

STATE OF ILLINOIS
DEPARTMENT OF MINES AND MINERALS
LAND RECLAMATION DIVISION

In Re the Matter of:)
)
PERMANENT PROGRAM PERMIT)
APPLICATION NO. 227)
MIDLAND COAL COMPANY,)
DIVISION OF ASARCO)
INCORPORATED, RAPATEE MINE)

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER**

Appearances.

William F. Morris, on behalf of Petitioners, Knox County, Illinois; Knox County Farm Bureau; Knox County Corn Growers Association; Illinois Stewardship Alliance.

Robert Creamer, on behalf of Midland Coal Company and Mid State Coal Company, Inc.

Karen Jacobs, on behalf of the Illinois Department of Mines and Minerals.

History.¹

On February 17, 1989, Midland Coal Company, Division of ASARCO Incorporated (hereinafter "Midland"), filed an application for a permit to engage in surface coal mining and reclamation operations on 368 acres of land located in Knox County, Illinois. (Jt.Ex.#1, p.404). The application encompasses approximately One Hundred Seventy Two and Nine Tenths (172.9)

¹ Much of the discussion concerning the "History" and regulatory background governing this matter are taken from the Post-Hearing Brief submitted by the Illinois Department of Mines and Minerals. That Post-Hearing Brief presents an excellent and succinct overview of the complex regulatory scheme by which the Department is mandated to operate.

acres of land classified as prime farmland. (Jt. Ex.#1, p.448)

The Illinois Department of Mines and Minerals (hereinafter "Department") deemed the application (hereinafter "Permit Application #227" or "the application") "complete" on February 27, 1989. On March 16, 1989, and pursuant to regulation, the Department forwarded the application to the Soil Conservation Service of the U.S. Department of Agriculture ("USDA"), and to the Interagency Committee, which consists of the Illinois Department of Transportation, the Illinois Department of Agriculture, the Illinois Department of Conservation, the Illinois Environmental Protection Agency and the Illinois Historic Preservation Agency. (Jt.Ex.#1, p.404) All of the agencies of which the Interagency is comprised, as well as the Soil Conservation Service of the USDA, submitted comments concerning Permit Application #227. (Jt.Ex.#1, p.404)

On April 10, 1989, pursuant to rights provided by regulation, the Knox County Board requested that the Department conduct a public hearing pertaining to Permit Application #227. (Jt.Ex.#1, p.404; Jt.Ex.#1B, p.904) A public hearing was held on June 8, 1989, at the Community Center in Galesburg, Illinois, and all of the individuals present were provided an opportunity to present oral and/or written testimony and evidence. (Jt.Ex.#1, p.404; Jt.Ex.1B, p.637) Representatives of the Petitioners (Knox County, Illinois; Knox County Farm Bureau; Knox County Corn Growers Association; Illinois Stewardship Alliance; hereinafter collectively referred to as "the Petitioners") testified at said hearing. (Jt.Ex.#1B, pp.638-703) The public hearing record was left open until July 7, 1989, for the submission of any additional written comments the public desired to have included, and all public hearing participants were notified in writing that the record was remaining open until July 7, 1989. (Jt.Ex.#1B, pp.746-47,

pp.774-797)

Subsequent to said public hearing, by letter dated September 7, 1989, the Department required that Midland submit forty-six (46) modifications to Permit Application #227. (Jt.Ex.#1, pp.231-238) Midland, in response to the September 7th letter, submitted the mandated modifications to the Department on January 2, 1992. (Jt.Ex.#1, pp.242-377) The Department subsequently required additional modifications from Midland in order to address new groundwater quality regulations, which Midland submitted to the Department on March 13, 1992. (Jt.Ex.#1, pp.239-242, pp.378-400)

On August 10, 1992, the Department issued its Results of Review of Permanent Program Permit Application #227, wherein the Department approved, as modified, the application. (Jt.Ex.#1, pp.402-447) Contemporaneously with the Department's approval of the application, and pursuant to Section 2.11(d) of the Illinois Surface Coal Mining Land Conservation and Reclamation Act (hereinafter "the State Act") (225 ILCS 720/2.11(d)), Permit #227 was issued.

The Petitioners, Knox County, Illinois, Knox County Farm Bureau, Knox County Corn Growers Association, and the Illinois Stewardship Alliance, all filed timely requests for hearing under 62 Ill.Adm.Code 1775.11, seeking to contest the Department's issuance of Permit #227. Evidentiary hearings were conducted on fourteen (14) days over a six (6) month period. Post-Hearing Briefs were submitted by the Petitioners, Midland, and the Department.²

² As an aside, but necessary to be stated, the "lawyering" on all sides of the issues presented by this controversy was excellent, including the Post-Hearing Briefs. I concur with the sentiments of one of the Petitioners, expressed during the hearings in this matter, that it is unfortunate that the issues raised by this controversy are required to be subjected to so much "judicialization" and adjudication, with attorneys seemingly bickering about every trivial matter raised within the context of the controversy. However, I know of no better means to subject decisions of administrative agencies to the crucible of truth and accuracy than by subjecting such

Statutory and Regulatory Background.

The federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. et seq. (hereinafter "SMCRA"), established the regulatory schema for a "nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." (SMCRA, Sec.102(a)) The federal Act created the Office of Surface Mining Reclamation and Enforcement within the Department of the Interior (hereinafter "OSM"), which office was charged with "assist[ing] the States in the development of State programs for surface coal mining and reclamation operations which meet the requirements of the Act, and at the same time, reflect local requirements and local environmental agricultural conditions." (SMCRA, Sec. 201(c)(9)) The Secretary of the Interior, through OSM, was charged with administering SMCRA and prescribing regulations to implement its provisions. (SMCRA, Secs. 201(c)(2) and 304) Such regulations are codified at 30 CFR 700 through 955.

SMCRA also permitted a state desirous of assuming exclusive jurisdiction over the regulation of surface coal mining and reclamation operations within the boundaries of the state to devise and submit to the Secretary of the Interior a state program "which demonstrates that such State has the capability of carrying out the provisions of [SMCRA] and meeting its purposes...." (SMCRA, Sec. 503(a)) Prior to approving a state's proposed program, the Secretary of the Interior must find that "the program provides for the State to carry out the provisions and meet the purposes of [SMCRA and the regulations promulgated thereunder] within

decisions to administrative, and subsequent, judicial, review. The Illinois Legislature has mandated such procedures, and in most instances, the process fulfills its salutary purpose.

552

the State and that the State's laws and regulations are in accordance with the provisions of the [Federal] Act and consistent with the requirements of the [federal regulations]." (30 CFR 732.15) Upon the Secretary's approval of a state program, that state assumes exclusive jurisdiction over the regulation of surface coal mining and reclamation operations within its boundaries. (SMCRA, Sec. 503(a)) With respect to a state for which the Secretary has approved a state program, OSM's role and responsibility is overseeing and evaluating the administration of the state program. (30 CFR 701.4 and 733.12)

OSM approved Illinois' proposed state program on June 1, 1982, and through the Land Reclamation Division of the Illinois Department of Mines and Minerals. Illinois assumed exclusive jurisdiction over regulation of surface coal mining and reclamation operations on that date. (See, 30 CFR 913.10) The Land Reclamation Division of the Illinois Department of Mines and Minerals, on June 1, 1982, was deemed the "regulatory authority" under SMCRA for all surface coal mining and reclamation operations within the State of Illinois. That is, the Secretary of the Interior found in 1982 that Illinois' proposed program fulfilled the purposes of SMCRA and its implementing regulations, and that such proposed state program was fully in accordance and consistent with the federal Act.

Illinois' state program consists of the Surface Coal Mining Land Conservation and Reclamation Act (State Act), 225 ILCS 720 et seq., and the regulations promulgated thereunder (published at 62 Ill. Adm. Code 1700 through 1850. Since its initial approval in 1982, the state program has been amended from time to time by the Illinois Department via legislative and regulatory changes. All such amendments are required to be, and have been, approved by OSM before taking effect within the State. (30 CFR 732.17) The current program (most recently

amended in 1992) has been reviewed and approved by OSM in accordance with 30 CFR 732. The Illinois state program, since its inception, has been subject to federal oversight and evaluation by OSM. Thus, Illinois' state program was in 1982, and continues to be, fully in accordance with and consistent with SMCRA and its implementing regulations.

Application Review and Permit Issuance.

Pursuant to the Illinois program, every mining permit application is reviewed by the Interagency Committee established by Section 1.05 of the State Act. (225 ILCS 720/1.05) As stated earlier herein, the Interagency Committee is comprised of the Illinois Department of Transportation, the Illinois Department of Agriculture, the Illinois Department of Conservation, the Illinois Environmental Protection Agency and the Illinois Historic Preservation Agency. These State agencies are charged with reviewing and commenting upon those portions of a permit application germane to their respective areas of expertise.

Additionally, pursuant to 62 Ill. Adm. Code 1773.13, all mining permit applicants must publish notice of the filing of an application in the locale of the proposed mining operations, and the applicant must file a copy of the application with the county clerk of the county in which the proposed mining will take place. Written comments on or objections to a permit application may be filed with the Department by governmental agencies and by persons or entities with an interest which is (or which may be) adversely affected by the Department's decision on the application. Such persons, entities and/or governmental agencies may request that the Department conduct an informal conference and/or a public hearing on the permit application. (62 Ill. Adm. Code 1773.13(c) and 1773.14) All of the participants at the public hearings conducted by the

Department are allowed to present data, argument, and evidence relevant to the permit application, in accordance with Section 1773.14(d)(2) of the Department's regulations.

After expiration of the comment period, the Department may either grant, deny or require modification of the permit application. (See, Section 1773.15) In making its determination, the Department must review written comments and objections submitted during the comment period. (See, Section 1773.15(a)) An application cannot be approved unless the Department finds, among other things, that the application is complete, accurate, and in compliance with the state regulatory program. (Sections 1773.15(c) and 1773.19) Prior to issuance of a mining permit, an applicant must submit a performance bond to guarantee full and complete performance of all of its obligations under the permit and the state regulatory program. (Section 1773.15(d)) The state regulatory program also mandates additional permitting and performance standards when prime farmlands are encompassed within the proposed permit application.

Upon the Department issuing a final decision as to a permit application, any person with an interest which is or may be adversely affected may request a hearing on the reasons for the Department's decision. (225 ILCS 720/2.11(c); 62 Ill. Adm. Code 1775.11(a)) A party seeking to reverse the Department's decision as to a mining permit application has the burden of proving that the Department's decision was "clearly erroneous," pursuant to 62 Ill. Adm. Code 1775.11(g).

Prime Farmland Provisions.

The State Act and implementing regulations contain additional, special permitting and performance standards to govern mining on prime farmlands. Permit application information and approval requirements for prime farmland are contained within Sections 2.08 and 3.07 of the

State Act. (225 ILCS 720/2.08 and 3.07) Section 2.08(b) provides that the Department may issue a permit for mining operations on prime farmland only if it "finds in writing that the operator has the technological capability to restore such mined area, within a reasonable time, to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management and can meet the soil reconstruction standards in Section 3.07." (225 ILCS 720/2.08(b)) Section 2.08(b) of the State Act further provides that "such findings shall be made in accordance with standards and procedures adopted by the Department by rule."

Such rules, implementing the mining permit application and approval process of the State Act with respect to prime farmland, are found at 62 Ill. Adm. Code 1785.17. Section 1785(d) mandates review of the applicant's proposed method of soil reconstruction by the Soil Conservation Service of the U.S. Department of Agriculture prior to the Department issuing a permit to mine on prime farmland.

Section 3.07 of the State Act also contains special performance standards governing mining on prime farmland. Rules implementing these performance standards are found at 62 Ill. Adm. Code 1823. Part 1823, entitled "Special Program Performance Standards---Operations on Prime Farmlands," contains soil removal, stockpiling, replacement and revegetation requirements for operations on prime farmlands.

Section 6.01 of the State Act enjoins issuance of a mining permit until the applicant has filed with the Department a performance bond ensuring reclamation. (225 ILCS 720/6.01) Statutory bonding requirements are implemented by 62 Ill. Adm. Code 1800. With respect to bonding vis-a-vis prime farmland, Section 1800.40(c)(2) provides that the operator's performance

bond is not to be released "until soil productivity for prime farmland has returned to the equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices as determined from the soil survey performed pursuant to Section 2.02(a) of the State Act and 62 Ill.Adm.Code 1823." (See, 62 Ill.Adm.Code 1800.40(c)(2))

Section 1823.15 sets forth revegetation success requirements for prime farmland. Under subsection (b)(3), revegetation is considered successful when:

...crop production is equivalent to or exceeds the production required in 62 Ill.Adm.Code 1816.116(a)(4)...for a minimum of 3 crop years of a 10 year period...prior to release of the performance bond. The level of management applied during the measurement period shall be the same as the level of management used on nonmined prime farmland in the surrounding area. (62 Ill.Adm.Code 1823.15(b)(3)).

Thus, whether productivity has been met on prime farmland is determined in accordance with Part 1823 of the Department's regulations, as measured by the Agricultural Lands Productivity Formula referred to in Section 1816.116(a)(4) and set forth within 62 Ill.Adm.Code 1816.App.A.

These Illinois regulations governing prime farmland have been reviewed and approved by OSM, and therefore they have been found to be consistent with and as effective as OSM's prime farmland regulations (found in 30 CFR 785.17 and 823).

Bond Release Performance Standards.

Pursuant to 62 Ill.Adm.Code 1785.17(e), before a permit encompassing the mining and reclamation of prime farmland may be issued by the Department, the Department must first find

(in writing) that:

- 1) The approved proposed post-mining land use of the prime farmland soils will be cropland;
- 2) The permit incorporates the contents of the soil reconstruction, replacement and stabilization plan required under Section 1785.17(c)(2);
- 3) The applicant has the technological capability to restore the prime farmland, within a reasonable time, to equivalent or higher levels of yield as nonmined prime farmland in the surrounding area under equivalent levels of management; and
- 4) The proposed operations will be conducted in compliance with the requirements of 62 Ill.Adm.Code 1823.

In addition, Section 1785.17(c)(2) requires that an applicant proposing to mine and reclaim prime farmland submit with the application "a plan for soil reconstruction, replacement and stabilization for the purpose of establishing the technological capability of the mine operator to comply with the requirements of 62 Ill.Adm.Code 1823."

The specific purpose of the special performance standards governing prime farmland with Part 1823 of the Department's regulations (i.e., by dictating strict standards for soil handling, revegetation and reclamation) is "to ensure both that the land will have agricultural productive capacity which is equal after mining to premining levels and the land is not lost as an important national resource." (62 Ill.Adm.Code 1823.2)

As indicated above, three successful crop years within a ten year period (as measured by the Agricultural Lands Productivity Formula at 62 Ill.Adm. Code 1816.App.A) is deemed (pursuant to regulation) revegetation success. Pursuant to 62 Ill.Adm.Code 1800.40(c)(2), the operator's performance bond may be released when "soil productivity for prime farmland has returned to the equivalent levels of yield as nonmined land of the same soil type in the

surrounding area under equivalent management practices as determined from...62 Ill. Adm. Code 1823."

Before the Department can make the required finding that an applicant possesses the technological capability to restore the prime farmland, within a reasonable time, to equivalent or higher levels of yield as nonmined prime farmland in the surrounding area under equivalent levels of management, the Department must find that the applicant will achieve revegetation success, as defined by the Department's regulations. The Department's finding of technological capability is premised upon an evaluation of whether the applicant's proposed mining and reclamation plan is capable to complying with the performance standards set forth within the Department's regulations, as specifically made clear by Section 1785.17(c)(2).

In discussing proposed 30 CFR 823.15, OSM published a preamble discussion regarding federal prime farmland regulations. There, OSM stated:

[s]ince performance standards are the link between permit approval and final successful reclamation judged at the time of bond release, the level of management that would be required by these performance standards is essentially the same as the two virtually identical statutory phrases for permit approval and bond release. (47 Fed.Reg. 19076, 19081; May 3, 1982)

More specifically still, OSM stated within its preamble to the adopted federal rules governing the mining and reclamation of prime farmland that:

[f]inal Section 823.15(b) imposes a general requirement that prime farmland soil productivity be restored. It contains eight paragraphs specifying how the operator must comply with the requirement, including an average yield requirement.

Final Section 823.15(b)(3) specifies that the measurement period for determining the average annual crop production (yield) for proving soil productivity for bond release is a minimum of three crop years. The substance of this final rule is unchanged from the proposed rule. (48 Fed.Reg. 21458, 21459; May 12, 1983)

Thus, OSM, the federal regulatory agency responsible for promulgating rules for the

administration and implementation of SMCRA, has specifically declared that a reclaimed soil which meets target yields in three (3) crop years has been restored "to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area." (SMCRA, Sec. 510(d)(1)) Illinois regulations mandate that those three (3) crop years occur within a ten (10) year span.

Issues.

Five (5) viable issues were raised within the Petitioners' "Statement of Issues":³

- II. The Department of Mines and Minerals erroneously found that Midland Coal Company possesses the technological capability to restore prime farmland within a reasonable time to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management.
- III. The Department of Mines and Minerals made no appropriate finding regarding the ability of the operator, Midstate [sic] Coal Co., to restore prime farmland as required by law, or in alternative, if any such finding was made, it was in error.
- IV. That the permit improperly allows a final water impoundment on prime agricultural land.
- V. That the Department of Mines and Minerals erroneously found that non-prime agricultural land can be converted into prime agricultural land after mining, and erroneously (supposedly) permits same to occur on the tract to be mined under Permit No. 227.
- VI. That Knox County, The Knox County Farm Bureau, The Knox County Corn Growers Association and the Illinois Stewardship Alliance have standing to pursue this action.

Unfortunately, Petitioners decided not to specifically delineate the arguments urged within their

³ Two (2) of the seven (7) issues originally raised by Petitioners' were disallowed by my Order of October 30, 1992. The Order is, of course, incorporated herein. The issues remaining are numbered as they appeared within Petitioners' "Statement of Issues."

Post-Hearing Briefs (i.e., their initial and reply briefs) with the same specificity as they demarcated the issues set forth within their "Statement of Issues." For instance, I find absolutely no reference to issue IV, purportedly pertaining to "final water impoundment," anywhere within Petitioners' Brief or Reply Brief. I am not required to cull Petitioners' arguments from the voluminous record in this matter, and as to this particular issue (i.e., the "final water impoundment" issue), I assume that the Petitioners have abandoned it.

As to the other issues set forth within Petitioners' "Statement of Issues," Petitioners appear to have "meshed" Issues II, III and V, eclectically urging perspectives associated with all three (3) issues, though apparently ultimately urging that reversal of the Department's approval of the mining permit herein should be premised upon the substantive assertion contained within Issue II (i.e., that the Department erroneously found that Midland Coal Co. possesses the technological capability to restore prime farmland within a reasonable time to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management).

Petitioners did not address the issue of standing (i.e., Issue VI) within their initial Post-Hearing Brief (however, Petitioners reserved the issue within their initial Brief, indicating that they would address the issue should the Department and/or Midland urge for reversal of my initial ruling granting standing to the Petitioners). Petitioners forcefully argued the "standing" issue within their Reply Brief. In light of my previous granting of standing to the Petitioners, I find Petitioners' reservation of their arguments pertaining to "standing" for their Reply Brief wholly appropriate.

ORDER

Standing.

Both the Department and Midland argue that all of the Petitioners lack standing to appeal the Department's decision "because none of them has a legally recognized interest in these proceedings." (See, Midland's "Post-Hearing Brief," p.6; see also, Department's "Post-Hearing Brief," p.15, "adopting" Midland's arguments concerning "standing") Section 1775.11 of the Department's regulations provide that:

[w]ithin thirty (30) days after an applicant is mailed written notice of the Department's final decision concerning an application for approval of exploration required under 62 Ill. Adm. Code 1772, a permit for surface coal mining and reclamation operations, a permit revision, a permit renewal, or a transfer, assignment, or sale of permit rights, the applicant, or any person with an interest which is or may be adversely affected, may request a hearing on the reasons for the decision. (See, 62 Ill. Adm. Code 1775.11(a)) (Emphasis added)

At the heart of Midland's and the Department's assertions concerning the "standing" issue is the Third District's decision in Citizens for the Preservation of Knox County, Inc. v. Illinois Department of Mines and Minerals, 149 Ill. App.3d 261, 500 N.E.2d 75 (3rd Dist. 1986). There, the Appellate Court affirmed my denial of standing to the Citizens for the Preservation of Knox County, citing United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 93 S.Ct. 2405, 2416 (1973) and Landmarks Preservation Council of Illinois v. City of Chicago, 125 Ill.2d 164, 531 N.E.2d 9 (1988).

But as the legal counsels to this proceeding know (since they were participants within the Citizens for the Preservation of Knox County litigation), my "Order and Decision" in Citizens concerning the "standing" issue was premised upon the specific testimony elicited during the administrative hearing therein. As I stated therein, the "sole evidence" presented at that

administrative hearing as to the "standing" issue was the testimony of a member of the Citizens organization, who stated that his group's "real concern [was] not with this particular permit," but its concern was with the "next potential permit." (See, "Order and Decision," Permanent Program Permit Application #132, Midland Coal Company, Rapatee Mine. SM-1 Application, p.13) In ruling that Citizens lacked standing therein, I stated:

[b]ased upon such testimony, such being the sole evidence as to the standing issue, I am required to hold that the Petitioners, Citizens For the Preservation of Knox County, Inc., lack standing to bring this matter for administrative review under Section 1787.11 of the Department's regulations. In accord with this ruling is Illinois South Project, Inc. et al. v. Office of Surface Mining Reclamation and Enforcement, Docket No. IN 1-13-R (1984).

I do wish to indicate that my inclination is to construe the regulatory basis for standing as broadly as possible. But such basis for standing cannot be stretched to include those seeking review for the sole purpose of testing the regulatory "waters." To do so would be to invite the very problems which the concept of standing was created to prevent. (See, "Order and Decision," Permanent Program Permit Application #132, Midland Coal Company, Rapatee Mine, SM-1 Application, p.14) (Emphasis in Original)

It is because I continue to be inclined "to construe the regulatory basis for standing as broadly as possible" that I respectfully decline to reconsider my original ruling granting standing to the Petitioners. Petitioners compellingly and forcefully set forth the bases for broadly construing the concept of "standing" within their "Reply Brief," and I fully concur with such analysis.

Petitioners assert that "[t]he 'interest' of Knox County is the preservation of its tax base as the economic resource upon which it (and every resident of Knox County) depends for the provision [sic] of governmental services to its citizens." (See, Petitioners' "Reply Brief," p.24) Whether such is a valid basis for overturning the Department's decision in this matter is irrelevant. The proper inquiry is whether Knox County is a "person [or entity] with an interest which is or may be adversely affected" by the Department's decision. (See, 62 Ill. Adm. Code

1775.11(a)) (Emphasis added) The governmental unit in which mining takes place will have standing, in my opinion, to appeal decisions of the Department pursuant to 62 Ill. Adm. Code 1775.11(a), except in the most unusual of circumstances (e.g., when a County seeks review premised upon the same premise as Citizens, i.e., testing the regulatory "waters"). Likewise (but less compelling), the other Petitioners have articulated a basis for "standing." The issue is not whether the party seeking standing has an interest which will be affected by the Department's decision, but rather whether the party has an interest which may be affected by the Department's decision. The Petitioners have articulated such interests, and I affirm my original ruling as to standing.

I would note that the "question of standing is a matter of law, and as such, [a reviewing] court is not bound by the administrative agency's conclusions of law." (See, Citizens, 149 Ill. App. 3d at p. 264, citing, Danison v. Paley, 41 Ill. App. 3d 1033, 355 N.E. 2d 230 (1976)) If the Department and/or Midland seriously believe the County of Knox (or the other Petitioners) lack standing under the regulation, they should seek redress from a reviewing Court. I am convinced these parties have standing.

Collateral Estoppel.

Midland and the Department assert within their respective Post-Hearing Briefs, for the first time (at least in writing), that Petitioners' claims are barred by "collateral estoppel." (See, Midland's "Post-Hearing Brief," pp. 22-27; Department's "Post-Hearing Brief," p. 18, "adopting" Midland's assertions) Midland's and the Department's contentions concerning collateral estoppel

564

are premised upon certain documents relating to the Lands Unsuitable Petition No. LU-003, including the Department's Decision and Statement of Reasons, dated November 7, 1990, and various documents from Case No. 90-MR-382 in the Circuit Court of Sangamon County, Illinois. (See, Midland's "Post-Hearing Brief," p.22) As stated by Midland within its "Post-Hearing Brief":

[o]ne of the original petitioners in the lands unsuitable proceeding was the Knox County Farm Bureau. Among the parties granted leave to intervene in that proceeding were the Knox County Board, the Knox County Corn Growers Association, the Illinois South Project, Mid State Coal Company, Inc. and Midland Coal Company.

In the lands unsuitable proceeding, the petitioners alleged that mining and reclamation of prime farmland, and Tama, Ipava and Sable soils in particular, was not technologically or economically feasible. As required by the State Act and the Department's Regulations, and reflected in the decision documents of November 7, 1990, public comment on the petition was sought, public hearing was held in Knox County and a Land Report was prepared to evaluate the petition. Upon completion of its review, the Department found that: "the evidence submitted is insufficient to substantiate that reclamation of the Petition area [Tama, Ipava and Sable soil] is not technologically or economically feasible under the State Act and implementing regulations."

Midland filed a timely action for administrative review of the Department's decision in the Circuit Court of Sangamon County, as Case No. 90-MR-382. On December 10, 1990, various parties in the lands unsuitable proceeding filed a Counter Complaint for Administrative Review. Those parties included Knox County, the Knox County Farm Bureau, the Illinois Stewardship Alliance (f/k/a Illinois South Project) and the Knox County Corn Growers Association.

The Counter Complaint for Administrative Review asked the court to review and reverse the Department's decision, including the decision with regard to the technological and economic feasibility of reclamation of Tama, Ipava and Sable soils. The Counter Complaint for Administrative Review was involuntarily dismissed by order dated April 28, 1992. The entire proceeding was subsequently dismissed by order dated August 13, 1992. Certified copies of those orders are included in the Department's submission.

Midland submits that the petitioners in this proceeding are barred under the doctrine of collateral estoppel by the final disposition of the lands unsuitable proceeding from relitigating the issues determined in that proceeding, particularly the issue of the technological feasibility of reclaiming Tama, Ipava and Sable soil, which is the central issue in this proceeding.

Collateral estoppel prohibits a party from relitigating issues that were

adjudicated in an earlier but different cause of action. Cirro Wrecking Company v. Roppolo, 153 Ill.2d 6, 605 N.E.2d 552 (1992). Collateral estoppel applies when three basic requirements are met: (1) the issues decided in the prior adjudication are identical to the current issues; (2) the same parties or their privies are involved in the two proceedings; and (3) there is a final judgment on the merits. Fred Olson Motor Service v. Container Corporation of America, 81 Ill.App.3d 825, 401 N.E.2d 1098, 1101 (1st Dist.1980) All these requirements are present here. (See, Midland's "Post-Hearing Brief," pp.23,24)

In response, the Petitioners concur that the elements cited from the Fred Olson Motor Service decision accurately set forth those comprising the concept of collateral estoppel. (See, Petitioners' "Reply Brief," p.38) But Petitioners further argue that:

...a fourth element also required before the doctrine [of collateral estoppel] can be invoked is that there was a "full and fair opportunity" to litigate the issue. United States v. Utah Construction and Mining Co., (1966) 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642; Raper v. Hazelett and Erdal [sic], 114 Ill.App.3d 649, 70 Ill.Dec. 394, 449 N.E.2d 394 [sic, miscited]; In Re: Wheat Rail Freight Rate Antitrust Litigation, 579 F.Supp. 517 (DC, 1984); and, Blair v. Bartelmay, 151 Ill.App.3d 17, 502 N.E.2d 859, 104 Ill.Dec. 362. The application of the doctrine to this case fails for two reasons: 1) the issues are not identical and, 2) the prior proceeding did not allow for a full and complete litigation of the issue (claimed to be identical).

The first and foremost consideration for the invocation of the doctrine of collateral estoppel is the requirement of an identity of issues. "Identity of issues is the first of the pertinent questions to be answered in determining the application of the doctrine." Cirro Wrecking Co. v. Roppolo, 153 Ill.2d 6, 605 N.E.2d 544, 178 Ill.Dec. 750, 758. The issue decided must be identical. Raper v. Hazelett and Erdal, 114 Ill.App.3d 649, 449 N.E.2d 268. None of the cases cited by the coal company allow for the application of the doctrine where the issues are merely similar or even substantially the same, and this writer could not find any authority to that effect either.

The issues in this proceeding differ from the Lands Unsuitable proceeding in the following respects:

1. The [Land Unsuitable Petition] was a broad academic inquiry into the general proposition of whether or not the soil types at issue could be reclaimed to equal or better productivity. That proceeding did not consider any specific reclamation plan and made no findings regarding any specific reclamation plan.

2. The [Land Unsuitable Petition] did not make a finding that any specific operator or permittee possessed the technological capability to restore the lands subject to a specific permit to equal or greater productivity within a reasonable period of time after mining. (See, Petitioners' "Reply Brief," pp.39,39)

5166

I again agree with the Petitioners.

As stated within the Fred Olson Motor Service opinion:

[c]ollateral estoppel will not be applied unless it appears that the party against whom the estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and that application of the doctrine will not result in an injustice to the party against whom it is asserted under the circumstances of the case. (Oldham v. Pritchett (8th Cir. 1979, 599 F.2d 274; Johnson v. United States (5th Cir. 1978), 576 F.2d 606; Kaiser Industrial Corp. v. Jones & Laughlin Steel Corp. (3rd Cir. 1975), 515 F.2d 964.) Collateral estoppel is not a rigid doctrine and should be applied only as fairness and justice require under the circumstances of each case. (Bruszewski v. United States (3d Cir. 1950), 181 F.2d 419; Willis v. Fournier (M.D. Ga. 1976), 418 F.Supp. 265; LaSalle National Bank v. City of Chicago (1977), 54 Ill.App.3d 944, 369 N.E.2d 1363.) (See, Fred Olson Motor Service, 81 Ill.App.3d at p.830)

Herein, Petitioners assert that "[t]he Department of Mines and Minerals erroneously found that Midland Coal Company possesses the technological capability to restore prime farmland within a reasonable time to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management." (See, Petitioners' "Statement of Issues," Issue II) (Emphasis added) The specificity of such assertion, contrasted with the broad, general issues raised within the Land Unsuitable Petition, undermines the requisite comparability of issues required for invocation of the doctrine of collateral estoppel.

Standard of Review of Substantive Issues.

This proceeding was held pursuant to Section 2.11(c) of the State Act and Section 1775.11 of the Department's regulations. (225 ILCS 720/2.11(c); 62 Ill. Adm. Code 1775.11)

Section 1775.11(g) specifically provides that:

[t]he party seeking to reverse the Department's decision shall have the burden of proving that the Department's decision was clearly erroneous.

That is, Petitioners herein, in order to prevail, must prove that the Department's decision approving Permit Application #227, was "clearly erroneous."

I concur with Midland that the "clearly erroneous" standard appears to have been borrowed from the Federal Rules of Civil Procedure (specifically Federal Rule 52(a)). (See, Midland's "Post-Hearing Brief," p.3) I also concur that such standard incorporates the notion enunciated by the United States Supreme Court in Anderson v. City of Bessemer City, 470 U.S. 564, 105 S.Ct. 1504 (1985), wherein the Court stated:

[a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed...This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently...If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous...

This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts....(105 S.Ct. at 1511) (See, Midland's "Post-Hearing Brief," p.4)

I also feel compelled to reiterate the Seventh Circuit's "more colorful definition" of the "clearly erroneous" standard, cited within Midland's "Post-Hearing Brief," since Petitioners appeared to make several references to the metaphorical "definition" within their "Reply Brief" (e.g., see Petitioner's "Reply Brief," pp.55,59,72):

To be clearly erroneous, a decision must strike us as more than just maybe wrong or probably wrong; it must, as one member of this court recently stated during oral argument, strike us as wrong with the force of a five-week-old, unrefrigerated dead fish. (See, Midland's "Post-Hearing Brief," p.4, citing Parts and Electric Motors, Inc. v. Sterling Electric, Inc., 866 F.2d 228, 233 (7th Cir. 1988))

Order and Decision.

Petitioners assert within their initial Post-Hearing Brief that the first issue to be decided is whether:

...the proposed reclamation plan [will] restore the affected land to a condition capable of supporting the uses it was capable of supporting prior to mining? (See, Petitioners' "Brief," p.2)

The Department objects to the wording of the issue by Petitioners, asserting that if, indeed, such an issue is properly before me, the proper wording should be:

Was the Department clearly erroneous in finding that the land areas affected by surface coal mining activities will be restored in a timely manner to conditions that are capable of supporting the use which they were capable of supporting before mining or to a higher or better use achievable under the criteria of 62 Ill. Adm.Code 1816.133? (See, Department's "Post-Hearing Brief," p.20)

The Department asserts that Petitioners' issue is "improperly framed" in a manner whereby I am invited to "substitute [my] judgment for that of the Department." (See, Department's "Post-Hearing Brief," p.20)

I agree with the Department. It is not my role to decide, de novo, whether "the proposed reclamation plan [will] restore the affected land to a condition capable of supporting the uses it was capable of supporting prior to mining." Rather, Petitioners have the burden of proving that the Department's finding, "that the land areas affected by surface coal mining activities will be restored in a timely manner to conditions that are capable of supporting the use which they were capable of supporting before mining or to a higher or better use achievable under the criteria of 62 Ill. Adm.Code 1816.133," is clearly erroneous.

Section 1816.133(a) of the Department's regulations provides that:

[a]ll disturbed areas shall be restored in a timely manner to a condition capable of supporting:

- 1) The uses which they were capable of supporting prior to any mining; or
- 2) Higher or better uses of which there is a reasonable likelihood of restoration...

As indicated within the Department's "Post-Hearing Brief":

[i]n the case of prime farmland, the pre-mining use of the land is, by definition, cropland. (See definition of "prime farmland" at 62 Ill. Adm. Code 1701. App. A). In addition, as previously discussed, the only allowable post-mining use of prime farmland is cropland. (See 1785.17(e)(3)). Thus, the Department must necessarily find that prime farmland, after mining and reclamation, will be capable of being used as cropland.

The Department's Results of Review regarding Permit Application No. 227 confirms that the pre-mining use of the 172.9 acres of prime farmland at issue here was cropland. (Jt. Ex. 1, p. 439) The Department determined that the prime farmland was capable of being reclaimed to cropland for rowcrop agricultural purposes. (Jt. Ex. 1, p. 439) (See, Department's "Post-Hearing Brief," pp. 20, 21)

Petitioners urge, within their initial Brief, that:

[i]n Knox County, the predominant use of agricultural land is for the cultivation of corn and soybeans. Ninety two percent of the cropped land in the County is devoted to growing corn and soybeans on a 3 year corn, corn and soybean rotation. (Dr. Lee Rpt., Pet. Ex. 16 at pp. 1 & 10). These are the uses which the Tama, Ipava and Sable soils of the permit area were "capable of supporting prior to mining."

The issue then presented is whether or not the lands in question will be restored to a condition capable of supporting such uses? The record is completely devoid of any evidence tending to establish that the lands to be reclaimed under the proposed reclamation plan will be capable of supporting the production of corn and soybeans in the standard three year rotation with consistent yields anywhere near those normally achieved on these soil types. (See, Petitioners' "Brief," p. 4)

On the contrary, the record is completely devoid of any evidence tending to establish that the lands to be reclaimed must be reclaimed to "growing corn and soybeans on a 3 year corn, corn and soybean rotation." As pointed out by both the Department and Midland, Dr. John Lee's report (i.e., the report upon which Petitioners' purported assertion, concerning the crops to

which the land in Knox County is "devoted", is premised) was the subject of a Motion in Limine (filed by both the Department and Midland) at the administrative hearing in this matter. (See, Department's "Post-Hearing Brief," p.21; see also, Midland's "Post-Hearing Brief," p.31, footnote 6) On January 12, 1993, Knox County filed a response to the Motion in Limine, stating that:

[t]he purpose of Dr. Lee's proffered Report and testimony goes to the issue of Knox County's standing.

Knox County intends to offer Dr. Lee's testimony and Report solely for the purpose of establishing the County's standing as a person with an interest which will or may be adversely affected by the issuance of Permit No. 227. Knox county [sic] does not question the ability of the Hearing Officer (or any reviewing court) to limit his consideration of Dr. Lee's Report and testimony solely for such limited purposes. (See, Knox County's Response to Motion in Limine to Bar Testimony of Dr. John Lee, pp.4-5) (Emphasis added)

A pre-hearing conference regarding the Motion in Limine was conducted on January 18, 1993. On January 19, 1993, I denied the Department's and Midland's Motion in Limine premised upon Knox County's specific indication that "the sole purpose for Dr. Lee's testimony was so as to attempt to establish the standing of Petitioners." (See, "Order," dated January 19, 1993, incorporated herein by reference)

I am not about to prejudice the respective legal positions of either the Department or Midland by wholly eviscerating, ex post facto, the limited basis upon which Dr. Lee's testimony and Report was originally admitted, especially in light of Knox County's specific assurance that the sole basis for such testimony and Report was for purposes of establishing standing. I specifically find that Petitioners' attempt to now use such Report for establishing factual matters in controversy (and not related to the "standing" issue) to be disingenuous. My opinion as to this matter is further bolstered by the fact that Petitioners assert within their "Reply Brief" that:

[r]egarding the substance of Dr. Lee's Report (Pet. Ex. 16), it is interesting to note that neither the Department nor the coal companies made any serious attempt to discredit this evidence. Even though they had Dr. Lee's Report well in advance of the hearing and they had taken his deposition, no direct evidence was offered to refute the Lee Report or his testimony. (See, Petitioners' "Reply Brief," p.27)

Clearly, the Department and/or Midland may have chosen not to "refute" the Lee Report in light of the Petitioners' specific and unequivocal assurance that such Report was "solely" for "the purpose of establishing the County's standing as a person with an interest which will or may be adversely affected by the issuance of Permit No. 227," as opposed to establishing any factual contention at issue herein (such as the identity of the crops grown in Knox County). Petitioners, in seeking the admission of Dr. Lee's Report into evidence, asserted that they do "not question the ability of the Hearing Officer (or any reviewing court) to limit his consideration of Dr. Lee's Report and testimony solely for such limited purposes" and I can assure the parties that I possess such ability. I therefore wholly reject Petitioners' contention that the issue herein is whether the lands in question will be restored to a condition capable of supporting the "growing of corn and soybeans on a 3 year corn, corn and soybean rotation." Petitioners, literally, failed to establish such contention. As pointed out by the Department, the only witness called upon to properly testify for the Petitioners as to the primary crops grown in Knox County was Mr. Rodney Lindsey, and he testified that corn, beans, wheat, hay and oats are grown in Knox County. (Tr. of 12/16/92, p.12)

I also concur with the Department that Petitioners have placed (or perhaps a better term, "misplaced") far too much emphasis upon one isolated statement from Permit Application #227. (See, Department's "Post-Hearing Brief," p.23) The permit application states:

[t]he reclamation procedure proposed [by Midland] is similar to the procedures

used at the Elm and Rapatee Mines which produced the yields discussed below on reclaimed mined lands. (Jt.Ex.1, p.474)

From this statement alone, Petitioners extrapolate that:

[t]he coal companies made the claim that the proposed reclamation plan, "is similar to the procedures used at the Elm and Rapatee Mines" and then cited certain (very limited and very selective) yield data from these mines. (Jt.Ex. 1, at p.474) The permit application does not contain any other claim which compares the proposed reclamation plan to or with any other reclamation plan from any other place or time. Only the Elm and Rapatee reclamation plans are claimed to be "similar." (See, Petitioners' "Reply Brief," p.52) (Emphasis added)

But the isolated statement cited from the Permit Application does not indicate that the reclamation "plans" are "similar." Rather, the Permit Application states that the "reclamation procedure" proposed is "similar" to that which was "used at the Elm and Rapatee Mines." The fact that Midland intends to use some reclamation "procedures" "similar" to those used at other mine sites does not mandate the summary rejection of the Department's Decision to approve the permit application.

This is especially true when examining the evidence presented by Petitioners in their attempt to place the yield data from the Rapatee and Elm Mines in a pejorative light. As pointed out by the Department:

Petitioners rely upon and reproduce in their Brief Petitioners' Exhibit Nos. 4 and 5, claiming that such exhibits prove that "it is very clear that the reclamation methods there employed (Elm and Rapatee mines) have not restored the land to a condition capable of supporting the uses which it was capable of supporting prior to mining." (Pet.Brief, p.8) The Department disagrees. Neither Petitioners' Exhibit Nos. 4 and 5 nor any evidence presented by Petitioners supports the contention that the prime farmland under Permit No. 227 will not be capable of growing row crops after mining and reclamation.

Petitioners' Exhibit Nos. 4 and 5 are purported compilations of data from Petitioners' Exhibit 3, which contains crop productivity target calculations for the Elm and Rapatee mines. (Tr. of 12/16/92, pp.128, 133). Anna Johnson, a farm owner, produced Petitioners' Exhibit Nos. 4 and 5 by extrapolating from and interpreting Petitioners' Exhibit No. 3 (Tr. of 12/16/92, pp.134-186). In her

analysis of the data, Ms. Johnson analyzed results from high capability fields as well as from prime farmland fields, even though high capability lands include soils of lower quality than prime farmland and are not subject to the same subsoil mixing requirements as are prime farmlands. (See 62 Ill. Adm. Code 1816.116 and 1825). Moreover, the regulatory performance standards require that prime farmlands meet 100% productivity with 90% statistical confidence, whereas high capability lands must meet 90% productivity with 90% statistical confidence. (62 Ill. Adm. Code 1816.116 and 1823.15). Nonetheless, Ms. Johnson interpolated the prime farmland target (100%) for the high capability lands (90%) and made a pass/fail projection against the 100% target. She did not subject such interpolation to the required 90% statistical confidence test to determine whether yields which are close to, but slightly less than the target, are nevertheless statistically equivalent. (See, Department's "Post-Hearing Brief," pp.23,24)

Petitioners, within their "Reply Brief," do not even attempt to address the allegation that the statistical data was interpolated and skewed because of a failure to apply the appropriate regulatory performance standards for the differing lands encompassed by the Elm and Rapatee Mine sites. On the contrary, Petitioners merely state that "[t]he only evidence in the record which is identified specifically as dealing with similar reclamation procedures at a nearby site is the Elm and Rapatee yield data, which has been thoroughly discussed in Petitioners' first brief." (See, Petitioners' "Reply Brief," p.51) (Emphasis added) The Department is clearly correct; the regulatory performance standards do require that prime farmlands meet 100% productivity with 90% statistical confidence, whereas the regulatory performance standards for high capability lands need only meet 90% productivity with 90% statistical confidence. To assert that the Exhibits created by Petitioners which fail to take into account such differing performance standards (and which thereby skew the projections made) somehow rises to the level of the "clearly erroneous" standard is patently myopic.⁴

⁴ Note, too, that Midland's "Post-Hearing Brief" asserted that:

[t]he petitioners' post-hearing brief has...distorted the yield data from Midland's

574

Moreover I agree with the Department that Petitioners' nearly total reliance upon such yield data is equally shortsighted. To jump from the isolated statement that "reclamation procedures" are "similar," and then to wholesale extrapolation that yield data is the first and last word as to Midland's permit application, and then have the yield data analyzed by Petitioners pursuant to an erroneous regulatory performance standard within the Exhibits submitted by Petitioners, and then to an assertion that any and all other material or opinion considered by the Department is irrelevant, begs the question posed. As inadvertently conceded by the Petitioners within their "Reply Brief":

[t]he plain and simple fact is that ALPF bond release has never been achieved on similar soil types with a similar reclamation plan. Lacking any such yield data to support a finding of 100% or better productivity, such a finding can only

Elm and Rapatee Mine that was produced and introduced into the record by the Department. Property [sic] interpreted, the yield data demonstrate a record of successful reclamation at both sites. For example, Exhibit A to this brief, compiled from the same data used to create Petitioners' Exhibit 4 relating to the Elm Mine, shows that 442.3 acres tested for productivity at the Elm Mine from 1985 through 1992: 390.3 acres have met target yield for corn; 173 acres have met target yield for soybeans; and 255.3 acres have met target yield for wheat. All of the 442.3 acres have been tested for corn, with a success rate of 88 percent. Exhibit B to this brief, derived from [the] same data used to create Petitioner's Exhibit 4 and Exhibit 5, demonstrates crop production on prime farmland at both the Elm and Rapatee Mines from 1988 through 1992. Target or estimated target yields have been met for five (5) wheat crops and two (2) soybean crops. Thus, the Midland yield data support the Department's decision. (See, Midland's "Post-Hearing Brief," pp.33,34)

Curiously, Petitioners did not see fit to address this contention within their "Reply Brief," but rather chose to rely upon the arguments set forth within their initial Brief...arguments which are premised upon clearly skewed statistical analysis. Again, I am not required to cull through the statistical data to formulate the appropriate results on behalf of Petitioners. Premised upon the assertions made by the Department concerning the inaccuracies contained within Petitioners' Exhibits 4 and 5 (inaccuracies which I find exist within the Exhibits in light of the regulatory performance standards cited by the Department), Petitioners assertion that it has met the "clearly erroneous" standard is clearly misplaced.

be based upon extraneous information (that dealing with other soil types and other reclamation procedures), projections, opinions and conclusions as to what it is thought will result from the proposed reclamation plan. (See, Petitioners' "Reply Brief," p.51) (Emphasis added)

Robert Dunker, one of the editors of the 1992 National Symposium on Prime Farmland Reclamation, published under the title Prime Farmland Reclamation in August, 1992 (See, Department's Exhibit #6), testified that based upon his review of the prime farmland restoration plan in Permit Application #227 and his knowledge and experience from long-term research in mined agricultural soils, he was of the opinion that the plan as presented in Permit Application #227 should result in the meeting of productivity requirements for prime farmland as outlined by the Department. (Tr.of 3/8/93, pp.1618, 1702, 1703, 1704)

Dr. Robert Darmody, also one of the editors of the 1992 National Symposium on Prime Farmland Reclamation, published under the title Prime Farmland Reclamation in August, 1992 (See, Department's Exhibit #6), testified that the presence of 40% glacial till in the reconstructed soil in the reclaimed area would not in his opinion prevent the soil from meeting productivity standards (Tr. of 3/24/93, p.1769), and that he had no concerns about the chemical or nutritional content of the proposed reconstructed soil. (Tr.of 3/24/93, pp.1773-75) Dr. Darmody concluded that in his opinion the post-mining reconstructed soil should achieve the desired bond release requirements. (Tr. of 3/24/93, p.1775)

Dr. Dean Wesley is a fully tenured professor at Western University and has taught various soil science courses for the past two (2) decades. Dr. Wesley is a practicing agronomist, and has advised and continues to advise farmers in west central Illinois (the locale where the permit area is located), since 1977. Dr. Wesley is the President and co-owner of Key Agricultural Services, Inc. Dr. Wesley unequivocally testified that the proposed reclamation plan

would meet the requirements of the Illinois regulatory program. (Tr.of 3/25/93, p.1925) On cross-examination, Dr. Wesley also testified that in his opinion, the long-term productivity of the permit area would continue to increase over time. (Tr.of 3/25/93, p.1934) Dr. Wesley also testified that the projected pH of the reconstructed root zone of the reconstructed soil should not affect crop productivity in any way. (Tr.of 3/25/93, p.1918) Dr. Wesley voiced the same opinion as Dr. Darmody and Mr. Dunker: the proposed reclamation plan will meet the requirements of the Illinois permanent program for reclamation of prime farmland, and that deep tillage would assure that such requirements would be met. (Tr.of 3/25/93, pp.1924-25, 1971)

Neither Dr. Wesley, nor Dr. Darmody, nor Mr. Dunker relied upon the Rapatee and Elm mine yield data set forth within Permit Application #277 to formulate their respective expert opinions of the reclamation plan. (Tr.of 3/24/93, p.1821; Tr.of 3/8/93, p.1672; Tr.of 3/25/93, p.1933-37)

Even Dr. Kevin McSweeney, one of the experts called as a witness by the Petitioners, conceded that:

[g]iven the laxity of the crop performance standards, there is a reasonable chance that established yield goals for bond release might be achieved by following the proposed reclamation plan. (See, Petitioner's Exhibit #18 at p.8)

More particularly, and perhaps more relevant, Dr. McSweeney specifically conceded that another soil scientist (and presumably the Illinois Department of Mines and Minerals) could reach the conclusion that the land under the reclamation plan could be reclaimed. (Tr.of 1/27/93, p.1145) Dr. McSweeney expressed the opinion that there is a reasonable chance that the performance standards of the Department would be met without even paying much attention to the physical condition of the subsoil. (Tr.of 1/27/93, p.1152) Dr. McSweeney believes that there is a "good

577

chance that bond release standards could be met by placing suitable topsoil over a landfill with a compacted clay-rich cap, if reasonable agronomic practices were followed. (Petitioner's Exhibit #18, p.10) Dr. McSweeney would, if such were up to him, apply a "higher," albeit undefined, bond release standard than that established under Illinois' regulatory scheme. (Tr.of 1/27/93, pp.1151, 1155-56)

In light of such expert testimony, it is clear that such does not support the contention of Petitioners that the Department's approval of Permit Application #227 is "clearly erroneous."

On the contrary, such expert testimony supports the contention of the Department and Midland that Petitioners' real objection to Permit Application #227 is not the Department's "decision," but rather the objection is with the bond release standards promulgated by the Department for reclaimed prime farmland and applied by the Department in making the decision to approve Permit Application #227. The Petitioners italicize their disdain of the bond release standards within their "Reply Brief," wherein they characterize the standards as "pathetic" and "pitiful." (See, e.g., Petitioners' "Reply Brief, pp.60,42) Petitioners state within their "Reply Brief" that:

[i]t is absurd on its face to assert that the 30% standard [i.e., the bond release standard] is, or was ever intended to be, a substitute for the provisions of the law requiring equal or greater productivity. Equal or greater productivity can only mean one thing; annual yields which are consistently year after year, 100% or better than nearby farmland of comparable quality. The standard is, on its face, so pitiful, that it veritably drips with admissions that a real equal or greater productivity standard would be very difficult to achieve, and that the regulators feel compelled to protect industry from the excesses of congress. (See, Petitioners' "Reply Brief," p.42) (Emphasis added)

But as is pointed out within the Section entitled "Bond Release Performance Standards" herein, OSM published a preamble discussion regarding federal prime farmland regulations when it first

published the proposed language of 30 CFR 823.15 [the federal bond release standards]. There,

OSM stated:

[s]ince performance standards are the link between permit approval and final successful reclamation judged at the time of bond release, the level of management that would be required by these performance standards is essentially the same as the two virtually identical statutory phrases for permit approval and bond release. (47 Fed.Reg. 19076, 19081; May 3, 1982)

More specifically still, OSM stated within its preamble to the adopted federal rules governing the mining and reclamation of prime farmland that:

[f]inal Section 823.15(b) imposes a general requirement that prime farmland soil productivity be restored. It contains eight paragraphs specifying how the operator must comply with the requirement, including an average yield requirement.

Final Section 823.15(b)(3) specifies that the measurement period for determining the average annual crop production (yield) for proving soil productivity for bond release is a minimum of three crop years. The substance of this final rule is unchanged from the proposed rule. (48 Fed.Reg. 21458, 21459; May 12, 1983)

Thus, OSM, the federal regulatory agency responsible for promulgating rules for the administration and implementation of SMCRA, has specifically declared that a reclaimed soil which meets target yields in three (3) crop years has been restored "to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area." (SMCRA, Sec. 510(d)(1)) Illinois regulations mandate that those three (3) crop years occur within a ten (10) year span, and those regulations have been approved by the federal regulatory authority.

As Petitioners well know, this is not the forum, nor is it the time, to have commenced litigation as to their objections to the Department's bond release standards for prime farmland.

The Department is correct that:

...this case is not about what someone else might do if they were writing regulations to implement the State or Federal Acts, and it is not about whether Petitioners' witnesses agree or disagree with the regulations as written. As every

party to this proceeding is aware, there is an established methodology by which to pursue regulatory change. Administrative review of a permit decision is simply not the proper forum in which to air disagreement with the regulations or debate their adequacy. Again, disagreement with the regulations does not confer standing upon the Petitioners and it does not prove that the Department's decision was clearly erroneous.⁵ (See, Department's "Post-Hearing Brief," pp.36,37)

Therefore, I reject the Petitioners' assertion that somehow the Department "clearly" erred by reviewing Permit Application #227 in light of the bond release standard for prime farmland previously promulgated by the Department. Further, I find that Petitioners have woefully failed to prove that the Department "clearly" erred in deciding that the reclamation plan contained within Permit Application #227 will meet that bond release standard.

Several comments concerning the expert testimony are in order. First, I reject the Petitioners' assertion that somehow the Department's or Midland's expert witnesses were "captive." (See, Petitioners' "Reply Brief," pp.54, 58, 60, 64) Nor did I find the testimony of Dr. Darmody "lame." (See, Petitioners' "Reply Brief," p.63) Nor do I agree with the Petitioners' assertions that:

[t]he only objective analysis of the reclamation plan and its purported documentation was presented by Dr. McSweeney and Dr. Dancer. All of the witnesses presented by the Department and the coal company were possessed of either a direct or indirect interest in the outcome of this proceeding. Dr. Darmody and Mr. Bunker are both employed with the Prime Farmland

⁵ I express no opinions herein as to whether the prime farmland bond release standard is, indeed, in conformity with the statutory mandate. Suffice to say that Petitioners' objection to the standard is not patently unreasonable. However, I served in no capacity with respect to the Department's promulgating and ultimate approval of the bond release standard, and therefore, I was not privy to the evidence and comments adduced within the context of such process. It is for that reason and others that I am confident that the instant controversy is not the context by which Petitioners may attack, collaterally, the administrative regulations which have been properly promulgated by the Illinois Department of Mines and Minerals, and which administrative regulations have received the regulatory imprimatur of the Office of Surface Mining Reclamation and Enforcement of the federal Department of the Interior.

Reclamation Program at the University of Illinois. (TR 1540 and 1750) In the past a majority of the funding for the Prime Farmland Program has come from the coal industry, and the Program is currently seeking additional funding from, among other sources, the coal industry; and it is Dr. Darmody's responsibility to seek out such funding. (TR 1836) Dr. Dean Wesley who testified for the coal company is a private consultant who regularly does work for the coal industry and governmental agencies. (TR 1901)

It is unrealistic to believe that Dr. Darmody and Mr. Dunker would bit the hand that feeds them by testifying contrary to the coal company's interests, thereby jeopardizing the continued coal industry funding for their research projects. Similarly, Dr. Wesley can only count on continued coal industry and (coal related) governmental consulting contracts so long as he supports the positions taken by government and industry. By contrast, neither Dr. McSweeney nor Dr. Dancer have even the remotest stake in the outcome of this proceeding. Their interest herein is one of pure science. (See, Petitioners' "Brief," pp.17,18)

But as pointed out by the Department within its "Post-Hearing Brief:"

[a]side from the fact that the University of Illinois' Prime Farmland Research Program received 80% of its last funding from the USDA and 20% from the coal industry. (Tr.of 3/24/93, p.1755), it is clear to all present for their testimony that Dr. Darmody and Mr. Dunker are highly educated, professional and credible. There is absolutely no evidence that they are biased in favor of the coal industry, nor did their testimony or demeanor suggest that such was the case. What makes Petitioners' assertion even more preposterous is the fact that it implies that Midland Coal Company and Mid State Coal Company bankroll the U of I's Prime Farmland Research Program -- an implication that is, again, a total fabrication on the part of Petitioners.

Petitioners' characterization of Dr. Dean Wesley is also wholly lacking in support. Dr. Wesley, President and co-owner of Key Agricultural Services, Inc., testified that 15% of the company's business is coal-related, which includes both private and governmental clients. (Tr.of 3/25/93, pp.1899-1901). The record is devoid of any evidence supporting Petitioners' assertion that "Dr. Wesley can only count on continued coal industry and (coal related) governmental consulting contracts so long as he supports the positions taken by government and industry." (Pet. Brief, p.18)⁶ (See, Department's "Post-Hearing Brief," p.45)

I found Dr. Darmody and Mr. Dunker credible witnesses, and I perceived no indicia whatsoever

⁶ Midland's "Post-Hearing Brief" points out that "...unlike the [P]etitioners' expert witnesses, Messrs. Darmody and Dunker testified without compensation." (See, Midland's "Post-Hearing Brief," p.29)

that they skewed their testimony in favor of the coal industry and/or the Department.

Nor did I find that "[t]he only objective analysis of the reclamation plan and its purported documentation was presented by Dr. McSweeney and Dr. Dancer." (See, Petitioners' "Brief," p.17) I, like the Department, took note of the fact that Dr. McSweeney specifically admitted that he is presently "sort of out of the picture" regarding reclamation research and has been since 1983. (Tr.of 1/27/93, pp.1161, 1126) Nor has Dr. McSweeney ever done any deep tillage research or performed any soil tests on deep tilled plots (and deep tillage is being proposed within the reclamation plan for Permit Application #227). (Tr.of 1/27/93, p.1127) And I, too, took note that Dr. McSweeney cited and quoted extensively from a report which contained the specific caveat:

[t]his report supplements previous reports and presents progress through 1990. Some of the included data and interpretations are incomplete or tentative. This is a progress report only and should not be cited in any form. (Department's Exhibit #20, 4th page) (Emphasis added)

Dr. McSweeney conceded on cross-examination that such caveat should be respected.

Yet it was Dr. Dancer's written analysis, and testimony, I found most troubling (with respect to supporting Petitioners' assertion that the Department's approval of Permit Application was "clearly erroneous"). Dr. Dancer testified that he has been out of the Illinois reclamation process for over ten years. (Tr.of 1/6/93, p.571) I agree with the Department that:

Petitioners' Exhibit No. 14, entitled "Testimony by William S. Dancer," is replete with typographical errors, flawed and baseless assumptions, graphs and charts that do not depict what actually occurred, and statements and conclusions that were revised, withdrawn and contradicted by Dr. Dancer during cross-examination. A brief sampling follows:

Pet.Ex.14, p.4: Dr. Dancer omitted 5 years of data from his graphs, despite the fact that such data was available and in fact referenced by him at page 38. Reference #19. (Tr.of 1/6/93,

pp.589-92).

Pet.Ex.14, p.5: Ditto, 4 years of data omitted. (Tr.of 1/6/93, pp.592-93).

Pet.Ex.14, p.6: Dr. Dancer admitted that his conclusions are not borne out by actual data to which he had access and in fact referenced. (Tr.of 1/6/93, p.598)

Pet.Ex.14, p.10: Dr. Dancer photocopied certain, but not all, graphs from Dept.Ex.7, explaining that he only reproduced the ones that supported what he was saying. (Tr.of 1/6/93, p.616).

Pet.Ex.14, p.14: Dr. Dancer made no distinction between deep tilled and non-deep tilled fields but rather lumped them all together to produce the depicted curves. (Tr. of 1/6/93, p.618).

Pet.Ex.14, p.18 and Pet.Ex.14A: Although the paper marked and admitted as Department's Exhibit No. 8 contains actual on site rainfall data to which Dr. Dancer had access and in fact cited at page 37, Reference #10, he did not use it. In fact, actual on site rainfall for July of 1985 was 3" less than what Dr. Dancer has plotted. (Tr.of 1/6/93, pp.634-35).

Pet.Ex.14, p.28: Dr. Dancer states that he is "particularly concerned that Illinoian [sic] glacial till will represent more than 60% of the proposed rooting media." During cross-examination, he refined that to be "plus or minus 10 percent." (Tr.of 1/14/93, p.781) His calculations of glacial till were based upon a schematic diagram found at page 86 of Jt.Ex.1, being a part of Appendix C of Permit Application No. 227, which contains hydrologic information. (Tr.of 1/6/93, pp.559-601). On January 6, 1993, reconstructed soil from the core samples provided in Permit Application No. 227 and admitted herein as Department's Exhibit No. 6. (Tr.of 1/6/93, p.603). On January 14, 1993, Dr. Dancer was purportedly able to calculate the percentage of glacial till would represent 86% of the reconstructed soil. (Tr.of 1/14/93, pp.776-77). A few moments later he inexplicably decided that "(i)t's got to be something like that, 67 percent." (Tr.of 1/14/93, p.780).

Interestingly enough, Robert Dunker and Robert Darmody were able to and had in their review of the permit application calculated

the amount of glacial till in the reconstructed soil from an analysis of the data in the core samples marked and admitted herein as Department's Exhibit No. 6. Dr. Darmody testified that the glacial till would represent 40% of the reconstructed soil. (Tr.of 3/24/93, p.1767). Mr. Dunker testified that it would be 38% glacial till. (Tr.of 3/8/93, pp.[sic]1606).

In addition, Dr. Dancer placed much reliance on the Sunspot mine research and 1982 Fehrenbacher paper stemming therefrom which he first said the Department cited (Tr.of 1/6/93, p.609) but then changed his mind. (Id. at 610). Dr. Dancer first believed that the Sunspot research most closely approximated the permit application under review (Tr.of 1/6/93, p.606), but later decided that since the reconstructed soil at the Sunspot site contained shale, it really was different because Midland Coal Company does not propose to include shale in the reconstructed soil. (Tr.of 1/6/93, pp.607-08; Tr.of 1/14/93, pp.799-801).

Despite having no experience with deep tillage technology and never having performed soil tests on a deep tilled site or even observing a deep tilled site (Tr. of 1/6/93, pp.641-42), it took Dr. Dancer only two days to assemble the "Addendum" to his "testimony" document, wherein he discusses deep tillage and soil structure. (Tr.of 1/14/93, p.733). And despite having available to him studies reporting yield data from a variety of deep tilled plots (Tr.of 1/6/93, p.654), Dr. Dancer relied on his interpretation of one statement made by the promoter of the DMI tillage equipment to make his predictions and reach his conclusions about the effects of deep tillage. (Tr.of 1/6/93, pp.649-53; Tr.of 1/14/93, p.816). That statement, found on page 541 of Jt.Ex.1, reads as follows:

He claims his data clearly shows that running 6 in. deeper than conventional cutter chisels can result in 3 to 12 bu./acre yield increases in corn.

The above sentence, which came from an article which Dr. Dancer originally said was not a scientific paper but then changed his mind and decided that it was (Tr.of 1/14/93, p.808), is the only sentence Dr. Dancer looked at to make his charts. (Tr.of 1/6/93, p.652).

Dr. Dancer originally testified that a conventional cutter chisel plows to a depth of about 18 inches. (Tr.of 1/6/93, p.650). He later testified that a conventional cutter chisel goes to a depth of 9 to 10 inches. (Tr.of 1/14/93, p.698). Even later, he decided that a conventional cutter chisel goes to 32 inches (Tr.of 1/14/93, pp.698, 815), and admitted that his conclusions about the effects of deep tillage were based on his assumption that a conventional cutter chisel does not go to a depth of 32 inches, the accuracy of his charts and of his conclusions concerning the effects of deep tillage would be affected. (Tr.of 1/14/93, p.815).

Robert Dunker testified that a conventional cutter chisel goes 8 to 10 inches into the soil (Tr.of 3/8/93, pp.1585-88), and that the sole statement relied

upon by Dr. Dancer, which was made by the promoter of the DMI tillage equipment, was the promoter's proclamation of the productivity response of using the DMI Tiger II, a 16-inch chisel plow, compared to using a conventional chisel plow, which effects [sic] 9 to 10 inches. (Tr.of 3/8/93, pp.1587-88); (See also Dept.Ex.10). The article was not proclaiming the productivity response of using the DMI deep plow proposed to be used by Midland, which is a different piece of DMI equipment with an effective depth of 48 to 50 inches.

Dr. Dancer admitted that although his curved figures at page 30 of his "testimony" document (Pet.Ex.14B) should match up with his tables at page 31, they in fact do not. (Tr.of 1/14/93, pp.683-88). He also admitted that his figure 6A at page 30 and Table 2A at page 31 regarding the Norris mine do not reflect what actually happened at that site, despite the data being available to him. (Tr.of 1/14/93, p.686). In fact, Dr. Dancer depicts a negative response to deep tillage in 1986 when that is not in fact what happened. (Tr.of 1/14/93, pp.689-90)

Given the above discussion, as tedious as it may appear, it is no wonder that Petitioners very simply contend that "Dr. Dancer's testimony and written presentation were lengthy, and very technical, and thus difficult to abstract or summarize." (Pet.Brief, p.39). The above discussion is not an exhaustive listing of examples from the record discrediting or casting doubt upon the testimony and conclusions of Dr. Dancer. It is simply intended to highlight the fact that Dr. Dancer's credibility and expertise with regard to the issues herein are, at best, questionable. Dr. Dancer's testimony and written submission certainly do not amount to a "scholarly analysis or critique." (Pet.Brief, p.39) (See, Department's "Post-Hearing Brief," pp.39-43)

I have quoted extensively from the Department's "Post-Hearing Brief" with respect to Dr. Dancer's testimony because I believe the Department ably emphasized the problems associated with Dr. Dancer's "analysis." I agree with the Department that Dr. Dancer's testimony and written submission do not amount to a "scholarly analysis or critique," and correlatively, I do not find that Dr. Dancer's testimony and written submission rise to the level of demonstrating that the Department's approval of Permit Application #227 was "clearly erroneous."

Less probative to the issues raised herein, in my opinion, was the testimony of Rodney Lindsey. Mr. Lindsey is a Knox County farmer who actually farmed some 640 acres of reclaimed Rapatee soil for seven or eight years. (Tr.of 12/16/92, pp.16,17) Petitioners correctly state that "Mr. Lindsey testified that in his opinion equal or greater productivity could

not be achieved on strip mined land." (See, Petitioners' "Brief," p.12) However, the Department is correct when it responds that "Mr. Lindsey did not know what method of reclamation was used on the land he farmed about which he testified." (Department's "Post-Hearing Brief," p.29, citing, Tr.of 12/16/92, p.43) Nor had Mr. Lindsey ever read the reclamation plan or plans for the land that he farmed. (Tr.of 12/16/92, pp.69-70) The Department also correctly points out that Petitioners wholly "failed to present any evidence showing how the land Mr. Lindsey farmed was reclaimed." (Department's "Post-Hearing Brief," p.29) Petitioners urged within their initial Brief that "[y]ield results and experiences from other locations become relevant only to the extent that...the reclamation methods used are the same or similar as those proposed in the reclamation plan under review." (Petitioner's "Brief," p.15) Taking the assertion at face value, even the Petitioners concede that Mr. Lindsey's testimony is not probative of the issues raised within this proceeding. Additionally, Mr. Lindsey did not say, as asserted within Petitioners' Brief that he "deep ripped" the land which he farmed in the early 1980's, but rather Lindsey testified that Midland Coal Company used "a big ripper on the back of D9 Cat that was to go down and tear up the ground" on approximately 120 acres. (Tr.of 12/16/92, p.22) Lindsey assumed that such "ripping" device went approximately three or four feet in the ground, but since he never actually measured the device, Lindsey admitted that it could have been two feet. (Tr.of 12/16/92, pp.22,67)

This last testimony is crucial in evaluating the weight to be placed upon Mr. Lindsey's opinion that "equal or greater productivity could not be achieved on strip mined land." Deep tillage, as that which is proposed to be used within the reclamation plan proposed within Permit Application #227, has been in use in west central Illinois for less than five years. (Tr.of 3/8/93,

586

p.1610; Tr.of 5/24/93, p.1838) Thus, the Department is correct when it states that "the only thing that is certain about the "deep ripping" that occurred in the early 1980's on the land farmed by Mr. Lindsey is that it was not the type of "deep tillage" that is proposed to be used by Midland Coal Company under Permit No.227." (See, Department's "Post-Hearing Brief," p.30) Thus, despite Petitioners assertion that "Mr. Lindsey's testimony cannot be dismissed as anecdotal," I find that it, indeed, must be considered so. Without any evidence proffered by Petitioners linking the reclamation procedure used on the Lindsey farmland with the reclamation procedure proposed in Permit Application #227, it is difficult to see how I can reach any other conclusion.

Robert Dunker, Agronomist and Technical Manager of the University of Illinois' Prime Farmland Reclamation Research Program, presented a succinct summary of Midland's proposed mining and reclamation plan:

Number 1, the mining company will segregate the A horizon topsoil with scrapers and either handle the topsoil in two different ways:

It will either be stockpiled, or it will be hauled for replacement back on the approved rooting medium.

The mining company will selectively remove and replace the B and C horizons by dragline and in doing so will avoid the mixing of any consolidated material and any shales or consolidated rock into the rooting material itself.

Following the rooting medium approval by the Department of Mines and Minerals, the topsoil will be put back again in either of two ways:

The A horizon will be removed from the stockpile and placed in windrows, and the dozers will then spread the A horizon out each way from the windrow. This proposal will attempt to limit traffic lanes on the rooting medium by using a windrow method to replace topsoil, thereby limiting excessive traffic within that windrow lane and will avoid compaction on the majority of the rooting medium in this method.

587

The other method by which topsoil will be replaced is it will be removed and replaced directly on the approved medium without placing it in a stockpile in basically the same way.

After the area has been reclaimed and the topsoil has been put back over the rooting medium, the mining company will seed the area with a vegetative cover to prevent erosion.

And they propose to do this first with an annual crop of wheat. And after wheat has been harvested, the next year they will probably---or they propose to use a grass legume mixture after subsequent grading, after the first initial vegetative cover.

And this grass legume will be managed for three to five years. They propose that fertilization will conform to soil tests, to tests of needed nutrients.

After three to five years of that management, the implementation by the DMI deep plow, and deep tillage plow which has about a 48 to 50 inch effective depth, will be used to ameliorate any compaction which was created during the previous traffic in the reclamation process.

And after deep tillage, the area will be then cropped to the rotation of corn, soybeans, wheat to complete the bond release requirements. (Tr.of 3/8/93, pp.1555-1557, See also, pp.1615-17)

The regulatory standard or measurement of successful prime farmland restoration is meeting the requirements of bond release. In order to obtain bond release, productivity target yields must be obtained three years out of a ten year period. I specifically find that Petitioners have failed to demonstrate that the Department's decision to approve Permit Application #227, premised upon the Department's finding that the reclamation plan contained within Permit Application #227 will meet bond release standards, is erroneous. Petitioners therefore wholly failed to prove that the Department's approval of Permit Application #227 was "clearly erroneous."

Two (2) final points. I did not find the testimony and evidence as to infrared and thermographic photography, presented by Petitioners, overly convincing. Not only did I find the extrapolations of Petitioners' witness unconvincing, I also seriously doubt that the type of

588

photography presented is a useful tool to assert that "subsurface conditions found on strip mined land" is very different than the subsurface of undisturbed lands. (See, Petitioners' Brief, p.37) Thermal imagery clearly does not provide any subsurface information. (Tr.of 3/24/93, p.1802) Dr. Darmody, an expert called by the Department to impeach Petitioners' attempt to use the results of remote sensing within this controversy, testified that he frequently uses remote sensing techniques and did so for his Master's thesis; Dr. Darmody teaches his students about remote sensing and has received specialized training and a certificate from the National Aeronautics and Space Administration (NASA) in the application of remote sensing and is currently conducting a research project involving thermal imaging, a type of remote sensing. Dr. Darmody, Soil Scientist and Director of the U of I's Prime Farmland Reclamation Research Program, has never and never would use thermal infrared scanning to detect compaction in a research project because the process cannot measure compaction. Dr. Darmody was present at the administrative hearing in this matter during the testimony of Mr. Jay Vanier, the expert Petitioners called on to testify concerning remote scanning. Dr. Darmody could not detect compaction from the thermal or false color images presented by Mr. Vanier, nor could Dr. Darmody detect subsurface moisture from Mr. Vanier's images. (Tr.of 3/24/93, pp.1799-1802) Both Dr. Darmody and Mr. Vanier testified that thermal imagery is limited to differentiating between objects with different surface temperatures. (Tr.of 3/24/93, pp.1799-1802) Therefore, Dr. Darmody deemed the attempt to find soil compaction through thermal imaging as "what you might call a very long shot." (Tr.of 3/24/93, p.1801) Although Mr. Vanier appeared to be sincere in expressing his opinions premised upon his remote sensing images, I cannot agree that his attempts to express opinions as to "density compaction" are the type of opinions which the judiciary had in mind when the

"clearly erroneous" standard was formulated. The "long shot" taken simply did not convince me. False color infrared photography is primarily used for camouflage detection or surface imaging. Thermal infrared scanning is primarily used in engineering applications, such as for detecting the integrity of insulation in walls or the detecting of leaks in a roof. I am unconvinced that such techniques provide any basis for Petitioners' assertions concerning the "compaction" problem subsequent to strip mining.

Lastly, I do not believe that the Department's "Response" to a "Comment," contained within the Permit Application and concerning the mapping of the reclaimed farmland, warrants reversal of the Department's approval of Permit Application #227. Within the section of the Permit Application entitled "Results of Review," the following appears:

Comment - Prime farmlands and high capability land are remapped as 872B Rapatee based on the Knox County Soil Survey.

Response - Although no soils mapped in Knox County have been reclaimed to prime farmland standards pursuant to current regulations, in all likelihood they would be mapped as Rapatee based on the current available soil series and the range of characteristics defined for that series. (Jt.Ex.1, p.426)

Petitioners characterize this "Response" as the Department's "expectations as to the condition of the land after mining..." (See, Petitioners' "Brief," p.9) (Emphasis added) But as Petitioners know, there exist a general dissatisfaction with the current mapping classifications for mined soils. As is pointed out in the paper entitled "Mapping and Classification of Minesoils: Past, Present, and Future", which appears at page 233 of the Department's Exhibit #25 (i.e., within the book entitled Prime Farmland Reclamation):

[t]he current soil classification scheme for mine soils is inadequate. Mine soil series are primarily focused at characterizing mine soils that were not reclaimed at all or were reclaimed prior to the Surface Mining Control and Reclamation Act (SMCRA) permanent program. This scheme is inadequate given the diversity of

mine soils and changes in reclamation. There are thousands of reclaimed mine soils that are not adequately classified.

Reclamation technology has improved as research has demonstrated limitations of old methods and introduced new methods. A new reclamation technique involving plowing to 1.2 m (48 in) deep has profound effects on soil properties and should be recognized in mapping and classifying of mine soils. Productivity indices assigned to existing series are not applicable to minesoils using improved reclamation techniques. Mines soils which have met productivity standards and mapped under the present scheme are under-assessed causing reduced property tax revenues to counties. This misclassification also reinforces the misconception that a mine soil is not adequately reclaimed under the law. (Department's Exhibit #25, pp.23-37)

It is my belief that the Petitioners' attempt to pigeon-hole the "Response" cited above as the Department's "expectations as to the condition of the land after mining" is exactly the "misconception" to which the authors of "Mapping and Classification of Minesoils: Past, Present, and Future" refer. One of the co-authors of the article "Mapping and Classification of Minesoils: Past, Present, and Future" was Dr. Darmody, who testified on behalf of the Department. Dr. Darmody testified that the article was written, in part, to encourage the Soil Conservation Service of the U.S. Department of Agriculture to publicize the fact that the list of soil series in Illinois is incomplete, and to alert the public that there is a problem with the current state of mine soil mapping and classification. (Tr.of 3/24/93, pp.1782-83) The fact that the Department is stuck with the inadequate "mapping" classifications is hardly a basis for stating that by adhering to such system, the Department has expressed its "expectations as to the condition of the land after mining." Therefore, I believe that the Petitioners' have missed the mark in attempting to undermine the rationale of the Department's approval of Permit Application #227 by asserting such.


As previously stated:

[a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed...This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently...If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous... (Anderson v. City of Bessemer City, 470 U.S. 564, 105 S.Ct. 1504 (1985))

There is no doubt in my mind that the Department's approval of Permit Application #227 "is plausible in light of the record viewed in its entirety." For such reason, and the reasons cited above, I affirm the Department's approval of Permit Application #227.

IT IS SO ORDERED.

Dated: 9/13/93



Michael O'Hara
Hearing Officer

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Findings of Fact, Conclusions of Law, and Order was hand delivered on September 13, 1993, to the following at the last known address of:

Karen Jacobs
Department of Mines & Minerals
300 West Jefferson Street - Suite 300
P.O. Box 10137
Springfield, Illinois 62791-0137

Fred Bowman, Supervisor
Department of Mines & Minerals
P.O. Box 10197
Springfield, Illinois 62791-0197

James Fulton
Office of Surface Mining
511 W. Capitol, Suite 211
Springfield, Illinois 62704-1968

The undersigned also hereby certifies that a copy of the foregoing Findings of Fact, Conclusions of Law, and Order was sent via regular mail on September 13, 1993 and was sent via certified mail on September 14, 1993, to the following at the last known address of:

Mr. Bill Morris
333 Court Street - Ste. 308
Pekin, Illinois 61554

Mr. Robert A. Creamer
77 West Wacker, 79th Floor
Chicago, Illinois 60601

Mr. Michael Lied
Husch & Eppenberger
Suite 800
101 S.W. Adams Street
Peoria, Illinois 61602

by enclosing the same in an envelope addressed to them as shown above, with postage fully prepaid, and by depositing said envelope in a U.S. Post Office Mail Box in Springfield, Illinois.



SAB