 971 (Ill. App. 2nd Dist. 2007). See also, Bradford v. Wynstone Property Owners' Ass'n, 355 Ill.App.3d 736, 823 N.E.2d 1166, 1170, 291 Ill. Dec. 580 (2nd Dist 2005).* Plaintiffs "need only raise a fair question as to the existence of the right which [it] claims and lead the court to believe that [it] will probably be entitled to the relief requested if the proof sustains [its] allegations." *Stenstron Petroleum*, supra. A preliminary injunction is a "provisional remedy granted before the hearing of a case on its merits in order to preserve the status quo, which is the last peaceable, uncontested status which preceded the pending litigation." *Southern Illinois Medical Business Associates v. Camillo, 190 Ill.App.3d 664, 671, 546 N.E.2d 1059, 1064 (Ill. App. 5th Dist. 1989).*

The elements:

1) In essence, plaintiffs are citizens of Illinois and have an interest in having the government comply with applicable law. They include landowners, mineral interest owners and members of communities where high-volume, horizontal hydraulic fracturing would be permitted under the rules. Plaintiffs have a clearly ascertainable right.

2) Plaintiffs allege multiple violations by IDNR in its rulemaking procedures. They are not required to prove they will win. They need only raise a fair question as to the likelihood of success on the merits. *CD Petes Construction Co. v. Tri-City Regional Port District, 281 Ill.App.3d 41, 666 N.E.2d 44, 48, 216 Ill.Dec. 876 (5th Dist. 1996).* Although the term needed for relief is described as "clearly ascertainable," plaintiffs need only show at the preliminary injunction stage that there is a "fair question" of the

existence of the protectable right and that the Court should preserve the status quo until the case can be decided on the merits to prevent immediate harm. *TIE Systems, Inc., Illinois v. Telcom Midwest, Inc., 203 Ill. App.3d 142, 560 N.E.2d 1080, 1086, 148 Ill.Dec. 483 (1st Dist. 1990).*

3) Plaintiffs failed to establish that they will suffer irreparable harm if the Secretary of State publishes the adopted rules. IDNR through JCAR adopted the rules. The rules will allow applications to be filed. Facts must be alleged with certainly as to what harm the plaintiffs will incur. Conclusory allegations that some of the plaintiffs have land near some areas where someone may file an application for a permit do not state irreparable harm. No applications have been filed, let alone granted. Plaintiffs have not established imminent harm or irreparable injury will occur simply by the publishing of the rules.

Again, Plaintiffs must (a) raise a "fair question" as to the existence of the right claimed, (b) persuade the court that it will probably be entitled to the relief sought, and (c) make the preservation of the status quo appear sound until the merits are decided. *TIE Systems, Inc., Illinois, supra, 560 N.E.2d at 1086.* Plaintiffs have not met their burden of proof regarding irreparable injury and therefore the court cannot grant the relief requested.

The Clerk is to send a copy of this order to counsel of record.

Entered November 21, 2014.

B. Crowder

Judge