BEFORE THE DEPARTMENT OF NATURAL RESOURCES
STATE OF ILLINOIS
OFFICE OF MINES AND MINERALS
LAND RECLAMATION DIVISION

IN RE:	)	
	)	
CAPITAL RESOURCES DEVELOPMENT COMPANY,	)	
	)	
Permittee,	)	
	)	
and	)	**Application No. 355**
	)	**Banner Mine**
ILLINOIS DEPARTMENT OF NATURAL RESOURCES, OFFICE OF MINES AND MINERALS,	)	**Fulton County**
	)	
Respondent,	)	
	)	
and	)	
	)	
ILLINOIS ATTORNEY GENERAL, *et al.*,	)	
	)	
Petitioners.	)	

FINDINGS OF FACT
CONCLUSIONS OF LAW
AND
FINAL ORDER

I.

STATEMENT OF UNDERLYING FACTS[1]

This controversy involves a challenge to the Illinois Department of Natural Resources, Office of Mines and Minerals, Land Reclamation Division (hereinafter Department) issuance of a surface coal mining and reclamation operations permit covering a tract of land, approximately

---

[1] Some of these underlying, background facts are taken from the parties' Post-Hearing Briefs, sometimes verbatim.

Fowler Pfleeger file

600 acres, located in Banner Township, Fulton County, Illinois. The parties challenging the Department's issuance of the permit are the Illinois Attorney General's Office (hereinafter "Illinois Attorney General" or "Attorney General"), Joyce Blumenshine and Rudy Habben on behalf of the Illinois Sierra Club (hereinafter "Sierra Club"), Terrance N. Ingram on behalf of Eagle Nature Foundation (hereinafter "Ingram"), and local residents (12) which include Kenneth Fuller, Richard B. Fuller, John R. Grigsby, Sr., Kenneth Grigsby, Mike Grigsby, Naomi and William Lott, Robert L. Williams, Lavern and Jean Yeske, and Sheila and Joseph Cook, as well as other interested persons (5) that include Elizabeth Gray, Jane Johnson, Janis King, Margaret Mitchell, and Richard Stout (hereinafter Petitioners"). Capital Development Company, LLC, the permit holder for Permit #355, intervened in this proceeding as the Permittee and party-in-interest (hereinafter "Applicant" or "Capital").

On February 7, 2002, Capital submitted the initial permit application for surface coal mining and reclamation operations to the Department. On May 4, 2004, the Department issued its determination that the application was administratively complete, and designated the application as Application No. 355 (hereinafter "Application"). (**See**, Capital Exhibit I) On May 17, 2004, two copies of the administratively-complete Application were submitted to the Department. The Application was then filed with the Fulton County Clerk on May 18, 2004, and public notice of the complete Application was published in the Canton Daily Ledger for four consecutive weeks (5/27/04, 6/3/04, 6/10/04, and 6/17/04). (**See**, Department Form SCML-1a, dated May 18, 2004; Certification of Publication for Surface Coal Mining and Reclamation Operations Permit No. 355).

Written notice of the Application was provided to the governmental agencies and entities

required to receive notice under 62 Ill.Adm.Code 1773.13(a)(3). The following state and federal agencies provided written comments on the Application: Illinois Department of Agriculture, Illinois Environmental Protection Agency ("IEPA"), Natural Resources Conservation Service, U.S. Fish and Wildlife Service, U.S. Corps of Engineers. (**See**, November 15, 20087 Results of Review at p.3)

On August 31, 2004, following the published newspaper notice, a public hearing on the Application was held in Banner, Illinois. The hearing was attended by representatives of Capital and the Department, as well as various members of the public. (**See**, Transcript of August 32, 2004 Hearing on Application 355, Banner Mine)

On July 10, 2007, the Department issued a second request for modification in Capital. Capital submitted the written modifications required by the Department on September 27, 2007.

Capital was notified on October 26, 2007, that the Department had approved the Application. (**See**, Department Exhibit #95) On November 7, 2007, Capital made its final, formal Application submitted to the Department, which included the payment of the permit fees and the posting of the required reclamation bond. The Department issued Permit No. 355 to Capital on November 15, 2007.

On November 9, 2004, the Department submitted a request for modification to Capital which requested additional information regarding approximately fifty items concerning the Application (the "2004 Modification Request"). Capital's 884-page response to the modification request was sent to the Department on November 7, 2005.

The Department issued its denial of the Application, without prejudice, on December 6, 2005. The denial was predicated on a pending legal action filed in the Fulton County Circuit

Court appealing the Fulton County Superintendent of Highway's decision to vacate a road within the permit area covered by the Application. On January 3, 2006, Capital timely filed an administrative appeal of the Department's denial of the Application, and, on August 15, 2006, filed a Motion to Vacate and Remand the Department's permit denial. On March 7, 2007, the Third District Appellate Court in *Michael Grigsby, el al. v. Richard Ball, et al.*, No. 05-MR-25 (Fulton County), affirmed the decision to vacate the road. On April 27, 2007, after Capital appealed the permit denial, I issued an Order remanding the Application to the Department so that the Department could continue to process the Application (in light of the Department's denial having been effectively overruled by the Circuit and Appellate Courts). Pursuant to the Order, I directed the Department to complete its review of the Application within thirty (30) days, but thereafter that deadline was extended on August 8, 2007, by an additional 180 days.

On November 16, 2007, Permit Application No. 355 was granted by the Department. Thereafter, on December 17, 2007, the individuals previously cited (on behalf of themselves or as representatives of their respective organizations or offices) filed Petitions seeking review of that Permit approval.

STATUTORY AND REGULATORY OVERVIEW[2]

The federal Surface Mining and Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 *et seq.* (hereinafter "SMCRA" or "Federal Act") established the background for a "nationwide program to protect society and the environment from the adverse effects of surface

[2] Again, portions of this section are taken from the parties' Post-Hearing Briefs, sometimes verbatim.

coal mining operations." (SMCRA, Sec. 102(a)). SMCRA created the Office of Surface Mining Reclamation and Enforcement within the U.S. Department of Interior ("OSM"), which was charged with "assisting the States in development of State programs for surface coal mining and reclamation operations which satisfy the requirement of the Federal Act, and at the same time, reflect local requirements and local agriculture conditions." (SMCRA, Sec. 201(c)(9)). The Secretary of the Interior, through OSM, was charged with administering the Federal Act and prescribing regulations to implement its provisions. (SMCRA, Secs. 201(c)(2) and 304). Such federal regulations are certified at 30 CFR 700 through 955.

Under the Federal Act, Congress recognized and declared that due to the "diversity in terrain, climate, biologic, chemical and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act rest with the States. (SMCRA, Sec. 101(f)) Thus, the State of Illinois and others that elected to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations within their state boundaries were given the opportunity to devise and submit to the Secretary of Interior a state program "which demonstrates that such State has the capacity of carrying out the provisions of [SMCRA] and meeting its purposes...." (SMCRA, Sec. 503(a)) The Secretary is precluded from approving a State program unless it was found that "the program provides for the State to carry out the provisions and meet the purposes of the ...[Federal Act and regulations]....within the State and that the State's law and regulations are in accordance with the provision of the [Federal] Act and consistent with the requirement of the [Federal regulations]."

(30 CRF 732.150) Upon the Secretary's approval of a state program, the state assumes exclusive jurisdiction or "primacy" over the regulation of surface mining and reclamation operations within its borders. (SMCRA, Sec. 503(a)) OSM's role in a primacy state, such as Illinois, is one of oversight; that is, OSM is responsible for evaluating the administration of the state program. (30 CFR 701.4 and 733.12)

Illinois, through the Land Reclamation Division of the former Department of Mines and Minerals, currently the Office of Mines and Minerals for the Department of Natural Resources, assumed exclusive jurisdiction over the regulation of surface coal mining and reclamation operations within its borders upon OSM approval on June 1, 1982. (**See**, 30 CFR 913.10) The Department's Land Reclamation Division on that date was bestowed with the full "regulatory authority" permitted under SMCRA for all surface coal mining and reclamation operations in Illinois. That is, the Secretary found in 1982 that Illinois' program met the intent and purpose of SMCRA and its regulations. And pursuant to its authority under Section 215/4 of the Attorney General Act (15 ILCS 205/4), the Illinois Attorney General's Office also certified the Illinois program for regulation of surface coal mining and reclamation operations when federal approval was granted to Illinois on October 25, 1988. (53 FR 43112)

The Illinois program consists of the Surface Coal Mining Land Conservation and Reclamation Act (State Act), 225 ILCS 720/1.01 *et seq.*, and regulations as promulgated thereunder at 62 Ill.Adm.Code 1700 through 1850.Since its initial approval in 1982, the Department has amended the program by means of legislative and regulatory changes, all of which require approval by OSM before taking effect in the State. (30 CFR 732.17) In addition,

any amendments to the State Act and its regulations require approval of the State Legislature, its Joint Committee on Administrative Rulemaking, and other state entities, such as the Illinois Attorney General's Office. Finally, all aspects of the regulatory program under the State Act are regularly audited by OSM every year under the terms of its federal funding grant from OSM to the Department in order to determine compliance of the Illinois program with federal SMCRA requirements.

Under the Illinois program, the contents of every permit application are reviewed by the Department pursuant to Section 2.02(a) of the State Act, 225 ILCS 720/2.02, and its regulations to first determine whether an application for permit approval is an "administratively complete application," as defined under Section 1701 Appendix A Definitions, 62 Ill.Adm. Code 1701. The Department determines that an application is "administratively complete" if the application contains "information addressing each application requirement of the regulatory program" and "all information necessary to initiate processing and public review" pursuant to 62 Ill.Adm.Code 1773 Upon submission of an "administratively complete application," the applicant is required to file the application with the clerk at the courthouse for the county where the mining activity is proposed and to place a public notice pursuant to 62 Ill.Adm. Code 1773.13(a)(1) In addition upon submission of an "administratively complete application," the Department sends written notification to local governmental agencies with jurisdiction over or an interest in the area of the proposed mining and reclamation operation, as well as to all federal or state governmental agencies with authority to: (a) issue permits applicable to the proposed mining and reclamation operations, and (b) participate in the permit coordinating process under Section 503(a)(6) of the Federal Act or 62 Ill. Adm. Code 1773.13(a)(3) and 1773.12.

Under the Illinois program and its provisions for public participation in the permit process, any person and/or agency having an interest, which is or may be adversely affected by the Department's decision on an application, may submit written comments or objections to a permit application. Such persons may also request an information conference and/or a public hearing on the permit application (62 Ill.Adm. Code 1773.13(c) and 1773.14) At an informal public hearing, the moderating official shall allow, among the moderator's other administrative duties, all participants to present data, view points or argument relevant to the permit application in order to develop a "clear and complete record." (62 Ill.Adm.Code 1773.14(d)) Following the close of the informal public hearing, the comment period if held open for ten (10) days, or for other reasonable time so as to allow inclusion of additional responsive written or oral statements or presentations. (62 Ill.Adm.Code 1773.14(d)(5))

After the close of the comment period, the Department may either grant, deny or require modification of the "administratively complete" application. (62 Ill.Adm.Code 1773.15(a)) In making this determination to grant, deny, or request modifications, the Department must review written comments and objections submitted as well as the records of any public hearings held on the "administratively complete" application. (62 Ill.Adm.Code 1773.15(a)(1)) Any decision for approval of an application requires that the Department find that the application was "complete, accurate...[and]...complied with the Federal Act, State Act and the regulatory program," including "public participation" requirements. (62 Ill.Adm.Code 1773.15(c) and 1773.19 respectively)

As to requests for modification of an "administratively complete" application, the Department must issue such written decision requiring modification of the application within 60

days after the close of the public hearing date. (62 Ill.Adm.Code 1773.15(a)(1)(B)) And, unless just cause for extension of this time limit is demonstrated, the applicant must submit the required modifications within one year after the date of receiving the Department's written request for modification. After receipt of the applicant's response to the required modifications, the Department reviews the responses and issues a written decision either granting or denying the application. (62 Ill.Adm.Code 1773.15(a)(1)(B) and 1773.19) Such final decision to grant or deny any pending "administratively complete" application, as modified, must be issued under the time limits prescribed by 62 Ill.Adm.Code 1773.19, unless waived by the applicant. The burden of establishing that an application is in compliance with all the requirements of the regulatory program rests with the permit applicant. (62 Ill.Adm.Code 1773.15(a)(2))

Once the Department has made a final decision on a permit application, any person with an interest which is or may be adversely affected may request a hearing within 30 days after the mailing date of written notice of the final decision concerning the reason for the final determination. (225 ILCS 720/2.02(c) and 62 Ill.Adm.Code 1847.3(a)) Failure to file a request for hearing within this 30 day period results in a waiver to such hearing. (62 Ill.Adm.Code 1847.3(a)) The Department is required to "start the hearing within 30 days after the hearing request[s]...unless a pre-hearing conference has been scheduled or unless the person requesting hearing waives the 30 day time-limit." (62 Ill.Adm.Code 1847.3(d)) If an administrative review is requested, the Department "may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceedings" upon notice to all parties to the proceedings, showing of "substantial likelihood...[to]...prevail on the merits," and "such relief will not adversely affect the public health or safety or cause significant

imminent environmental harm to land, air, or water resources." (225 ILCS 720/2.01(e))

The State Act and its implementing regulations, in conformance with the Federal Act, also provides for the designation of certain lands as unsuitable for mining operations. Briefly, the substantive criteria for designating certain lands unsuitable for mining operations are as follows: (a) if reclamation of mine operations is not technologically and economically feasible, *or* (b) if such mine operations would be: (1) incompatible with existing state or local land use plans, (2) affect fragile or historic lands, (3) affect renewable resource lands and long-term loss or reduction in water supply or food/fiber productivity, *or* (4) affect natural hazard lands, such as areas of frequent flooding or unstable geology, that could endanger life and property. (225 ILCS 720.7.02(a) and (b), and 62 Ill.Adm.Code 1762.11)) Any person having an interest which is or maybe adversely affected has the right to petition the Department for designating such area as unsuitable for mining. The merits of such petition (hereinafter, "lands unsuitability for mining petition") require "allegations of fact with supporting evidence which would tend to establish the allegations" and a finding that the petition is not "incomplete, frivolous, or submitted by a person lacking an interest which is or may be adversely affected" by the proposed coal mining operations." (225 ILCS 720/7.03(a) and (b)) The State Act authorizes additional procedures, namely 62 Ill.Adm.Code 1762, 1764, and more specifically 1764.13 and 1764.15 which describes information criteria for a "complete petition" and the "initial processing" requirements for a land unsuitable for mining petition, respectively. (225 ILCS 720/7.03(f)) The State program, in conformance with the Federal program, also prohibits processing "any petition received insofar as it pertains to lands for which an administratively complete permit application has been filed and the first newspaper notice has been published." (62 Ill.Adm.Code

1764.15(a)(6)) However, as to judicial review of a land suitability designation or the termination of a land unsuitability for mining petition, the State Act specifically provides that "all final administrative decisions of the Department under this Act are subject to judicial review pursuant to the Administrative Review Law..." (225 ILCS 720/8.10), with the exception of administrative remedies created by the State Act, such as hearings to contest the Department's final decision concerning a permit application for surface coal mining and reclamation operations.

(a)

Burden of Persuasion

The Attorney General of the State of Illinois "seeks a ruling to vacate the permit for the proposed Banner Mine [issued to Capital Resources Development Company] on the ground that the Company failed to carry the statutory burden of establishing that its application complies with all requirements of the Illinois Surface Coal Mining Land Conservation and Reclamation Act and that the findings of the Department pursuant to Section 2.08(b) of the Act are erroneous." (**See**, Attorney General's Reply Brief, p.1) Likewise, Petitioners seek similar remedial relief. The Attorney General correctly notes that Section 1847.3(g)(1)(B) of the Department's rules contains the burden of persuasion in this matter, and therefore the Attorney General:

> ....shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion by a preponderance of the evidence that the permit application fails in some manner to comply with the applicable requirements of the State Act or regulations.

The Attorney General also *correctly* points out the egregious error of the Company in its urging that the Illinois "Administrative Procedure Act mandates that the 'findings and conclusions of

the administrative agency on questions of fact shall be held to be prima facie true and correct.'" (**See**, Company's Brief, p.6, citing 735 ILCs 5/3-110) The statutory citation referenced by the Company is to the Illinois Administrative *Review* Act, *not* the Illinois Administrative Procedure Act. Indeed, I agree with the Attorney General that the Administrative Review Act only applies to *judicial* review of "final administrative decision[s]," and not the type of proceeding at issue herein. (**See**, Attorney General's Brief, p.3) Indeed, the Company compounds its error by then asserting that:

> ....the role of the Hearing Officer in this proceeding is not to reweigh evidence or substitute its [sic] judgment for that of the Department; rather it is the Hearing Officer's job to determine whether the Department's findings in support of its decision to grant the Banner Permit are against the preponderance of the evidence. (**See**, Company's Brief, p.6, *citing Excelon Corporation v. Department of Revenue*, 2009 Ill.LEXIS 188, *6-7, Illinois Supreme Court Docket No. 105582 (Feb.20, 2009))

First of all, the *Excelon* decision has not been released by the Illinois Supreme Court for publication, and therefore the decision may be withdrawn and/or amended and/or revised at any time. Thus, for the Company to cite the *Excelon* decision is, I believe, unfortunate, inasmuch as the case is not only inapplicable to the instant cause, but is not yet so final as to be insulated from amendment or revision. Under such circumstances, the Company's reliance upon such is highly questionable. But far more particularly, the *Excelon* decision pertains to the Illinois Administrative Review Act, and as such does not provide any guidance as to the proper role of the Hearing Officer in the instant cause. I agree with the Illinois Attorney General that "[t]he underlying case in *Excelon* certainly did not pertain to any evidence either weighed or reweighed by the administrative law judge." (**See**, Attorney General's Reply Brief, p.5) I also agree with the Attorney General that:

> [t]here is no legal authority to apply the Administrative Review Law's standard (findings and conclusions of the administrative agency on questions of fact shall be held to be *prima facie* true and correct) to an administrative proceeding (conducted by a hearing officer or administrative law judge) for the internal review by an agency of that agency's decision. The Company blunders further in its next paragraph by using *Excelon* to suggest that (in the Banner Mine proceeding) the "mixed questions of fact and law" raised by the Attorney General regarding "procedural matters" during both the permit application review and this administrative proceeding to review the permit decision are to be "reviewed under a 'clearly erroneous' standard." Company brief at 6. How any of this comports with the preponderance of the evidence standard is not apparent from the Company's argument. (**See**, Attorney General's Reply Brief, p.5)

I find that neither the *Excelon* decision nor the Illinois Administrative Review Act has any relevance as to the burden of proof or the burden of persuasion for this proceeding.

The Attorney General also takes exception with the Department's early contentions concerning the "appropriate burden of proof," and rightfully so. (**See**, Attorney General's Reply Brief, p.5) The Attorney General correctly notes that the Department's Brief veers off course by discussing *judicial* review as opposed to the appropriate burden of persuasion to be applied in the instant cause. (**See**, Attorney General's Reply Brief, p.5) Although the Department does not make the egregious error committed by the Company by wrongfully imputing the *judicial* standard of review applicable under the Illinois Administrative Review Act to the instant cause, the Department does not explain the reason it deems it appropriate to cite to the judicial standard of review at all in the context of this proceeding. That is, the Department's pronouncements concerning the correct standard for judicial review for an administrative decision are accurate as far as they go, but that does not mean those pronouncements are remotely relevant or applicable to the instant cause. (**See**, Department's Brief, p.12) Indeed, by citing the "standard of judicial review" within its Brief, the Department seems to imply that its "decisions on questions of fact

are entitled to deference and are [to be] reversed only if against the *manifest weight of the evidence*." (**See**, Department's Brief, p.12, *citing Friends of Israel Defense Forces v. Department of Revenue*, 315 Ill.App.3d 298, 302, 248 Ill.Dec. 114, 733 N.E.2d 789, 792-93 (2000)) (Emphasis added) That would only be true in the context of *judicial* review pursuant to the Illinois Administrative Review Act; certainly such is not the appropriate standard at this juncture of the litigation.

Again, I fully agree with the Attorney General that:

> [i]t is well-settled that a preponderance of the evidence is evidence that renders a fact more likely then not. This standard is qualitatively different than "clearly erroneous" and "against the manifest weight" standards. At this stage of administrative review the Attorney General does *not* have to prove the opposite conclusion (*i.e.* permit denial) is clearly evident nor are the Department's findings and conclusions on questions of fact be [sic] held to be *prima facie* true and correct. (**See**, Attorney General's Reply Brief, p.6)

I'll repeat the refrain I made in my prefatory remarks, inasmuch as such reflects the applicable statutory criteria specifically applicable to the instant cause of action: "the Attorney General....shall have the burden of going forward to establish a prima facie case[,] and the ultimate burden of persuasion[,] by a preponderance of the evidence that the permit application fails in some manner to comply with the applicable requirements of the State Act or regulations."

(b)

Standing

On August 19, 2008, the Company filed a Motion to Dismiss the Attorney General's Petition for Hearing to Contest permit Decision for lack of standing. I originally denied this

Motion, but ruled that Capital and the Department could raise the standing issue again, should they so desire, by means of argument within their respective Post-Hearing Briefs. (Tr.2207-2208)

The Attorney General, within her Reply Brief, asserts that both the Department and the Company "criticize and distort the role of the Attorney General in this proceeding." (**See**, Attorney General Reply Brief, p.7) The Attorney General states that:

> [t]he Illinois Supreme Court has many times interpreted the Attorney General's exercise of the powers and duties under the State Constitution. These decisions regarding the constitutional authority of the Attorney General to pursue legal claims in the public interest clearly support her standing in this administrative review proceeding before the Department. Likewise, the assertion of standing comports with the plain language of the statute. Section 2.11(c) of the Act provides in pertinent part as follows: " Within 30 days after the applicant is notified of the final decision of the Department on the permit application, the applicant of [sic] *any person with an interest that is or may be adversely affected* may request a hearing on the reasons for the final determination." If there were any hierarchy of the various types of "interest" then the protection and presentation of the public interest, the common weal, and the State's trust of its natural resources, must surely rank at the top of such list.
>
> The question of standing is a matter of law. The particular language of the statute at issue must be considered in the context of the legislative objectives and declarations of public policy. These matters as articulated by the Congress and the General Assembly were quoted at length in the [Attorney General's previously filed] Memorandum of Law. In order to permit a coal mine to operate in Illinois, according to Section 1.02(a) of the State Act, the Department must "strike a balance between protection of the environment and agriculture productivity, and the Nation's need for coal as a source of energy." The Department must also "prevent erosion, stream pollution, water, air and land pollution and other injurious effects to persons, property, wildlife and natural resources," and protect "the health, safety and general welfare of the people, the natural beauty and aesthetic values, and enhancement of the environment in the affected areas of the State," and provide for "the enhancement of wildlife and aquatic resources."
>
> The language of Section 2.11(c) (*any person with an interest that is or may be adversely affected*) has only been analyzed by the courts in the context of the standing provided to an organization of private citizens. *Citizens for the Preservation of Knox County, Inc. v. Illinois Department of Mines and Minerals*, 149 Ill.App.3d 261 (3rd Dist. 1986). While *Citizens for the Preservation of Knox County* is the only Illinois decision to consider the application of Section 2.11(c) to a petitioner for permit review, this decision

did not actually focus on the issue of whether the Citizens Group was "a person with an interest which is or may be adversely affected" regarding participation in the internal review of the permit issuance but rather on the issue of whether the organization possessed standing to seek *judicial* review. Neither the Department nor the Company cited this appellate decision and it certainly does not affect the Attorney General's exercise of her constitutional powers and duties in challenging the strip mining permit in this proceeding before the Department. What *is* pertinent to any assertion of standing by any person in the Banner Mine Proceeding is the Third District Appellate Court's acknowledgment that standing can derive from a statutory enactment. 149 Ill.App.3d at 264. (**See**, Attorney General's Reply Brief, pp.8-9)

Since I was the Hearing Officer who issued the underlying administrative decision in *Citizens for the Preservation of Knox County* (and therein denied the *Citizens* organization standing under the statute), I feel compelled to make several comments. The Attorney General is simply wrong in its assertion that the issue in the *Citizens* case was "whether the ["Citizens"] organization possessed standing to seek *judicial* review," although I can certainly see how the Attorney General came to believe such was the case (since the Appellate Court fails to make clear within its analysis that the Court was ruling on the propriety of the Hearing Officer's ultimate decision as to the standing issue *in the context of the administrative hearing* as opposed to the standing issue of *Citizens* in the context of its *appeal* to the Appellate Court).[3] I ultimately denied the

---

[3] I would note that in *Citizens*, I initially ruled in favor of *Citizens* organization insofar as the standing issue was concerned, but thereafter permitted the Company to reargue the issue within its Post-Hearing Brief (similar to the actions I took in the instant cause). In *Citizens*, the Appellate Court notes that:

> The Departmental Administrative Review was conducted by a hearing officer appointed and paid by the Department. A hearing was conducted on February 1, 1985, at which time various motions were considered including Midland's Motion to Dismiss for Lack of Standing. Midland alleged that the Citizens Group was not a party with an interest which "is or may be adversely affected" by the decision of the Department, which is a statutory prerequisite to bringing such an action. The hearing officer denied the motion on the basis that the Citizens Group had participated in the public hearing and had been given notice of the action taken by the Department and, therefore, was a party with an interest that

Citizens organization standing, but only after initially allowing the *Citizens* organization to participate in an administrative hearing and then allowing the parties to the administrative hearing to reargue the standing issue within their respective Post-hearing Briefs (much as I have in the instant cause). The ruling I made in *Citizens* — wherein I subsequently denied standing to the *Citizens* organization — was premised upon a *very* narrow factual issue in conjunction with the manner in which the standing language existed within the applicable statute. Indeed, in a subsequent Order issued in yet another docket (in 1993), I noted that:

> ....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 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

---

could be adversely affected. *The hearing officer stated that Midland could reargue the question of standing at a later time if it wished. Citizens for Preservation of Knox County, Inc. v. Illinois Dept. of Mines and Minerals.* 149 Ill.App.3d 261, 263, 500 N.E.2d 75, 77, 102 Ill.Dec. 453, 455 (Ill.App. 3 Dist.,1986) (Emphasis added)

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. (**See**, "Findings of Fact, Conclusions of Law, and Order," Midland Coal Company, Application No. 227, entered 9/13/93, pp.14-15)

The Attorney General, within its Reply Brief, asserts that:

> [t]he Company's motion to dismiss, challenging the Attorney General's standing to seek administrative review of the Banner Mine permit, relied solely upon a July 28, 2008 decision by the U.S. Court of Appeals for the Seventh Circuit in *Citizens Against Ruining the Environment, People of the State of Illinois, et al v. Environment protection Agency and Midwest Generation, et al. v. Environmental Protection Agency and Midwest Generation, LLC*, 535 F.3d 670 (7th Cir.1008) (hereinafter "*CARE v. EPA*")[4]. One of the three administrative review actions consolidated in *CARE v. EPA* was filed by the Attorney General in the name of the People of the State of Illinois. The Seventh Circuit, citing *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir.2002), noted that under federal law, where a petitioner's standing is not self-evident, "the petitioner must supplement the record to the extent necessary to establish her entitlement to judicial review at the first appropriate point in the proceeding," and held that the Attorney General failed to establish standing . *CARE v. EPA*, 535, F.3d at 675. (**See**, Attorney General's Reply Brief, pp.9-10)

Within its Post-Hearing Brief, the Company presented its arguments concerning the "standing" issue thusly:

> [t]he Attorney General's intervention in this proceeding was, by her own admission, unprecedented. Tr.13,14 ("We don't get involved in the permitting decisions in the first place, whether it's the Environmental Protection Agency or some other state agency.") Moreover, the Attorney General's role in this proceeding has never been entirely clear. As the "spokesperson of the petitioners," the Attorney General insisted, at the outset of this proceeding, that her role was not to challenge the Department's permitting program, but was to simply focus on three main issues: hydrology, threatened and endangered

---

[4] The case will be cited by the Hearing Officer hereafter as *"CARE"* as opposed to *"CARE vs. EPA."*

species, and quality of life issues. Tr. at 15-20. However, 164-page Brief and 64-page Memorandum of Law filed by the Attorney General contain numerous challenges to the Department's regulatory and permitted program. Moreover, the multitude of issues raised by the Attorney General in its Brief and Memorandum of Law go far beyond the three issues identified above and encompass issues never articulated or likely comprehended by the other Petitioners.

As set forth in this Brief, Capital's position is, and has always been, that its permit application met or exceeded all of the regulatory requirements of the Department, and was properly granted by the Department. Capital understands and respects the rights of Petitioners to challenge the Department's decision to grant the Permit. However, the involvement of the Attorney General was the primary, if not sole, reason for the length of this proceeding, as well as the breadth and number of issues that the parties have had to address. From an industry standpoint, clarification as to the Attorney General's standing to participate in proceedings such as this is critical.[5]

The issue of the Attorney General's standing must begin with an analysis of the Act and regulations. The Act provides that the Department is the agency endowed by the General Assembly with the "full powers and authority to carry out and administer the provisions of the Act." 225 ILCS 720.9.02. The stated purposes of the Act include "protecting the health, safety and general welfare of the people, the natural beauty and aesthetic values, and enhancement of the environment in affected areas of the State." 225 ILCS 720/1.02. Thus, the general interest of the People of the State of Illinois are represented in this permitting proceeding by the Department. *Citizens Against Ruining the Environment, et al., v. Environmental Protection Agency, et al.*, 535 F.3d 670, 676, *mtm. for reconsideration not granted*, (7th Cir.2008) (herein after "*CARE*").

The Act and Department regulations also define who has standing to appeal the Department's issuance of a surface mining permit. Section 2.11 of the Act provides that "the applicant or *any person with an interest that is or may be adversely affected*" may request a hearing on the Department's final decision to grant or deny a permit. 225 ILCS 720/2.11(c). (Emphasis added) 62 Ill.Adm. Code 1847.3(a). The determination as to who is a "person with an interest that is or may be adversely affected" is not left to the

---

[5] [footnote in original] The Attorney General's position and actions in this proceeding also place the Department in an extremely difficult and untenable position. If the Hearing Officer's decision in this case is appealed, Illinois law requires the Department to be represented by the Attorney General's Office in any subsequent appeal, which would obviously be impossible in this case. *Environmental Protection Agency v. Pollution Control Board*, 69 Ill.2d 394, 398 (1977). Moreover, in light of the Attorney General's comprehensive and wide-ranging criticism of the Department's actions and program in this case, it appears possible, if not likely that the Attorney General may intervene and vigorously oppose the Department's issuance of mine permits in future cases. It can only be presumed that the precedent set by the Attorney General in this proceeding could have significant implications for the legal relationship between the Department and the Attorney General's Office.

Hearing Officer or the courts — the Department's regulations define this term and, in so doing, set forth the criteria for standing to appeal the Department's issuance or denial of a permit:

> Person having an interest which is or may be adversely affected...shall include any person:
>
> Who uses any resources of economic, recreational, esthetic, or environmental value that may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related activity of the Secretary or the Department.
>
> Whose property is or may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Secretary or Department. 62 Ill.Adm. Code 1701 (**See**, Company's Brief, pp.6-8)

The Company later in its Brief asserts that:

> [t]he *CARE* decision recently issued by the Seventh Circuit most closely parallels the facts of this case. In *CARE*, the current Attorney General appealed the issuance of an air permit by IEPA to Midwest Generation, LLC. As in this case, the *CARE* case involved "a rather unusual antagonistic relationship between an office and an agency that are both part of the executive branch of the State of Illinois." *CARE*, 535 F.3d at 676. The Attorney General conceded in *CARE* that it was asserting standing in a *parens patriae* capacity, and the Seventh Circuit rejected *parens patriae* as a basis for standing, noting that "any general interests of the people of the State of Illinois would seem to be represented (at least informally) by the IEPA" and explained:
>
> > We say "informally" to distinguish this kind of representation from the authority to represent the State in litigation, which is possessed exclusively by the Illinois attorney general when the State is the only real party in interest. *Id.*
>
> The Seventh Circuit also based its holding on the authority granted to IEPA by the Illinois Environmental Protection Act, noting:
>
> > In sum, the Attorney General has failed to explain why we have jurisdiction over an internal conflict between an office and an agency under the executive branch of the same state government....the IEPA has the duty to make Title V permit

decisions, so it appears to be the agency responsible for making Illinois policy in that arena. *Id.*

Absent some explanation from the Attorney General as to why she or her office meets the standing requirements and criteria set forth in the Act and regulations, the Attorney General has not articulated a recognizable or sufficient basis for standing in this proceeding. Her office's participation in this proceeding appears to have been limited to representing the interests of the small group of Petitioners, rather than the "People's best interests."

The Attorney General responds to this argument by affirmatively stating that:

> [t]he *CARE v. EPA* decision is certainly not on point. It merely stands as an instance (and perhaps the *only* instance) of the Illinois Attorney General failing to persuade a federal court of a legal entitlement to judicial review. The Attorney General made claims in *CARE v. EPA* starkly different than the assertion of standing in the present proceeding and failed to make them at the first appropriate point in federal court. The pertinent factual and legal contexts for those claims are so dissimilar to the Banner Mine permit proceeding that the Company's argument failed on its motion to dismiss and must fail again. While in *CARE v. EPA* the Illinois Attorney General did make a claim based upon *parens patriae*, there is no good faith basis whatsoever to here argue (as the Company did in its motion to dismiss) that "in the instant case, the Illinois Attorney General asserted standing in a *parens patriae* capacity." Motion at ¶4. The assertion and articulation of standing to challenge the strip mine permit was properly and timely made in the December 14, 2007 Petition for Hearing to Contest Permit Decision, and not in the reply brief as in *CARE v. EPA*. The phrase *"parens patriae"* does not appear in this initial pleading, yet the Department and the Company continue to foist this untenable claim.

The Attorney General, after attempting to explain its understanding of the concept of *parens patriae*, goes on to argue that:

> [i]n stark contrast to the situation in *CARE v. EPA*, federal law is simply inapplicable on the standing question. Illinois courts are not required to follow federal rules regarding standing; however, where the state and federal laws of standing differ, state courts tend to be more liberal, finding standing to challenge an administrative action where federal courts would not. *Greer v. Illinois Housing Development Authority* (1988), 122 Ill.2d 462, 491. "In Illinois, standing is part of the common law. However, federal principles of standing are grounded largely on the jurisdictional case and controversy requirements imposed by Article III of the United States Constitution." *People v. $1,124,905 U.S.*

Currency and One 1988 Chevrolet Astro Van (1999), 177 Ill.2d 314, 328. In the more recent case, the Illinois Supreme Court further explained the critical distinctions between the State and federal constitutional underpinnings regarding standing to challenge the decisions of administrative agencies:

> In *Greer v. Illinois Housing Development Authority* [citation omitted], this court rejected federal principles of standing. In *Greer*, plaintiffs challenged an administrative agency's approval of mortgage financing relating to a housing project. The agency challenged plaintiff's standing, arguing that a plaintiff must demonstrate both prongs of the federal test for standing articulated in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). The Data Processing test requires that a plaintiff challenging an administrative action demonstrate: (1) that the illegal action will cause the plaintiff to suffer injury in fact; and (2) that the interest asserted by the plaintiff lies within the zone of interest sought to be protected by the statute in question. [citations omitted]
>
> This court in *Greer* rejected application of the Data Processing test for standing as needlessly restrictive. [citations omitted] In so holding, this court recognized that state courts are more liberal in recognizing the standing of parties than the federal courts. In addition, this court criticized the federal zone of interest test as confusing standing with the merits of the underlying suit. Thus, the *Greer* court concluded that standing in Illinois requires only "some injury in fact to a legally cognizable interest." *Greer*, 122 Ill.2d at 492; see also *In re Estate of Burgeson* (1988), 125 Ill.2d 477, 486.
>
> In *Greer*, this court also rejected the defendant's underlying assumption that a plaintiff bears the burden of establishing standing. The *Greer* court explained that a plaintiff need not allege facts supporting standing because in Illinois standing is an affirmative defense. *Greer*, 122 Ill.2d at 494. Therefore, it was the defendant's burden to plead and prove lack of standing. *Greer*, 122 Ill.2d at 494. (**See**, Attorney General's Reply Brief, pp.17-18)

I concur with this analysis, not only because it recognizes the breadth of the standing concept that I believe is appropriate under Illinois law, but also because it places the burden upon those opposing participation of a party to prove the absence of a particular party's standing.

The Illinois Attorney General also argues that:

[t]he regulatory definition [addressing the issue of standing] specifically equates a "person having any interest which is or may be adversely affected" with a "person with a valid legal interest" by collectively defining these phrases to "include any person who uses any resources of economic, recreational, esthetic, or environmental value that may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Secretary or the Department; or whose property is or may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Secretary or the Department." The latter phrase ("person with a valid legal interest") is employed in the Act only in Section 6.08 which pertains to bond releases. The pertinent language ("person having an interest which is or may be adversely affected") is used in Sections 2.04(a), 2.04(d), 2.11(c), 7.03(a), 7.03(b), 8.05(b), and 8.07(a) of the Act. This statutory phrase must be interpreted according to its plain language. Any rule purporting to define statutory language must be in strict accordance with the statutory authority vested in the agency. (**See**, Attorney General's Reply Brief, pp.21-22)

Within its Reply Brief, the Attorney General also cites to an extensive quote from the Illinois Supreme Court's decision in *Greer v. Illinois Housing Development Authority* (1988), 122 Ill.2d 462, a quote that I believe is particularly pertinent to the issue of standing raised herein. In *Greer*, the Illinois Supreme Court stated:

> Together with allied doctrines like mootness, ripeness, and justiciability, the standing doctrine is one of the devices by which courts attempt to cull their dockets so as to preserve for consideration only those disputes which are truly adversarial and capable of resolution by judicial decision. There is universal agreement that one component of standing — injury in fact — genuinely narrows the class of potential plaintiffs to those whose grievances may be redressed by such decisions. As one commentator has put it:
>
> > "Elementary justice requires that one who is hurt by illegal action should have a remedy. The central principle that grows out of [this] is very simple: *One who is adversely affected in fact by governmental action has standing to challenge its legality, and one who is not adversely affected in fact lacks standing.*" (Emphasis in original) (4 K. Davis, Administrative Law Treatise §24:2, at 212 (2nd ed. 1983).)
>
> The key question has been whether standing, particularly standing to challenge the legality of governmental action, requires not only injury in fact, but something else as well.

Prior to 1970, the Federal courts generally held that a plaintiff must show not only an injury but also some "legal interest" — founded either in common law or in a specific statutory or constitutional provision — which would entitle him to relief. [citation omitted]. In 1970, however, the United States Supreme Court abandoned the "legal interest" test, at least for actions brought under the Federal Administrative Procedure Act (APA). The Court stated that the legal-interest test confuses standing to sue with the merits of a suit. Interpreting that provision of the APA which grants standing to a person "aggrieved by agency action within the meaning of a relevant statute" ....the Court held in two cases that standing could be shown if, in addition to injury, the "interests sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." (*Association of Data Processing Service Organizations, Inc. v. Camp* (1970), 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184, 188; see also *Barlow v. Collins* (1970), 397 U.S. 159, 164, 90 S.Ct. 832, 836, 25 L.Ed.2d 192, 198.) Justices Brennan and White, concurring in the result and dissenting, disagreed with the "zones of interests" test, stating that standing only requires a showing that the challenged action has caused the plaintiff injury in fact. In their opinion, "[b]y requiring a second, nonconstitutional step, the Court comes very close to perpetuating the discredited requirement that conditioned standing on a showing by the plaintiff that the challenged governmental action invaded one of his legally protected interests." (*Barlow*, 397 U.S. at 168, 90 S.Ct. at 838-39, 25 L.2d.2d at 200 (Brennan and White, JJ., concurring in the result and dissenting).) It was their view that the "zone of interests" test, like its predecessor, the "legal interests" test, confused standing to sue with such separate issues as reviewability and the merits of a particular claim. Only these latter issues, and not standing, they wrote, need be determined by considering the zone of interests sought to be protected by a particular statutory provision.

Since its adoption by the United Stated Supreme Court, the *Data Processing* "zone of interests" test has had a checkered career...

Like the appellate court, we might assume *arguendo* that the zone-of-interests test is part of Illinois law and go on to conclude that the appellees, homeowners living near an IHDA development, having standing because they are among the intended beneficiaries of the Act's strictures against economic segregation. Since, however, we are convinced that the zone-of-interests test would unnecessarily confuse and complicate the law, we decline to adopt it.

We are not, of course, required to follow the Federal law on issues of justiciability and standing....

If, however, we were convinced that the zone-of-interests test served some useful purpose we would not hesitate to adopt it. But the criticisms generally leveled against it persuade us that it is not a useful addition to the doctrine of standing. The zone-of-interests test has generally proved to be a "feeble barrier to standing," which "seems more honored in the breach than as the rule." (2 C. Koch, Administrative Law & Practice § 10.9, at 170 (1985).) Also, like the "legal interests" test before it, it tends to lead to confusion between standing and the merits of the suit. In the case before us, for example,

application of the zone-of-interests principle would entail a examination of the goals, purposes, and objectives of the IHDA Act so as to determine whether the plaintiffs were among its intended beneficiaries. This same examination, or one very similar to it, is also needed to determine whether the plaintiffs have in fact stated a claim for relief. Nor is it always easy to determine whether a particular plaintiff's asserted interest falls within the zone "arguably sought to be protected" by a particular statutory provision. While it is often possible to identify the primary purpose of a statute, its secondary or subsidiary purposes are often not so obvious. The task of searching for them becomes more difficult when the legislative history is, as in this case, relatively sparse. Moreover, as the United States Supreme Court itself has noted, the test is not "self-explanatory." (*Clarke v. Securities Industry Association* (1987), 479 U.S. 388, ----, 107 S.Ct. 750, 762, 93 L.Ed.2d 757, 769.) A test which is not self-explanatory and which does not in fact appreciably narrow the class of potential plaintiffs serves no useful purpose. We therefore decline appellant IHDA's invitation to adopt the test, at least in the context of a challenge which alleges a statutory violation by an administrative agency.

We thus adhere to the principle that standing in Illinois requires only some injury in fact to a legally cognizable interest. (*Glazewski v. Coronet Insurance Co.* (1985), 108 Ill.2d 243, 245, 91 Ill.Dec. 628, 483 N.E.2d 1263.) More precisely, the claimed injury, whether "actual or threatened" (*Warth v. Seldin* (1975), 422 U.S. 490, 500, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343, 355), must be: (1) "distinct and palpable" (*Havens Realty Corp. v. Coleman* (1982), 455 U.S. 363, 375, 102 S.Ct. 1114, 1122, 71 L.Ed.2d 214, 227); (2) "fairly traceable" to the defendant's actions (*Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977), 429 U.S. 252, 261, 97 S.Ct. 555, 561, 50 L.Ed.2d 450, 462); and (3) substantially likely to be prevented or redressed by the grant of the requested relief [citation omitted] (**See**, Attorney General's Reply Brief, pp. 22-24, *citing Greer v. Illinois Housing Development Authority,* 122 Ill.2d 462, 491, 524 N.E.2d 561, 574-575, 120 Ill.Dec. 531, 544 - 545 (Ill.,1988)

In light of such, I believe there is some credence to the Attorney General's argument that its "allegation of 'a statutory violation by an administrative agency' is in itself a sufficient interest for standing purposes." (**See**, Attorney General's Reply Brief, p.24) For that reason, I am affirming my finding that the Attorney General has standing in this matter.

However, I would be remiss not to mention my belief that this finding as to the Attorney General's standing in this matter *conflicts* with the *CARE* decision. The Attorney General argues within its Reply Brief that:

> [f]or the Attorney General, the interest in having regulatory agencies, such as the Department's Office of Mines and Minerals, conform to the law is a legally cognizable interest. Another legally cognizable interest for the Attorney General is to ensure that decisions regarding the actual and potential effects of strip mining upon the State's publicly owned or protected natural resources, such as Rice Lake and Banner Marsh and Baker Hollow Creek and the groundwater, conform to the law. Another legally cognizable interest for the Attorney General is to ensure that any and all decisions regarding the actual and potential effects of strip mining upon the wildlife and their habitat (including but not limited to threatened and endangered species such as osprey, bald eagles, and decurrent false aster), are made after compliance with any and all legal requirements applicable to such a decision, including mandatory statutory consultations. These and other interests have been pleaded and supported by evidence presented by the Attorney General and other Petitioners. (**See**, Attorney General's Reply Brief, p.25)

If, on the part of the Attorney General, the mere "interest in having regulatory agencies...conform to the law" was truly a "legally cognizable interest," as urged by the Attorney General, why would the Federal Court in *CARE* summarily reject the Illinois Attorney General's standing in that controversy? As the Federal Court stated in *CARE*:

> ....the attorney general has failed to explain why we have jurisdiction over an internal conflict between an office and an agency under the executive branch of the same state government. Under these circumstances, it seems appropriate for the governor, rather than the federal courts, to resolve the controversy; yet, there is no evidence that the state has taken any steps internally to change the IEPA's decision. The IEPA has the duty to make Title V permit decisions, so it appears to be the agency responsible for making Illinois policy in that arena. *See* 415 Ill. Comp. Stat. 5/4. And while the attorney general may have broad authority to protect public rights, which indicates that she has *capacity* to sue, *standing* must be independently established in every case. *See Bd. of Educ. of City of Peoria, Sch. Dist. No. 150 v. Ill. State Bd. of Educ.*, 810 F.2d 707, 709-10 (7th Cir.1987). *Citizens Against Ruining The Environment v. E.P.A.*, 535 F.3d 670, 676 -677 (C.A.7,2008)[6]

---

[6] Frankly, I believe the Attorney General's legal counsel is being somewhat hubristic when he asserts that "the [Federal Court in *CARE*] displayed remarkable naivety in suggesting that the Governor might resolve a policy dispute between one of his agencies and the Attorney General." (**See**, Attorney General's Reply Brief, p.14) Why? If, indeed, these elected officials of Illinois were acting responsibly toward achieving their statutory and constitutional responsibilities, certainly the Governor could be expected to take affirmative steps to avoid

That is, the mere "interest in having regulatory agencies...conform to the law" is not a "legally cognizable interest" as far as the Federal Court in *CARE* is concerned. I believe that under Illinois law the concept of standing as it applies to these types of proceedings, however, was to be construed as broadly as possible. In light of such, despite my belief that granting the Illinois Attorney General standing in this proceeding conflicts with the Federal Court's pronouncement in *CARE*, such liberal interpretation of the concept of standing comports with the purpose and intent of the concept of standing in the State of Illinois.

Part I

Allegations of Error

The Attorney General, within its Brief, asserts the following allegations of error occurred during the Review process:

> Section 2.02 of the Act governs the contents of permit applications and is implemented through the regulations at Part 1777 (General Content Requirements for Permit Applications), Part 1778 (Minimum Requirements for Legal, Financial, Compliance, and Related Information), Part 1779 (Minimum Requirements for Information on Environmental Resources), and Part 1780 (Minimum Requirements for Reclamation and Operation Plan). The Attorney General has pleaded and proven the following allegations of error:
>
> Application No. 355 was filed on February 7, 2002, but the Department and the Company failed to timely provide the respective notifications mandated by Section 2.04 of the Act.
>
> The Department's determination on May 5, 2004, that the permit application was

---

having its Chief legal counsel (*i.e.*, the Attorney General) suing an agency in any area where that agency is supposed to have primacy over that subject's policy and implementation. The fact that such remedy is not reasonably available in Illinois speaks volumes as to the current state of State government in Illinois as opposed to revealing some sort of naivity on the part of the federal judiciary.

administratively complete was erroneous.

The Department failed to assure that appropriate procedures were provided for public participation regarding the review and comment of the administratively complete permit application and the conduct of the public hearing on August 31, 2004.

The Company's November 2005 modifications to Application No. 355 failed to demonstrate compliance with the Act and applicable rules.

The Department's hearing officer exceeded his authority in the April 27, 2007, permit remand by imposing deadlines upon the Department for subsequent action. (**See**, Attorney General's Brief, pp.7,8)

(a)

Alleged Failure of Department and Company to Provide Timely Notifications

The Attorney General asserts that "neither the Company nor the Department complied with their respective statutory obligations imposed by Section 2.04 of the Act regarding notifications to the public and governmental agencies and availability of the application for public inspection." (**See**, Attorney General's Reply Brief, p.35) The Attorney General asserts that because the Company submitted its initial permit application to the Department on February 7, 2002, the notice requirements of the applicable statute required the Department and the Company to provide *immediate*, timely notice to the public, a notice that the Attorney General asserts neither the Company nor the Department provided. Section 2.04(a) of the Act provides that:

> [a]t the time of submission of a permit application, the applicant shall (1) place a public notice of the application in a local newspaper of general circulation in the locality of the proposed mining operations to appear at least once a week for four consecutive weeks, and (2) file the application for public inspection at the county seat of each county containing land to be affected under the permit..." (**See**, 225 ILCS 720/2.04(a))

Section 2.04(c) of the Act provides that:

> [w]hen an application is received, the Department shall notify various local governmental bodies, planning agencies, sewage and water treatment authorities, and water companies in the locality in which the proposed mining will take place, of the operator's intention to mine a particular described tract of land and state the permit application's number and where a copy of the application may be inspected...." (**See**, 225 ILCS 720/2.04(c))

The Attorney General asserts that:

> ....the practice of the Department of conducting a preliminary review of a permit application to determine completeness is also inconsistent with the federal Act and regulations if such review results in a delay of public notification. The Act at Section 2.04 imposes notification requirements regarding the beginning of the application review process. The notifications are to the public through newspaper notices and to other governmental agencies for necessary coordination and comment....
>
> The Act does not explicitly authorize any lengthy "completeness review" or "early coordination" of a permit application prior to the mandatory notifications and fee payment.[footnote omitted] Section 2.08 of the Act prohibits the grant of a permit unless the applicant satisfies its "burden of establishing that its application complies with all the requirements of the Act" and the Department finds that "the application is accurate and complete and that all requirements of this Act have been complied with." Therefore, at some point *after the notifications of the filing of an application,* but before it may be approved, the application must be determined to be complete. Public participation through review and comment is useful to identify informational deficiencies in the application. Generally applicable administrative law requires more than the mere opportunity to comment. (**See**, Attorney General's Memorandum of Law, p.11) (Emphasis added)

However, the Attorney General does not provide any statutory or regulatory support for the assertion that the Department must give the statutorily-required notification *prior* to the application being deemed "complete" by the Department. Nor does the Attorney General, after asserting that the practice of the Department of conducting a preliminary review of a permit application to determine completeness is also inconsistent with the federal Act and regulations if such review results in a delay of public notification, provide any citation or authority (statutory, regulatory or case law) for such blanket assertion.

The Company notes that:

> [t]he Attorney General contends that the Department and Capital failed to provide public notification after the initial proposed permit application was submitted to the Department in February, 2002. *AG's Brief* at 7; *Attorney General's Memorandum of Law* at 10-12. However, 62 Ill.Adm. Code 1773.13, which contains language identical to that found in the U.S. Department of Interior's Office of Surface Mining Reclamation and Enforcement ("OSM") regulations at 30 C.F.R. §773.6(a), clearly provides that public notification and participation is not required until an "administratively complete" application has been filed. Thus, there was no obligation on the part of Capital or the Department to provide public notification of the permit application until May 4, 2004, the date on which the application was deemed complete by the Department. There has been no issue raised regarding the sufficiency of the notice provided after May 4, 2004. (**See**, Company's Brief, p.16)

Likewise, the Department argued that:

> [t]he Attorney General first alleges that the Department did not comply with public notification requirements for the Banner application, submitted in February of 2002, citing to a subsequent meeting between the Department and various local residents. The statutory requirements for formal public notice under the Act, as further delineated in 62 Ill.Adm.Code 1773.13(a)(1), require publishing public notice when an "administratively complete application," as defined by 62 Ill.Adm.Code 1701, had been received and accepted as such for public comment and further evaluation on its technical merits. For the 2002 application, such public notice was not required. The Department's initial internal discussion, as documented in various e-mail correspondence, determined that the submitted information for the 2002 application was insufficient and therefore, not "administratively complete." In other words, the 2002 permit application and its information 'died on the vine' - a standard occurrence for initial permit applications filed under this State Act and its regulations. Since the 2002 permit application failed to satisfy the minimal information requirements for an "administratively complete application," the further public participation or public notice proceedings were not warranted at that time. Nevertheless, as recounted in testimony by R. Grigsby, Sr., the Department arranged that its staff and the 2002 permit application were available for the discussion and review by various concerned citizens in August 20, 2002. (Tr.1067-1069) (**See**, Department's Brief, p.22)

I do not find any legal infirmity with the manner in which the Department handled the initial and subsequent permit application *vis-a-vis* the notification requirements. The Department

determined that the initial 2002 application was not complete and therefore did not process the application as then presented. There is no statutory requirements that each and every *incomplete* application be subject to the notification requirements of Section 2.04. Further, I do not find that there was any *de facto* prejudice that resulted in the Department awaiting until the Company actually filed a "complete" application (as subsequently determined by the Department in 2004) prior to mandating the notification requirements for the Company and for the Department itself to comply with its own notification requisites. Therefore, I do not believe that the Attorney General (or the Petitioners) have shown, by a preponderance of the evidence, that the Department's failure to mandate compliance with the notification requirements of section 2.04 as to the 2002 permit application, in 2002, was a violation of the regulations or applicable statute.

(b)

Department's Determination on May 5, 2004, that the Permit Application was "Administratively Complete" was not erroneous

The Attorney General urges that "[t]he Department's determination on May 5, 2004, that Application No. 355 was 'administratively complete' was flawed because the version of the permit application subsequently filed on May 17, 2004, still had numerous serious deficiencies." (**See**, Attorney General's Brief, p.13) The Department responds to this allegation of error by stating:

> [t]he Attorney General also alleges errors in the judgment by the Department concerning its May 5, 2004 determination that Banner #355 Application was "administratively complete." Attorney General cites to deficiencies in the Banner #355 Application, described therein as "numerous" and "serious," such as right-of-entry information [1773.13 and 1778.15], pre-mining and post-mining land uses [1779.11, water supply [1780.21(e)], surface water quality [1780.21.(b)], groundwater quality [1780.21(b)], or

wildlife habitat [1780.16(a)]. Of these deficiencies, the Department would agree that only one [*i.e.*, right-of-entry] was "serious" so as to warrant the denial of the Banner #355 Application in December, 2005; this deficiency as to the vacation of Prairie Lane Road and public access right was subsequently resolved by Order of the Illinois Appellate Court, Third District (entitled *Michael Grigsby, et al. v. Richard Ball, et al.*, Docket No. 05-MR-25, dated March 7, 2007). Nevertheless, the Attorney General's preference that information should have been provided earlier and included as an element of the "administratively complete application" is only suggestion. This recommendation is premised on the Attorney General's preference that such issues "could have been addressed much earlier in the review process" to arguably minimize confusion about an admittedly complex and controversial mining project. This preference also suggests an exception should have been given for reviewing the Banner #355 Application that is contrary to the standard regulatory practice for the Department review process.

This preference about *timing or sequence* of the information submitted for review and comment fails to acknowledge that such information was *in fact submitted* to the Department for review by Capital in its responses to the 11/10/04 and 7/10/07 requests for modification. (Capital Ex. 2A and 2B) The Department notes that similar complaints as to the length and time needed for the Department review are also frequently raised by the regulated coal mining industry. The State Act and its regulations provides [sic] no mandatory schedule for the Department's completion of its technical review and issuance of its written decision to grant or deny an application as "complete and accurate." (62 Ill.Adm.Code 1773.15(a) and (c)). The issue before this administrative forum is therefore not when the information is provided for review and comment, but whether by a preponderance of the evidence the Department's review of such submitted information was in error. (62 Ill.Adm. Code 1847.3(g)(2)). The Attorney General's critiques and preferences are all determinations more appropriately with the regulatory purview of the Department, not the Attorney General's Office. These allegations of preference by the Attorney General do not establish error. (**See**, Department's Brief, pp.26-27)

The Attorney General does not directly refute the argument of the Department. The Attorney General, however, argues that the Department's determination that "as of May 5, 2004 Application No. 355 was an 'administratively complete application' was erroneous because the application did not then contain all information addressing each application requirement of the regulatory program and necessary to initiate processing and public review." (**See**, Attorney General's Reply Brief, p.42)

Yet the Attorney General does not assert that the modification requirements mandated by the Department *subsequent* to the May 5th determination did not properly address those alleged shortcomings. The Attorney General asserts that:

> ....the Department failed to hold the Company to its statutory obligations regarding a complete and accurate permit application, and, for numerous reasons, the permit issued in November 2007 violates the Act. According to the regulatory agency, the preliminary review of a permit application conducted without public notice and governmental notifications is intended to result in the subsequent filing of an "administratively complete application" at which time public notice and governmental notifications are made per Section 1773.13(a)(1). By the time the public is notified, however, it would be too late (according to the non-discretionary language in Section 1764.15(a)(6) of the rules) for anyone to file a petition under Section 7.03 of the Act to designate the proposed permit site as unsuitable for mining. (**See**, Attorney General's Reply Brief, p.43

The Attorney General further asserts

> [i]f as mandated by the statute, public notice is published by the applicant in accordance with Section 2.04 when it submits a permit application and governmental notifications are made by the agency when it received the application for review in accordance with Section 2.04(c), then the public may be timely afforded its statutory opportunity for participation. The record shows that public comment alerted the Company and the Office of Mines and Minerals to several important matters relevant to the proposed mining site at Banner, but specifically omitted from Application No. 355, including the existence of Prairie Lane Road and Baker Hollow Creek. Public participation includes review and consideration of information provided within the application as well as consideration of the agency's direct and indirect dealings with the public regarding the mine proposal. Concerns resulting from their participation prompted some members of the public to exercise their statutory opportunity regarding a lands unsuitable for mining proceeding. However, since public notice was delayed for over two years after the initial filing of Application No. 355, the Department did not direct the Company to address the several important matters raised by the public [footnote omitted] until the November 10, 2004 Modification. It was subsequent to this first modification request (listing 50 specified technical or compliance items) that these concerned citizens hired a lawyer to file an unsuitability petition. By later complying only with the regulatory provisions of Section 1773.13(a)(1) instead of first complying with the statutory mandates of Section 2.04, the process of attempting to derive a complete and accurate permit application suffered and the opportunity for the citizens to react to the application process by seeking an unsuitability designation for the lands subject to the application was restricted. (**See**, Attorney General's Reply Brief, pp. 43,44)

Frankly, I don't see that "the process of attempting to derive a complete and accurate permit application suffered" by means of the Department awaiting until it determined, administratively, that the 2004 application filed by Capital was complete. Nor am I convinced that "the opportunity for the citizens to react to the application process by seeking an unsuitability designation for the lands subject to the application" was *improperly* restricted.

The Attorney General asserts that the Department's "May 4, 2004 completeness determination is contradicted by its 50 item modification request on November 10, 2004. (**See**, Attorney General's Reply, p.44) But simply because the Department required fifty (50) additional modifications to the permit application does not necessarily mean that the Department's administrative determination that the application is "complete" for purposes of the regulatory process — a determination that I believe is particularly within the Department's purview to make in light of its role as the administrative body assigned to conduct such permit review — is erroneous and that the application is incomplete. I agree with the Department that "[t]he Attorney General's critiques and preferences are all determinations more appropriately with the regulatory *purview* of the Department, not the Attorney General's Office" and that "[t]hese allegations of preference by the Attorney General do not establish error." (**See**, Department's Brief, pp.26-27)

The Attorney General finally asserts that:

> ...[t]he issue here is not whether the Department must be afforded deference in determining what additional information is required [for a permit application] but rather the Department's failure during its preliminary and technical review process to actually require this applicant to generate and submit the necessary information. The Department may not excuse an applicant from compliance with applicable regulatory requirements. (**See**, Attorney General's Reply Brief, p.47)

I disagree. I believe the issue *is* whether the Department is to be afforded deference in determining what additional information is required for a permit application, and I believe the Department acted properly. Rejecting the initial 2002 application without first requiring the statutory notifications was not error. The Department's finding that the 2004 application was complete for purposes of further processing the application was not error, and I find that the Attorney General's Office did not provide a preponderance of evidence that such finding of completeness was erroneous.

(c)

Public Participation Was Adequate

The Attorney General urges that "[t]he public hearing conducted on August 31, 2004 by the Department did not satisfy the public participation requirements imposed by Section 2.04(e) of the Act and the contested case requirements of the Illinois Administrative Procedure Act ("APA").[7] (**See**, Attorney General's Reply Brief, p.47)

> The Attorney General argues in [its] Reply [Brief] that a "permit" is a "license" pursuant to the APA, and permit application review proceedings are "contested cases." Indeed, this is the actual *holding* of *Pioneer Processing*, 102 Ill.2d at 141; the Illinois Supreme Court rejected the same argument ("the hearing was held was not adjudicatory but only informational") the Department makes. Section 10-65(a) of the APA provides: "When any licensing is required by law to be preceded by notice and opportunity for Hearing, the provisions of this Act concerning contested cases shall apply." The court stated: "Two elements are necessary under section [10-65(a)] to cause the applicability of the contested-case provisions: notice and opportunity for hearing. Both elements are found in section 39(c) of the Environmental Protection Act [415 ILCS 5/39(c)] where it provides that 'the Agency shall *notify*' and that 'the Agency shall conduct a public *hearing*.'

[7] [footnote in Attorney General's Reply Brief] 5 ILCS 100/1 *et seq.*

(Emphasis added) We disagree with the very narrow interpretation which the appellate court gives to the notice and hearing requirements...." 102 Ill.2d at 142.

The statutory provisions of the Act and the APA demonstrate the applicability of contested case requirements. Section 2.04(d) of the Act provides:

> Any person having an interest which is or may be adversely affected or any person who is an officer of any government agency, or the county board or a county to be affected under a proposed permit, may file written objections to a permit application and may request an informal conference with the Department. If no informal conference is requested, or if the issues in question are not resolved by the informal conference, such interested person, officer, or county board may request a public hearing within 80 days after the first newspaper notice required by subsection (a) of this Section. If a hearing is requested, the Department shall hold at least one hearing in the locality affected by the permit....

Notice is of course governed by subsection (a) and subsection (d) provides the opportunity for hearing. In order to request such a hearing, a person must have legal standing. Section 2.04(e) provides for implementation of due process requirements:

> By rule the Department shall establish hearing dates which provide reasonable time in which to have reviewed the proposed plans, and procedural rules for the calling and conducting of the public hearing. Such procedural rules shall include provisions for reasonable notice to all parties, including the applicant, and reasonable opportunity for all parties to respond by oral or written testimony, or both, to statements and objections made at the public hearing. County boards and the public shall present their recommendations at these hearings.

As discussed in the Memorandum of Law, the rules promulgated under Section 2.04(e) are comprised within Section 1773.14. It is evident from the plain language of these rules that the public hearing is not merely an informational forum as the Department suggests.

For instance, Section 1773.14(a) provides in part: "Any person who requests the Department to hold a public hearing with respect to an application must claim, in the request for a public hearing, an interest which is or may be adversely affected by the Department's decision, and shall identify the interest(s) claimed and shall state how the Department's decision may or will adversely affect the interest(s) specified." Similar language (quoted above) is utilized in Section 2.04(d). In other words, any person requesting such a hearing must affirmatively allege standing.

The Department argues that the public hearing "did not result in adjudication of legal rights, duties or privileges immediately thereafter [because] the Department's

subsequent action was to request additional information for evaluation and review. DNR brief at 25. The suggestion that a decision on the permit application must be made "immediately" after a hearing in order for the hearing to be considered as a contested case finds no support in law or logic. While subsequent events following a hearing cannot logically control the procedures required at such a hearing, Section 2.11(a) does mandate the following: "If a hearing has been held under Section 2.04, the Department shall within 60 days after the last such hearing make its decision on the application..." A 60 day period mandated by statute does possess a certain immediacy for a regulatory agency. In contrast, Section 2.11(b) provides: "If no hearing has been held under Section 2.04, the Department shall make its decision on the application after receipt by the Department of a complete application..." As a practical matter, the time period afforded by Section 2.11 is actually briefer than if a hearing were held.

The Department's focus on "the adjudication of legal rights, duties or privileges" is too narrow. Section 10-65(a) of the APA provides: "When any licensing is required by law to be preceded by notice and opportunity for Hearing, the provisions of this Act concerning contested cases shall apply." The record shows that the Department refuses to acknowledge its obligations as to the conduct of public hearing on pending permit applications and may continue to do so until this issue of applicability may be adjudicated by a court of competent jurisdiction. (**See**, Attorney General's Reply Brief, pp. 48-51)

The Department argues in response to the Attorney General's general arguments as to these issues:

[t]he Attorney General's allegations [] skip over the various public participation protocols (*i.e.*, public notices, public hearing notifications, and local repository availability) implemented by the Department concerning the "administratively complete" permit application submitted in May, 2004. Instead, the problem is the Department's conduct of the August 2004 public hearing, which was lengthy, late evening, and well-attended by many, including concerned area residents, the local media, the Lt.Governor's Office, representatives for Capital, technical and legal staff for the Department; but notably not the Attorney General's Office. As acknowledged in the Attorney General's Memorandum of Law, a public hearing is "useful to identify information deficiencies in the application," especially for locally-known issues and features, such as the Slim Lake INAI Area, Prairie Lane Road, Baker Hollow Creek, and new sightings of protected wildlife species. Its purpose was, in fact, gathering information and accumulating data through verbal statements, written comments, presentations, question and answer discussions before, during or after the public hearing, and sometimes confidential statements from local residents. (Administrative Record - D0026001TIF -8/31/04 Public Comment Hearing. TR. 18, 21-23, 25-26, & 37 regarding private well locations.) All submitted comments, plus that received during the entire public comment period (*i.e.*,

approximately 80 days), were used to further evaluate the application and for the subsequent request to modify the permit application. (IDNR Ex. 9 - Request for Modifications, dated 11/10/04.)

The Department notes that this public participation forum is *held at the onset of the overall application review process* per 62 Ill.Adm.Code 1773.14(a) and 1773.13(a). It is not an adversarial proceeding involving trial-like cross-examination and redirect questioning, and does not result in a final administrative adjudication of interests, as would occur in this administrative proceeding, or before a court of law. And unlike the 1984 *Pioneer Processing* proceeding, alluded to by the Attorney General, the Department's public comment hearings are factually distinguishable and conducted as public participation activities required by the State Act and its regulatory permitting program. The Department notes the timing of review events for the *Pioneer Processing* permit differed significantly from the Banner #355 Application review sequence. The public hearing in *Pioneer Processing* were conducted 30 day[s] prior to permit issuance. The Banner public comment hearing was conducted during the early phase of the application process for purposes of gathering information. Further more [sic] and in contrast to the *Pioneer Processing* permit proceeding, in the aftermath of the Banner public comment hearing, the permit application was not approved. Instead, the Department requested more information from Capital, based on public comments and Department staff comments arising as a result of the August 2004 public hearing and public comment period. (IDNR Ex.9 - Request for Modification, dated 11/10/04.)

* * * * * * * * *

In that 1984 *Pioneer Processing* opinion, the Court appears to rely heavily upon three factors: 1] the occurrence of notice, and 2] opportunity for hearing, as was conducted during the *Pioneer Processing* review, plus, 3] the APA statutory definition of "contested case" as follows:

> "Contested case" means an adjudicatory proceeding, not including ...information or similar proceedings, in which the individual legal rights, duties or privileges of a party are required by law to be determined by an agency only after an opportunity for hearing. []

In the public notices for the *Pioneer Processing* hearings, that agency specifically described the hearing procedures and, in fact, conducted those public hearings as "an adversary hearing where legal counsel or other registered representative of...[applicant]....or an opposition group may present expert witness who will be subject to cross-examination by the other side." *Pioneer Processing, Inc. v. Environmental Protection Agency*, 102 Ill.2d 119, 130 (1984). Such was not the case for the public

> notices and the conduct of the 2004 Banner public hearing; for the Banner #355 Application, as indicated above, these public hearings are intended to gather information and data from public comments obtained during this forum and the subsequent public comment period. [Administrative Record D0026001TIF and D0024001TIF] The 2004 public hearing did not result in adjudication of legal rights, duties or privileges immediately thereafter. As noted above, the Department's subsequent action was to request additional information for evaluation and review. (IDNR Ex.9, Request for Modifications, dated 11/10/04.)
>
> To further distinguish this information, this State Act and its regulatory review program provide for two distinct review steps within its overall permit application process, the first being information gathering and the second being the decision to approve, deny or to request modification of the permit application. The first or "administratively complete application" phase is specifically triggered upon submittal of an application with sufficient information "necessary to initiate processing and public review" pursuant to 62 Ill.Adm.Code 1773.13(a), and then more specifically, 1773.14 with regard to presenting "data, views, or arguments," and "statements" by parties in interest. The second is the Department's written findings for approval of a "complete and accurate" application pursuant to 62 Ill.Adm.Code 1773.15(c) based on information provided in the application and otherwise available, such as application modifications, responses to public comments, Department comments, etc. The record for this matter documents in detail that these and other procedural review steps were fully implemented by the Department in its review and decision making process for the Banner #355 Application. (**See**, Department's Brief, pp.23-26)

I cannot agree more with the Department as to this issue. The Department's rules specifically and unequivocally indicate that the hearings contemplated by 62 Ill.Adm.Code 1773.14 will be *informal*. Further, the Attorney General's argument appears to assert that every single hearing conducted in a licensing process is required to be conducted pursuant to the rules for a contested hearing. I don't believe either the rules of the Department or the APA mandate such. The hearing contemplated pursuant to Section 1773.14 was intended to be non-adversarial and informational-gathering. I find that the Attorney General's assertion, that the requirements of the APA for contested hearings is applicable to Section 1773.14 hearings, is simply incorrect. Further, I do not find that the decision in *Pioneer Processing* applicable to the issue. In *Pioneer*,

the only hearing provided by the Ill. EPA was that which did not comply with the APA's requirements for a contested hearing. In contrast, the hearing under the Department's regulations that requires compliance with the APA requirements is *this* administrative hearing, not the informal, informational hearing conducted pursuant to Section 1773.14 by the Department at the very nascent stages of this permit process.

I also agree with the Company that "[n]either the Act nor the Department's regulations require that the Department or the permit applicant be subject to cross-examination at the public hearing" contemplated by Section 1773.14. (**See**, Company's Brief, p.18) I also concur with the Company that "[c]ontrary to the Attorney General's assertion, the 'contested case' provisions of the Illinois Administrative Procedure Act apply only to the extent such provisions are consistent with the reasonable rules adopted by the Department pursuant to the Act." (**See**, Company's Brief, p.18, *citing* 225 ILCS 720/9.01(d); *Peterson et al., v. Chicago Plan Commission, et al.*, 302 Ill.App.3d 461, 707 N.E.2d 150, 156-157 (1st Dist.1998) (due process does not require cross-examination at administrative proceeding where rules and procedures for hearing do not provide for cross-examination)). The Attorney General's objections concerning the method and manner by which the Department conducted the August 31, 2004 hearing are rejected *in toto*.

(d)

The Company's November 2005 Modifications Did Not Fail to Demonstrate Compliance with the Act or Applicable Rules

The Attorney General spends much of its original Brief attempting to point out alleged

deficiencies in the Application that was ultimately determined by the Department to be "administratively complete" in May, 2004. However, I concur with the Company that most, if not all, of these arguments by the Attorney General are appropriately addressed by applying the notion that it is the findings of the Department's *final* determination, and not the initial determination as to "completeness," that is subject to challenge by means of appeal. That is, "Section 2.11 of the Act specifies that the focus of the instant administrative review proceeding is to be on the Department's 'final determination,'" and not necessarily on the preliminary determination by the Department concerning the "completeness" of the filed application. (**See**, Company's Brief, p.19) As the Company asserts:

> ....the Department's regulations direct that any person challenging a Department decsion to grant a permit must provide "an explanation of each specified alleged error in the Department's *final decision*...." 62 Ill.Adm.Code 1847.3(b). (Emphasis added) There is no provision of the Act or regulation that allows the permittee or any other party to challenge the Department's finding that an application is "administratively complete."
>
> In fact, the Act and regulations include no criteria or standards for the Department's preliminary determination of "administrative completeness," and, therefore, this determination is within the Department's discretion. As noted, the OSM utilizes the same review process as the Department, and also makes a determination as to "administrative completeness" prior to beginning a technical review of a surface mining permit application. *Apollo Fuels, Inc. v. United States*, 54 Fed. Cl.717, 720, 2002 U.S. Clam LEXIS 347 (2002) (noting that "OSM reviews applications for mining permits in three stages: First, the agency determines if an application is administratively complete; second, the application undergoes a technical review to ensure that it satisfies all legal requirements, and third, the application is closed out, and any final matters (such as securing bonds) are addressed"). The testimony of William O'Leary, the Department's Natural Resources Specialist, reveals that the identical process is followed by the Department:
>
> > ...[I]f [the application's] administratively complete it means that the applicant has addressed in some fashion all of the items that need to be addressed. The technical review then goes into detail as to the adequacy of those responses compared with the regulatory requirements. Tr.at 1557

Throughout her Brief, the Attorney General raises issues concerning purported deficiencies with the May 2004 Application and the information provided by Capital in response to the Department's November 4, 2005 requested modifications. The Attorney General concedes that some of the "deficiencies" were the subject of later requests for modification by the Department[8],which only goes to demonstrate that the permitting process in this case was working as intended.

* * * * * * * * * * *

The absence of authority in the Act and regulations for challenges to the Department's "administrative completeness" determination, reflects the reality that there is no practical purpose served by subjecting every preliminary determination of the Department to scrutiny through administrative review. The Attorney General wishes to engage in at least two separate administrative reviews: one of the "administratively complete" application, and another review of the final submittal. However, in *Wyatt v. United States*, 271 F.3d 1090, 1098 (Fed. Cir.2001), the federal court made the following observation regarding the OSM process for reviewing surface mining permit applications:

> Complex regulatory schemes often require detailed information before the issuance of a permit. The nature of the regulatory scheme is especially critical when the permitting process requires detailed technical information necessary to determine environmental impacts. *Governmental agencies that implement complex permitting schemes should be afforded significant deference in determining what additional information is required to satisfy statutorily imposed obligations.* 271 F.3d at 1098. (Emphasis added)

As explained above by Dr. Norris, the permitting process under the surface mining law is a highly iterative process, involving a significant amount of communication between the applicant and the permitting authority. *See also* Tr. At 1712-3 (William O'Leary testimony that the permitting process involves both documented communications and "lots and lots of phone calls.") However, the Act and regulations provide that it is only the Department's "final decision" that is subject to administrative review, and this final decision is based on the "administratively complete" application, as well as all of the information subsequently provided by Capital to the Department in

---

[8] [footnote in Company's Brief] *AG's Brief* at 15, 23-24 (land ownership information was requested and provided by Capital in its 2005 Modification Response to the Department's modification request); *AG's Brief* at 22-23 (road and stream addressed in Department modification requests and Capital responses); *AG's Brief* at 92 (discrepancies regarding land use numbers were resolved during the modification process).

response to the modification requests and other inquiries. The Attorney General's numerous challenges to the sufficiency of the "administratively complete" application (or any form of the Application other than the November 2007 Filing) are unauthorized and improper and should be disregarded. (**See**, Company's Brief, pp.19-23)

Again, I have to side with the Company and against the Attorney General. Allowing every challenge to the Department's administrative determinations as to completeness would significantly complicate the permitting process and potentially require the courts to become engaged in *prematurely* reviewing matters concerning the permit application that *might* not even be encompassed by the final application decision. I concur that the Act and regulations only contemplate review of the Department's "final decision"; it is *that* decision that is subject to administrative review (inasmuch as it is this final decision that is based on the "administratively complete" application, as well as all of the information subsequently provided by Capital to the Department in response to the modification requests and other inquiries). That is not to say that every challenge to the "completeness" of an application should be rejected, simply because it is the final decision that ultimately must be the subject of rigorous review. In this instance, I do not believe the Attorney General has raised sufficient evidence to prove that the application was "incomplete" so as to require rejection of the ultimate approval of the application. The Attorney General's challenges to the sufficiency of the "administratively complete" application are hereby rejected.

(e)

The April 27, 2007 Order did not Exceed the Hearing Officer's Authority

The Attorney General's last objection in Part I of its Brief in this matter alleges that "the hearing officer issued an order on April 27, 2007, reversing the Department's December 5, 2005 denial of Application No. 355 and remanded the permit application," but that such order exceeded the hearing officer's authority.

The Attorney General states that:

> [t]he Department's hearing officer exceeded his authority in the April 27, 2007 remand order which imposes deadlines on subsequent permit review, because there is no legal provision for a hearing officer to impose review deadlines during the remand of a permit application. The assessments and evaluations performed by the Department following the April 27, 2007 order of remand were adversely affected by the arbitrary imposition of deadlines by the hearing officer, which required the Department to resume its review of the permit application and to make specific findings within 30 days.

The Department argues that these contentions are irrelevant and have been waived because "the Attorney General and other interested parties did not file a timely appeal to the draft April, 2007 Order to Remand within the specified 10 day period provided under 62 Ill.Adm.Code 1847.3." DNR at 27. The only participants in the permit denial appeal were the Company and the Department; without intervention, no other interested person could have *directly* challenged the remand order. The Department misses the point.

The Company argues that the hearing officer's imposition of a review deadline in the April 27, 2007 order comported with Section 1848.16(f), which authorizes a hearing officer to "rule on procedural requests and other matters." Company brief at 23. The record includes the documents and pleadings in the administrative appeal of the permit denial but does not contain any request for the 30 day deadline; it is a reasonable inference that the imposition of such a deadline was *sua sponte*. The clear language of Section 1848.16 simply does not authorize a hearing officer to do anything other than conduct and regulate the course of a hearing.

The April 27, 2007 order also included an explicit but unnecessary finding by the hearing officer that Application No. 355 as modified on November 7, 2005, "sets out a Reclamation Plan that may demonstrate that Applicant has complied with all requirements of the Federal Act, the State Act, and the Illinois regulatory program and that the reclamation required by the Federal Act, the State Act, and the Illinois regulatory program may be able to be accomplished pursuant to said Reclamation Plan." The permit

appeal was limited to the issue of valid existing rights and no final action was taken with respect to the proposed reclamation plan.

The Company argues that in making the claim that the assessments and evaluations performed by the Department following the April 27, 2007, order of remand may have been adversely affected by the arbitrary imposition of deadlines by the hearing officer, "the Attorney General has to assume certain facts that are not a part of the administrative record." Company brief at 23. Whether the applicable law authorizes the actions taken by the hearing officer is a matter of law. (**See**, Attorney General's Reply Brief, pp.68-69)

The Company is correct that the Attorney General had to assume certain facts that are not in the record, such as where the Attorney General "contends that the assessments and evaluations performed by the Department following the April 27, 2007 order of remand *may have been adversely affected by the arbitrary imposition of deadlines by the hearing officer,* which required the Department to resume its review of the permit application and make specific findings within 30 days." (**See**, Attorney General's Brief, pp. 25-26, 31-32) (Emphasis added) As the Company correctly notes:

> [t]here is no evidence in the administrative record supporting this hypothesis — in fact, the administrative record reflects that the Department requested an extension of the review deadline, which was not opposed by Capital and was granted by the Hearing Officer. (**See**, Supplemental Order Establishing Completion Date for Review of Permit, dated August 8, 2007) (extending the permit review deadline to October 26, 2007) (**See**, Company's Brief, p.23)

The Attorney General asserted further within its Reply Brief that:

> [i]n its Motion to Request Modification of the [Remand] Order, filed May 14, 2007, the Department [at ¶8] objected to the initial May 27, 2007 deadline:
>
> > This period of time is insufficient for the Department to complete its review of these specific issues [*e.g.*, regarding the proposed reclamation plan] as well as other outstanding issues concerning the Application. The Department notes that when the Decision to Deny was issued in December, 2005, the Department's

review of other relevant matters on the Application was only partially completed and was thereby suspending pending resolution of the facts and judicial proceedings relating to the specific issues concerning vacation of Prairie Lane Road.

While DNR's motion sought a deletion of the deadline, it failed to object to the hearing officer exceeding his authority by imposing any deadline.

* * * * * * * * * * *

The hearing officer did issue a Modification of Order on May 17, 2007, but did not eliminate the schedule for review as the Department requested, instead imposing AG Exhibit 104/documents 1368-7. [sic] The hearing officer stated in the May 17, 2007 Modification of Order: "Although I empathize with the wishes of the Department....I believe emasculating the prior Order to such a degree so that it contains *no* time table for the Department to issue its decision is as myopic as providing too short of a time period for the Department to conduct a permit review. [emphasis in original]" [sic] The hearing officer did not deem it fitting to cite any legal authority for his revised edict. (**See**, Attorney General's Reply Brief, p.71)

This is a curious statement (the tone of which I believe is totally inappropriate). Why would the Hearing Officer cite such "legal authority" in an order of this type? More particularly, since the Attorney General asserts that the issue of "[w]hether the applicable law authorizes the actions taken by the hearing officer [in setting deadlines for administrative action on remand] is a matter of law," why did the Attorney General decide not to cite even one case or legal citation in support of her stance in this matter (no such citation or case law appears in the Attorney General's voluminous Brief, Memorandum of Law and Reply Brief)? Frankly, I believe the Attorney General is again speculating as to the law in this area. The Attorney General did not intervene and contest the order at the time it was entered. The Attorney General does not indicate the reason she believes she has the ability to contest the order, not only because of the waiver issue, but also because the order only directs the *Department* to complete an action, and does not direct

the Attorney General to do anything. Although the Attorney General speculates that the deadline adversely affected the Department's review of the permit application, there is absolutely no evidence to support such a supposition. Certainly the Department did not assert such. Indeed, the Department was provided each and every extension of time (after the initial thirty day time limit was established) that it indicated it required in order to complete the application process. Contrary to the Attorney General's assertion, the record does *not* show that the deadline affected DNR's attempts to address the permit issues. I reject the Attorney General's assertion that the establishment of a deadline in the April 27, 2007 Order was an act that exceeded my authority as a hearing officer.

PART II

Allegations of Error

I.

Was the Application Accurate and Complete?

The Attorney General asserts that:

> [t]he Department's approval of Application No. 355 on October 26, 2007 was not based upon a complete and accurate permit application. The Company failed to meet its burden under Section 2.08(a) of the Act that its application complies with all requirements of the Act. These compliance obligations are set forth in the statutory and regulatory performance standards, but the permit application informational requirements must first be satisfied to ensure such compliance.
>
> * * * * * * * * * * * *
>
> The Company claims that it notified DNR of the property transfers [affecting the

> ownership of the Permittee] through a document referenced as an "ownership transfer of the permit." TR 2758. The Company also claims that it notified DNR of its ownership and control by North Canton, LLC, and of its new name and change from a corporation to a limited liability company through additional documents. TR. 2758, 2762. However, the administrative record filed by the Department does not contain any of these notifications and none was produced in discovery. Mr. Arnett may have mis-spoke in referring to "ownership transfer of the permit" (which (per Section 1774.17) pertains to the permit itself) because the permit had yet to be approved and issued. The application itself would have to be amended or revised and it was not. Neither Part I(2) nor Attachment I has been modified or revised to reflect the changes in the ownership and identity of the applicant. The application was therefore incomplete and inaccurate as to the ownership and control information, and even the identity of the permittee, when it [sic] approved on October 26, 2007. The November 15, 2007 final decision issued the permit to a legal entity that no longer existed. (**See**, Attorney General's Brief, pp.29, 30)

As pointed out by the Attorney General, "the Department does not respond to the Attorney General's arguments on this issue." (**See**, Attorney General's Reply Brief, p.77) The Attorney General also notes that the:

> Company argues that the Department "was notified that Capital Resources Development Company, LLC was substituted for Capital Resources Development Company, Inc. In 2007....but the notifications submitted by Capital are not included in the administrative record."[9] The Company also argues that "the Attorney General presents no evidence or testimony contradicting Mr. Arnett's testimony regarding the notifications to the Department," but it does not tender copies of the notifications to correct the record. Company brief at 26. Any documents submitted as notifications would actually be part of the applicable record. Since the record does not include any alleged notifications, their absence in the record does indeed contradict Mr. Arnett's testimony. (**See**, Attorney General's Reply Brief, p.77)

I agree with the Illinois Attorney General that "[t]he identity of the permit applicant is important." (**See**, Attorney General's Reply Brief, pp.80,81) Section 1778.13(a) requires the permit application to state "whether the applicant is a corporation, partnership, single

---

[9] The Attorney General failed to cite the quotation. It is taken from the Company's Brief, p.26.

proprietorship, association, or other business entity." Section 1778.13(b) requires the application to identify "the applicant, the operator (if different from the applicant), the person who will pay the abandoned mine land reclamation fee, and the applicant's resident agent who will accept service of process." Section 1778.13(c) requires that each person who "owns or controls" the applicant (as specifically defined in Section 1773.5) be identified. Section 1778.13(c) also mandates application information regarding: the person's "ownership or control relationship to the applicant, including percentage of ownership and location in organizational structure;" the "title of the person's position [and] date position was assumed;" and the "application number or other state or federal identifier of, and the regulatory authority for, any other pending surface coal mining operation permit application filed by the person in any State in the United States." Section 1778.13(d) requires that "any surface coal mining operation owned or controlled by either the applicant or by any person who owns or controls the applicant under the definition of 'owned or controlled' and 'owns or controls'" must be identified in the application. Sections 1778.13(e) and 1778.13(f) respectively require the application to contain the names and addresses "of each legal or equitable owner of record of the surface and mineral property to be mined, each holder of record of any leaseholder interest in the property to be mined, and any purchaser of record under a real estate contract for the property to be mined" and "of each owner of record of all property (surface and subsurface) contiguous to any part of the proposed permit area." "A statement of all lands, interest in lands, options, or pending bids on interests held or made by the applicant for lands contiguous to the area described in the permit application," must be included in the application as required by Section 1778.13(h). Also, as asserted by the Attorney General, there are explicit legal requirements for the applicant to notify the Department

of changes in such information. Section 1778.13(i) provides: "After an applicant is notified that his or her application is approved, but before the permit is issued, the applicant shall, as applicable, update, correct, or indicate that no change has occurred in the information previously submitted under subsections (a) through (d)."

I cannot place my imprimatur upon an administrative decision that does not contain such ownership information. Until such time as the permittee's ownership and control information is properly filed and included within the permit record, including the identification of the operator and all owners and controllers of the operator, this application is indeed incomplete and cannot be approved pursuant to Section 1773.22(a). I so rule. As to the manner in which this affects the further processing of this application (and the correlative appellate process), that is for the Department to determine.

II.

Excess Spoil Pile

The Company's Brief contains the following argument in response to the Attorney General's arguments concerning the issue of an excess spoil pile at the Banner Mine site:

> [t]he Attorney General contends that the proposed boxcut stockpile violates applicable performance standards of the Act. *AG's Brief* at 34-41. As explained in the Application and in Capital's 2005 Modification, the boxcut stockpile was designed to permanently manage soil and rock from the initial boxcut. 2005 Modification, #43.
>
> "Boxcut," as defined in the Department's regulations, means "the first open cut resulting in the placing of overburden on unmined land adjacent to the initial pit." 62 Ill.Adm.Code 1701. The Department regulations establish requirements for boxcut spoils, including the requirement that "boxcut spoils shall blend with undisturbed land with a maximum outslope steepness of twenty-five (25) percent (4h:1v)." (62 Ill.Adm.

Code 1816.71 (g)(2).

The above-referenced regulation clearly contemplates that a reclamation plan may include the type of boxcut stockpile proposed by Capital, as long as it blends with the undisturbed land and meets the slope criteria. *Illinois South Project, Inc. v. Hodel*, 844 F.2d 1286, 1293 (7th Cir. 1988) (affirming slope requirements of 62 Ill.Adm. Code 1816.71(g)(2), and noting that it "is hard to read this language as permitting disruptive, unsightly walls of spoil to be scattered willy-nilly through Illinois"). Communications between Capital and the Department resulted in the proposed boxcut stockpile being modified during the permitting process in order to achieve the "approximately original contour" of the permit area, as required by Section 3.04 of the Act. 225 ILCS 720/3.04(a). Greg Arnett explained:

> So what we did in this application, and it was actually part of the modifications, was we originally proposed to be a slope of about 25 percent on this. But we couldn't — we weren't able to meet approximately original contours, so we reduced that slope down to a 10 percent slope, which is a one foot rise and a ten foot run. So it is actually below what we see as contours that exist within the mining site. Tr. at 2586.

As indicated above, the side slopes of the proposed boxcut stockpile will be ten to one or less, which is a significantly more gradual slope than the four to one slope required by the applicable regulation. 2005 Modification; *see also* Tr. at 1504 (William O'Leary testimony that "the specification in the plan is ten to one, which is much — a much less steep slope than the maximum of four to one that's allowed.") (**See**, Company's Brief, pp.27-28)

The Attorney General argues that the Company erroneously cites *Illinois South Project, Inc. v. Hodel*, 844 F.2d 1286 (7th Cir.1988), as "affirming slope requirements of 62 Ill.Adm.Code 1816.71(g)(2)." The Attorney General then cites the *Hodel* Court: "This means that the mine operator may select as steep as 25% in order to match a hilly terrain. It is hard to read this language as permitting disruptive, unsightly walls of spoil to be scattered willy-nilly through Illinois. The Secretary did not err in approving these regulations." 844 F.2d at 1293. (**See**, Attorney General's Reply Brief, p.84) Yet the Court in *Hodel did* affirm the slope requirements of 62 Ill.Adm.Code 1816.71(g)(2) and did so by indicating that a 25% slope requirement

appropriate "to match a hilly terrain." 844 F.2d at 1293. The Attorney General then asserts that:

> [o]f these three sentences, [Capital] quotes only a portion of the middle one. The Company self-servingly omits the court's actual interpretation holding: "This means that the mine operator may select a slope as steep as 25% *in order to match a hilly terrain.*" *Ibid.* emphasis added.
>
> The site of the proposed Banner Mine does not contain hilly terrain. The Company's omission of the court's construction of the regulatory provision allows the Company to inappropriately focus on the side slope criterion. The court, however, placed its focus upon whether the boxcut stockpile (as part of "the final configuration of the fill [which] must be suitable for the approved post-mining land use") actually blended with undisturbed land. (**See**, Attorney General's Reply Brief, pp.84-85)

Yet it is clear from the above-quote from Greg Arnett that the Company rejected utilization of a 25% slope *because* it did not meet the original contours, and that the Company settled on the 10% slope — which is a one foot rise and a ten foot run — (with the Department's eventual imprimatur) because such would be *below* the contours that exist at the mine site. Here's what Arnett said:

> So what we did in this application, and it was actually part of the modifications, was we originally proposed to be a slope of about 25 percent on this. But we couldn't — we weren't able to meet approximately original contours, so we reduced that slope down to a 10 percent slope, which is a one foot rise and a ten foot run. So it is actually below what we see as contours that exist within the mining site. Tr. at 2586.

Frankly, I find the Attorney General's arguments that such a slope would create a "Banner Mound" which would "literally and figuratively stick out like a proverbial sore thumb" unpersuasive and hyperbole. Indeed, I believe such a slope contour under all the facts is well within the purview permitted by the Department's regulations and statute, and therefore I find that the Attorney General has not proven, by a preponderance of the evidence, that such "approval [by the Department] of the excess spoils is more likely than not contrary to law." (**See**,

Attorney General's Reply Brief, p.87; *see also*, Attorney General's Brief, pp.38, 39)[10]

III.

Hydrologic Balance

The Department correctly notes that:

> Section 3.10 of the State Act, specifically 225 ILCS 720/3.10(a), states that "[d]isturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water is surface and ground water systems shall be minimized both during and after surface mining operations and during reclamation." The hydrologic balance means the relationship between the quality and quantity of water inflow to, water outflow from, and water storage in the hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir. Hydrologic balance encompasses the dynamic relationship among precipitation, runoff, evaporation, and changes in ground and surface water storage. A permit applicant is required to provide a determination of the probable hydrologic consequences ("PHC") of the proposed surface mining activities, on the proposed permit area and adjacent area. The Department must find that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area (*i.e.*, the proposed mine site). The Department notes that not all portions of the hydrologic balance will be impacted by the proposed mining operations at the Banner site; therefore, an exhaustive academic exercise to characterize all parts of the hydrologic balance...is in fact not necessary to determine that material damage to the hydrologic balance will not occur. (**See**, Department's Brief, pp.33-34)

The Attorney General asserts, however, that:

---

[10] I note here that I am wholly unconvinced that the Department's decision as to this Application, either in whole or in part, was motivated by an alleged *quid pro quo* (an alleged land swap with the Company). The Attorney General asserts that her "inferences [concerning such alleged *quid pro quo*] is legitimately subject to discussion," after the Department unequivocally states that such *quid pro quo*/land swap argument is "based on the Attorney General's suppositions about the Department's ulterior motive for future conversion of the proposed mine site to state managed land....[and] is total speculation without any supporting evidence or facts." (**See**, Attorney General's Reply Brief, p.83, citing Department's Brief, p.67) I wholly agree with the Department: the *quid pro quo* theory conjured-up by the Attorney General to disparage the purported motivations of the Department is not supported by evidence or facts.

> ...the Company failed to provide sufficient and reliable data to establish a baseline, *i.e.*, to properly investigate the site-specific groundwater and surface waters; the Company failed, after its determination of probable hydrologic consequences, to provide supplemental information; and the Department failed to require the necessary additional factual information, relied instead upon modeling utilizing assumptions and regional data, and thereby conducted a flawed assessment. (**See**, Attorney General's Brief, p.41)

The Department responds that:

> Capital provided sufficient site specific baseline data for groundwater and surface water for the Department to make its determination that the proposed mining operation was designed to prevent material damage to the hydrologic balance outside the permit area. The use of modeling techniques, interpolation or statistical techniques may be included as part of a permit application. However, it is the Department's discretion to determine if additional surface and groundwater information is required or necessary to calibrate the model. Also, statistically representative data of the site may be included as part of the permit application. The hydrology information provided by Capital was adequate for determining baseline groundwater and surface water quality and quantity. The Department finds that the provided information is also adequate to determine seasonal variations and water usage. The Department finds that Capital has provided sufficient data to adequately characterize the baseline hydrology of the propose[d] mine area and other adjacent areas. (**See**, Department's Brief, p.34)

The Company utilized the Rice Lake Land Report and the information contained therein for much of the responses to the hydrological issues raised by the application. The Attorney General concedes that the Rice Lake Land Report "is useful because Rice Lake is an adjacent area and is within the cumulative impact area." (**See**, Attorney General's Reply Brief, p.119) However, the Attorney General asserts that because the Land Report "does not provide any data specific to the permit area," "the Company's use of the Land Report did not satisfy the applicable regulatory requirements." (**See**, Attorney General's Reply Brief, p.119, citing Sections 1780.21 and 1780.22 respectively) The Attorney General asserts that "Sections 1780.21 and 1780.22 respectively require the application to contain detailed and *site-specific* hydrologic and geologic information." (**See**, Attorney General's Reply Brief, p.119)

Section 1780.21 provides, in part that:

a) All water quality analyses performed to meet the requirements of this Section shall be conducted according to the methodology in the 15th edition of "Standard Methods for the Examination of Water and Wastewater," (1980) which is incorporated by reference, or the methodology in 40 CFR 136 and 434. Water quality sampling performed to meet the requirements of this Section shall be conducted according to either methodology listed above when feasible. "Standard Methods for the Examination of Water and Wastewater" (1980) is a joint publication of the American Public Health Association, the American Water Works Association and the Water Pollution Control Federation and is available from the American Public Health Association, 1015 15th Street, NW, Washington, D.C. 20036. This document is also available for inspection at the Department's Springfield office.

b) The application shall contain the following baseline hydrologic information. When this information is insufficient for the Department to determine if adverse impacts may result to the hydrologic balance, additional information shall be required, such as but not limited to water supply contamination or diminution.

1) Ground water information. The location and ownership for the permit and adjacent area of existing wells, springs, and other ground water resources, seasonal quality and quantity of ground water, and usage.

A) Ground water quality descriptions shall include, at a minimum, pH, total dissolved solids, hardness, alkalinity, acidity, sulfates, total iron and total manganese. The Department shall allow the measurement of specific conductance in lieu of total dissolved solids if the permittee develops site-specific relationships precisely correlating specific conductance to total dissolved solids for specific sites for all zones being monitored.

B) Ground water quantity descriptions shall include, at a minimum, rates of discharge or usage and elevation of the potentiometric surface in the coal to be mined, in each water-bearing stratum above the coal to be mined, and in each water-bearing statum which may be potentially impacted below the coal to be mined.

2) Surface water information. The name, location, ownership, and description of all surface water bodies, such as streams, lakes, and impoundments, the location of any discharge into any surface water body in the proposed permit and adjacent areas, and information on surface water quality and quantity sufficient to demonstrate seasonal variation and water usage.

A) Water quality descriptions shall include, at a minimum, baseline information on pH, total suspended solids, total dissolved solids, alkalinity, acidity, sulfates, total iron and total manganese. The Department shall allow the measurement of specific conductance in lieu of total dissolved solids if the permittee develops site-specific relationships precisely correlating specific conductance to total dissolved solids for specific sites for all surface water points being monitored.

B) Water quantity descriptions shall include, at a minimum, baseline information on seasonal flow rates.

3) If the determination of probable hydrologic consequences required by subsection (f) below indicates that adverse impacts on or off the proposed permit area may occur to the hydrologic balance, or that acid-forming or toxic-forming material is present that may result in the contamination of ground or surface water supplies, then information supplemental to that required under subsections (b)(1) and (2) shall be provided to evaluate such probable hydrologic consequences and to plan remedial and reclamation activities. Such supplemental information shall be based upon drilling, hydrogeologic analyses of water-bearing strata, flood flows, or analysis of other water quality or quantity characteristics.

c) Baseline cumulative impact area information.

1) Hydrologic and geologic information for the cumulative impact area necessary to assess the probable cumulative hydrologic impacts of the proposed operation and all anticipated mining on surface and ground water systems as required by subsection (g) shall be provided to the Department, if available from appropriate Federal or State agencies.

2) If the information is not available from such agencies, then the applicant may gather and submit this information to the Department as part of the permit application.

3) The permit shall not be approved until the necessary hydrologic and geologic information is available to the Department.

d) *The use of modeling techniques, interpolation or statistical techniques may be included as part of the permit application if such techniques will enhance the evaluation*

of hydrological impacts, but actual surface and ground water information may be required by the Department for the purposes of calibration of such models for each site even when such techniques are used.

e) If the determination of probable hydrologic consequences required in subsection (f) indicates that the proposed mining operation may proximately result in the contamination, diminution, or interruption of an underground or surface water source of water within the proposed permit or adjacent areas which is used for domestic, agricultural, industrial, or other legitimate purpose, then the application shall contain information on water availability and alternative water sources, including the suitability of the alternate water source for existing premining uses and approved post-mining land uses. (**See**, 62 Ill.Adm.Code 1780.21) (Emphasis added)

I would note that the regulatory language utilized would appear to provide the Department with *considerable* discretion as to the type of information and data upon which it would rely to determine whether the applicant has complied with the requirements of the Act *vis-a-vis* hydrologic concerns. Indeed, the regulation state:

> [t]he use of modeling techniques, interpolation or statistical techniques may be included as part of the permit application if such techniques will enhance the evaluation of hydrological impacts, but actual surface and ground water information *may* be required by the Department for the purposes of calibration of such models for each site even when such techniques are used. (Emphasis added)

If, indeed, the Attorney General was correct — that site-specific data was mandated for fulfillment of the requirements of the regulations — the regulation above would undoubtedly have provided that "actual surface and ground water information *shall* be required by the Department for the purposes of calibration of such models for each site even when such techniques are used." Instead, the Department is provided leeway in assessing the complex hydrological issues raised by a permit application. I should indicate that most of the Attorney General's objections to the hydrology issues raised by this application relate to whether site-

specific data is a requisite under the statute and regulations, or whether other information and data may be relied upon by the Department is processing a permit application. I specifically rule that the Department possesses discretion to determine the type of information and data it may require of an applicant to comply with the requirements of Section 1780.21, and such discretion includes utilization of information other than site-specific testing if the other information provided by the applicant is otherwise probative of the issues raised by the regulations.

The Attorney General also notes that:

> [i]n Item 29 of the November 9, 2004 request for modification the Department noted that "surface water discharge from the proposed outfalls appears to eventually flow into the Rice Lake Fish and Wildlife Area." The Department required the Company to provide a detailed discussion of the probable hydrologic consequences of the quantity and quality of the discharge to Rice Lake and the management of its water levels. The Attorney General contends that the Company's response to Item 14 failed to provide the required detailed discussion...(**See**, Attorney General's Brief, p.42)

I disagree. I find that the Company appropriately and in compliance with the Department's modification demand, provided a proper "detailed discussion of the probable hydrologic consequences" of the discharge into Rice Lake.

The Attorney General asserts, however, that:

> [t]he Department argues repeatedly that the Company provided adequate information and the Department's findings are thereby sufficiently justified. One of the premises for this general argument is noted at the outset: "not all portions of the hydrologic balance will be impacted by the proposed mining operations at the Banner site; therefore, *an exhaustive academic exercise* to characterize all parts of the hydrologic balance that Mr. Norris claims as necessary, is in fact not necessary to determine that material damage to the hydrologic balance will not occur." DNR brief at 34; emphasis added. How did the Department determine that "portions of the hydrologic balance" will not be impacted? Appendix C to the final decision ("Assessment and Findings of Probable Cumulative Hydrologic Impacts") does not include such a finding and does not identify the "portions of the hydrologic balance" that will purportedly not be impacted. This statement (*i.e.*,

"not all portions of the hydrologic balance will be impacted by the proposed mining operations at the Banner site") indicates that the Department employed a *restrictive* view toward hydrologic impacts. If this were indeed the Department's conclusions, and thereby influenced the findings in its assessment, then such a conclusion does not appear in the Banner Mine record. (**See**, Attorney General's Reply Brief, pp.95,96)

I do not find any inherent flaw in the Department's approach to the review of the hydrology issues raised by this Application. Nor do I concur with the Attorney General that the Department's explanation necessarily means that the Department employed an objectionable "restrictive" review of the potential hydrologic impacts.

The Attorney General also asserts that:

> [t]he Department believes that the Attorney General cannot "second guess" the decisions of its Office of Mines and Minerals. The purpose of calling Mr. Norris [at the formal administrative hearing] as a properly and timely disclosed expert witness was to explain and defend his report [a report that was admitted into evidence at the hearing], and to expound upon his opinions and conclusions in light of the information that became available after the Department resumed its technical review after the remand in April 2007. The true focus is not on whether Mr. Norris may be absolutely correct in his evaluation but whether the Department's assessment was actually based upon all of the required information. In other words, it is enough to show that the Department's assessment itself is merely a "first guess" regarding these critical issues. (**See**, Attorney General's Reply Brief, p.97)

I don't agree that "it is enough to show that the Department's assessment itself [was] merely a 'first guess'" in order to establish that the decisions of the Department as to the hydrologic issues raised by this Application should result in rejection of the Department's approval of the permit.

The Attorney General purports to attack the Department's decisions as to the hydrology issues on a number of fronts. For instance, the Attorney General asserts that:

> [i]n its May 17, 2004 application, the Company stated [at page III-8] that Coppera Creek is the "only significant water body located *immediately* adjacent to the proposed permit area," that the water bodies at Rice Lake are one-half mile to the south, and that none of

> Banner Marsh's several water bodies (located a quarter-mile to the east) is *immediately* adjacent to the proposed permit area." Since Section 1780.21(b) requires an applicant to identify and describe "the location of any discharge into any surface water body in the proposed permit and adjacent areas," Application No. 355 as submitted was obviously incomplete by using "*immediately*" to improperly qualify and restrict the scope of Section 1780.21(b). (**See**, Attorney General's Brief, p.42)

I don't agree that the Company's use of the term "immediately" "improperly qualifies and restricts the scope of Section 1780.21(b), and therefore I do not find that the Application "incomplete" premised upon this assertion.

The Attorney General also notes that:

> [Chuck] Norris [a licensed geologist] prepared a report dated December 19, 2006 and entitled "Surface and Subsurface Hydrology of Banner Basin" for the unsuitability petitioners. It was submitted as part of the "supplemental" information in support of Petition LU-005 requested by DNR [] at the end of the 60 day completeness review period imposed by rule. The Norris report is essentially a critique appraisal regarding the review of this application as performed by the Office of Mines and Minerals. AG Exhibit 2. The fundamental contentions in this challenge to the Banner Mine permit is that the Company failed to carry its burden of complying with all of the applicable requirements, including Section 3.10 of the Act and Section 1816.41(a) of the rules, and that the Department issued the permit despite such failures. The Norris report is proof of these contentions. (**See**, Attorney General's Brief, p.43)

The Department, however, purports to disparage the probative worth of the Norris report because of its having been completed (on December 9, 2006) prior to Capital submitting its first and second modification responses pursuant to the subsequent requests of the Department during the permit application process. Here is what the Department asserts:

> [i]n page 43 of the Attorney General's Brief, the Attorney General offered with 2006 Norris Report as proof of their allegation that Capital failed to carry it [sic] burden of complying with all of the applicable requirements, including Section 3.10 of the State Act and 62 Ill.Adm.Code 1816.41(a). The Attorney General alleges that "[t]he Norris report is essentially a critique of the Company's 'investigations' regarding the quantity and quality of the groundwater and surface waters. It was admitted into the record of the

> proceeding for that purpose as well as a critical appraisal regarding the review of the application as performed by the Office of Mines and Minerals." However, the Department notes at page 3 of the Norris report, Norris states "[i]n the permit application materials *provided to date*, there are no measurements for any of these constituents." The Department notes that the permit application materials available to Norris at the time he wrote his December 9, 2006 report ("2006 Norris Report") apparently included only the information available at tat time and thus, was limited to the original administratively complete permit application of May 17, 2004. Therefore, *none* of the information provided in Capital's responses to the Department's FIRST or SECOND modification requests, approved by the Department, was available at the time of Mr. Norris' writing of his 2006 Report. Therefore, the 2006 Norris Report is written without consideration of all the data and information that was reviewed and approved for the final Permit #355. The s2006 Norris Report is an incomplete evaluation of the entirety of Permit Application #355. (**See**, Department's Brief, p.35)

Frankly, I don't agree with the Department insofar as its disparaging assessment of the probative value of Mr. Norris' Report. Further, I believe the Attorney General is correct when she states that:

> ....[t]he record [] shows that the Company's first set of modification responses was available for 13 months (early November 2005 through early December 2006) prior to the completion of the Norris report. Mr. Norris testified that his first investigation was to find out what information was available as to the pending permit application. TR.40. Throughout his testimony, including cross-examination, Mr. Norris referred to the modifications to the application. When asked about this "additional information" Mr. Norris stated that he used "everything that I was able to get." TR 212. (**See**, Attorney General's Reply Brief, pp.102-103)

The *real* issue is whether Mr. Norris' Report, coupled with his testimony, coupled with the other facts and information garnered at the administrative hearing, established that:

> ....the information submitted by the Company (in the application and the modification responses) was insufficient for scientifically valid characterizations of the existing hydrologic balance; [whether] such a pre-mining baseline must be generated from site-specific data; and "absent that integrated assessment of existing conditions and seasonal variations of those conditions, [whether] there can not be and is not a defendable, reasoned projection of the likely consequences of the proposed mining." AG Exhibit 2 at pages 12-13. (**See**, Attorney General's Reply Brief, p.102)

Predictably, the Department vehemently disagrees with the Attorney General that the Norris Report, coupled with the other evidence, established the legal infirmity of the Department's decision. (**See**, Department's Brief, p.36) The Department:

> ...notes that the components addressed in the 2006 Norris Report do interact to define the water quantity in the "Banner basin;" however, not all such components will be impacted by the proposed mining operations. Therefore, the Department determined that a detailed academic characterization of all the components, as envisioned by the 2006 Norris Report, was not necessary to determine if the proposed mine was designed to prevent material damage to the hydrologic balance outside the permit area. For example, the Attorney General, referring to the 2006 Norris report, states that there are no "site-specific data" to "approximate typical run-on to the Banner basin from the adjacent highlands to the northwest." The Department notes that Capital provided site specific data using Figure V-4 from the Rice Lake Land Report in response to Modification Request No. 14 which shows the typical flow duration curve for a small watershed on the bluff on the Illinois River. The figure V-4 data provides typical flow information for the ephemeral and intermittent streams that flow from the highlands into the permit area. The Department determined that this data provided better flow depiction of those types of streams than that normally provided by required flow sampling in a permit application. The Department notes that the run-on flow from the adjacent western highlands will not be impacted by the proposed mining operations. Once mining is completed and the mine is reclaimed, the same amount of run-on flow from the highlands will occur regardless of whether or not mining was ever conducted. Therefore, the information provided by the Capital [sic] was adequate to determine that the proposed mine was designed to prevent material damage to that specific aspect of the hydrologic balance. (**See**, Department's Brief, p.38)

The Attorney General disagrees with the Department, and argues that:

> [t]he Department later inaccurately claims that Figure V-4 from the Rice Lake Land Report "provides site-specific surface water quantity information necessary for baseline data." DNR brief at 48. Whether derived from ignorance or arrogance, its argument that this "typical flow duration curve for a small watershed on the bluff of the Illinois River" actually provides empirical data specific to the Banner Mine site must be rejected. Moreover, the representations the DNR determined that Figure V-4 provided a "better flow depiction" are made without any citation to the record because no such finding was made in the Department's assessment and no witness provided such testimony.
>
> More importantly, the record shows that Figure V-4 of the Land Report [at page

V-23] does not contain any site-specific data. As discussed in the text of the Land Report [at page V-22], the figure merely "illustrates" flow duration of a "typical" small watershed tributary, which is not identified. The Department also quotes the Report [at page V-22] for the fact that "the small tributaries flowing into Rice Lake are [in 1983] most often dry." That may well have been true back then, but more recent information would seem to be more reliable. In any event, the Department begins to conclude this discussion with the assurance that "a specific permit condition requirement in Appendix C ....requires Capital to obtain background data, prior to [the] start of mining operations, from the point where surface water flowing from the proposed mine site would flow around the west end of the berm that lies south of Morgan Ditch, during brief periods of high water or intense rainfall." DNR brief at 38-39. This is simply not true. There is no specific permit condition as represented by the Department in its brief. Appendix C merely states: "Monitoring point No. 7 was established in July 2005. Due to zero flow conditions during sampling events to date, samples are not presently available. The applicant will continue to monitor this point to establish baseline seasonal water quality information."

At best, this statement by the Department in Appendix C is a statement of expectation: the Company "will continue to monitor." It is not listed as a permit condition in Section IV of the final decision. There is certainly no effort by the Office of Mines and Minerals to ensure the enforceability of this alleged provision by making, for instance, the "start of mining operations" contingent upon such monitoring. The representations in the DNR brief as to "a specific permit condition requirement in Appendix C....to obtain background data, prior to [the] start of mining operations," is unsupported by the record. (**See**, Attorney General's Reply Brief, p.103-104)

I agree with the Attorney General in this regard. The Department's affirmative assertion that there is a "specific permit condition requirement" concerning Capital "obtain[ing] background data, prior to [the] start of mining operations, from the point where surface water flowing from the proposed mine site would flow around the west end of the berm that lies south of Morgan Ditch, during brief periods of high water or intense rainfall," is simply not accurate. Thus, I am ruling that the Department's decision as to Application #355 must be denied until such time as the Department makes a specific, unequivocal ruling as to whether such a specific permit condition is warranted. I agree with the Attorney General that the Department cannot have it both ways: if the Department is rationalizing the effectiveness of its review of the hydrologic

issues raised by this Application by asserting the existence of a permit condition, then such a permit condition should be *specifically* imposed. Thus, this matter is remanded with the direction that the Department is directed to review this specific issue (and this *specific* permit condition, if indeed it *is* a permit condition) to determine whether, indeed, a permit condition is warranted.

The Attorney General also contends that "the Company's characterization of the groundwater quantity was insufficient for a proper assessment of cumulative hydrologic impacts." (**See**, Attorney General's Reply Brief, p.107) The Attorney General states "the effects of the groundwater on surface water quantity are critical to understanding the hydrology of the 'Banner basin;' indeed, the interchanges between the surface and subsurface waters make the 'Banner basin' unique and unsuitable for strip mining." (**See**, Attorney General's Brief, p.48) The Department responds that:

> [the Attorney General's statements are] based upon the 2006 Norris report [which was] written prior to the additional information provided in Capital's modification responses. Capital's modification responses provided information needed to characterize the interchanges between the surface and subsurface waters for the permit area (hydraulic conductivities of sediments and rocks, pump tests, hydraulic heads). The 2006 Norris report states that [1] the intermittent streams enter the permit area and lose their water to the sediments until they entirely vanish, and then, [2] further southward in the "Banner basin," intermittent streams begin flowing in mid-basin and convey water southward, particularly toward Morgan Ditch. The description in the 2006 Norris report is a mis-characterization of interchange system at the proposed mine site. As indicated during his testimony (TR.226), Mr. Norris never entered onto the permit site; therefore, testimony by Mr. Norris was based primarily upon his interpretation of maps available for the area. The Department notes that based upon its numerous on-site inspections of the proposed mine site and adjacent areas, such intermittent streams do not begin flowing again "mid-basin," as opined by Mr. Norris. The stream identified by Mr. Norris (TR. 2818) is in fact a dredged agriculture ditch that helps convey drainage from the existing farm fields in the central portion of the proposed mine site to the south toward Morgan Ditch. The dredged ditch is deep enough to intercept groundwater flows that would not have resurfaced

> naturally but for the dredging of this agricultural ditch or the excavation of Morgan Ditch. Therefore, the Department has ample reason to state that the Attorney General's allegations of "unique" groundwater characteristics of the proposed mine site are not , supported by fact or testimony... (**See**, Department's Brief, pp.39-40)

Although the Attorney General argues that even though "Mr. Norris did not enter the site itself, he made observations of both Baker Hollow Creek and the Morgan Ditch as well as other adjacent areas," and "he also utilized in his investigation the same Company map that Mr. Arnett relied upon during his testimony." (**See**, Attorney General's Reply Brief, p.107) As to the issues of whether the intermittent streams do or do not begin flowing again "mid-basin" at the site (so as to make the site particularly "unique"), I credit the Department's witnesses who performed on-site inspections as opposed to Mr. Norris, who relied upon maps or other information, instead of visiting the site.

The Attorney General also quotes from the Norris Report that states "[a]s a result of the data deficiencies in the permit application, although it is known there is surface water storage at times within the wetland areas, there is no measure of the quantity and no way to track the seasonal variation of this component of the hydrologic balance." (**See**, Attorney General's Brief, p.50, citing AG Exhibit 2 at page 11) The Department responds by noting that "surface water storage at the proposed mine site is a minor component to the pre-mining hydrologic system, and that the mining application plans adequately characterized this portion of the system." (**See**, Department's Brief, p.40) Neither the Attorney General nor the Petitioners presented sufficient evidence to overcome this characterization ("minor component") by the Department.

The Attorney General's Brief also asserts that the Norris Report supports the contention that there is insufficient groundwater quantity characterization in the permit application. The

Department notes that "significant amount [sic] of additional groundwater quantity characterization information was supplied in the Capital's Modification Responses which adequately defined the groundwater quantity for the proposed mine area." (**See**, Department's Brief, p.40)

> Additional groundwater head measurements, hydraulic conductivity estimates along with actual nearby pump test results were included to define the quantity of groundwater flow within and near the proposed mine site. With regard to Modification No. 14, the Rice Lake Land Report at page V-12 estimates that the amount of groundwater usage and demand in the area to be less than 10,000 gallons per day.....Capital provided adequate information for the Department to determine that the proposed mine was designed to prevent material damage to the hydrologic balance outside the permit area. (**See**, Department's Brief, p.40)

The Company likewise points to the information it provided to the Department within the Modification responses, stating that the below-described site-specific analytical data and baseline hydrologic information that was collected, assembled and submitted by Capital to the Department during the permit application process was as follows:

(A) the results of ground water sampling conducted from February 2002 through March 2004 to establish seasonal groundwater quality in the permit area. *May 17, 2004 Application, Att. III(1)(B)(2).*

(B) the results of surface water sampling conducted from October 2001 through October 2002 to establish seasonal surface water quality upstream, within, and downstream of the permit area. *May 17, 2004 Application, Att.III(2)(C).*

(C) A Pointiometric Surface Map, indicating that the groundwater flow directoin in the permit area is from the northwest to the southeast. *2005 Modification, #30.*

(D) Well logs and available groundwater information for private wells located within ½ mile of the permit area. *May 17, 2004 Application, Att. III(2)(B)(1); 2005 Modification, #4a.*

(E) Identification of all watersheds reporting to the permit area. *May 17, 2004 Application, Part 3, Watersheds and Wells Within ½ Mile Map, and 10-Mile Radius Map; 2005 Modification, #21.*

(F) Identification of all surface water bodies located within and adjacent to the permit area. *May 17, 2004 Application, Part 3, Watersheds and Wells Within ½ Mile Map, and 10-Mile Radius Map; 2005 Modification, #21, #28, and #29.* (**See**, Company's Brief, pp.30,31)

The Company also indicated the manner in which Capital collected background information regarding surface water flows, citing the testimony of Greg Arnett:

> [a]s part of the process when you're collecting background information, the applicant is required to identify areas where water is flowing onto the permit area. SW-3 is one of those points. There was actually SW-3 which is in the center, if we see it on Exhibit #45, it's basically in the center of the drawing, it has a number 3 and there's a blue dot by t.
>
> There was also SW-4 which is located somewhere near the section line at the center of section 15, just to the west of that. That's where Baker Hollow came in.
>
> And then we went down to SW-5 which is located several hundred feet south and west of SW-4. And then there's also SW-6 which occurs at the southwest corner of the permit area. Those were areas that we monitored, collected background information on, to suffice the requirements for the department's hydrologic assessment. (**See**, Company's Brief, p.31, citing Tr. at 2494-5.

The Company also cited its actions in collecting water quality data from the same identified water monitoring points so as to establish background surface water quality:

Q. [Zeman, Capital's attorney]

And why do you sample water quality before the mine operation commences?

A. [Greg Arnett]

We need to find out what the background data is of what water's coming onto the permit, what the quality is and also the quantity.

Q. And what does the development of background information on water quality and water quantity help you determine?

A. It's my understanding that it's a baselne by which the performance of the mine is measured in the post-mining phases.

* * * *

Q. And how many sampling points do you have in that area?

A. There are four points that go along Route 24 for surface water monitoring. They're shown as numbers 3, 4, 5 and 6. And then over in the — to the eastern edge of it there's another blue dot, and it's shown as number 2, it is just north and west of the east sediment pond, and there's also a location number 7 which is right at the property boundary between the Department of Natural Resources, the conservation, Rice Lake Conservation Area, and the 5 area that we have leased from Central.

Q. How many samples do you collect to determine background?

A. The department requires, they'd like us to have six samples so that we can characterize the water that comes onto the property.

Q. And it the department the only one that utilizes that information?

A. We send that information to Mines and Minerals and to IEPA. (**See**, Company's Brief, pp. 31-32, citing TR.251 6-17)

The Company also cites the following Arnett testimony:

A. Prior to 2007 there were eight wells on the site. Three of them, four of them went to the coal, four of them were in the consolidated material.

Q. Okay. Could you go to the exhibit behind you and point out where te eight monitor wells were on the permit area?

A. Well, going in order, the monitoring well 1 was established basically in the southwest corner.

Q. Is it marked with a dot?

A. There's a green dot that actually the — there's two wells in that location. It's a nested monitoring system where we have one well that extends to the coal, one well goes into the unconsolidated only, so it's actually a nested system.

Q. Monitoring well 1 is the furthest one west. A few feet, maybe 20 feet over to the east, that's where monitoring well number 7 is, and it checks the unconsolidated. It would come along the southern edge of the permit line and its showing — there's another green dot shown near the center of the drawing right next to where it says final cut one, that is monitoring well 8.

Monitoring well 8 goes to the coal but it also monitors the unconsolidated material in that location because there was no shale units or anything at that particular location.

As we come around we come to monitoring well 3 which is over close to the Banner Dike Road near the center of section 14. That well extended to the coal.

We go north up close to where the sewage treatment facility is and we have monitoring wells 2 and 4. Monitoring well 2 goes to the shale. Monitoring well 4 extends to the coal.

And then over in the northeast area of the permit area we have monitoring well 5 which looks at the unconsolidated material there.

* * * *

Q. Tell us again why they go to different layers under the ground.

A. Well, the — to assess the impact of the hydrologic balance, for the department to be able to do that we needed to be able to show what the water quality was ni the two water seams that are on-site. We have a seam, a vein of water, a water table that is in the unconsolidated material, and we have a water — a confined aquifer which is above the coal, and that's why we've extended to the coal.

Q. And believe you said you tested for water quality and water quantity?

A. Yes, out quantity was more or a measurement down to the surface of the water so that we could see what kinds of changes were occurring over the timeframe that we were monitoring.

Q. After the 2007 [sic], how many groundwater monitor wells have been installed?

A. All eight wells have been in place for the duration. And as a result of a correspondence from the Environmental Protection Agency, they requested two additional wells, and those wells have been installed and I'm in the process of monitoring them now. (**See**, Company's Brief, p.34, citing Tr. At 2530-2532)

The Company also asserts that:

> [p]rior to the submittal of the Permit Application, the permit area was the subject of a detailed investigation and evaluation of the proposed mining of the permit area and adjacent areas, designated as the "Rice Lake Conservation Area," ("RLCA") by the Illinois Department of Energy and Natural Resources ("IENR"). *Illinois Land Report: Rice Lake Conservation Area* (Aug. 29, 1983) ("Land Report"). The two-volume Land Report was prepared, pursuant to statutory requirements, following receipt by the Department of Mines and Minerals of a petition to declare the RLCA unsuitable for mining. The permit area is included within the RLCA. *Land Report, Figure 1-2* [footnote omitted]; *Capital Exhibit 15*. The Land Report documented the results of a comprehensive study and assessment of the RLCA, and surrounding area, including, but not limited to, the geology, groundwater hydrology, surface water system, soil properties and land capabilities, and biological resources associated with the RLCA. *Land Report, Chapter V*. The Land Report also evaluated the impact of mining on the RLCA,

including the impacts on geological, groundwater, and surface water resources in and around the RLCA. *Land Report, Chapter XI.*

The Land Report explained that the water level in Rice Lake is managed by the Department of Conservation (now Illinois Department of Natural Resources ("IDNR")). *Land Report*, at V-18 — V-19 In order to manage water levels in Rice Lake, IDNR must necessarily have a complete understanding of the sources of water to Rice Lake; the Land Report explains that the Illinois River is the primary source of water to Rice Lake through flooding in the Spring. *Land Report*, V-18 — V-19, V-38 — V-39. According to the Land Report, a small amount of water s provided to Rice Lake by surface runoff from the bluff area on the west side of Rice Lake. *Land Report* at V-27, V-39.

Because there has been no significant change in the use of the RLCA since the preparation of the Land Report, the Land Report serves as an invaluable source of information concerning the geologic and hydrologic characteristics of Rice Lake as the receiving body for surface water and groundwater from the permit area. Contrary to the Attorney General's contention, the Land Report provides a comprehensive and detailed picture of the groundwater and surface water systems discharging into Rice Lake from the permit area.

* * * * * * *

In response to the Department's 2004 Modification Request, Capital supplemented the Permit Application with detailed and site-specific geologic and hydrologic information from the Land Report. *2005 Modification, #14, 27 and 29.* Capital's 2005 Modification also explained how data from the Land Report applied to and defined the baseline conditions in the permit area and cumulative impact area. *Id.* The Attorney General contends that Capital's use of data from the Land Report did not comply with applicable regulatory requirements. *AG's Brief*, at 54. However, there is no explanation as to what regulation was violated by the use of the Land Report data in conjunction with the above-described baseline hydrologic information collected and submitted by Capital. (**See**, Capital's Brief, pp.30-35)

The Attorney General acknowledges that Mr. Arnett (and thus Capital) "placed a great deal of reliance on the 1983 Rice Lake Land Report instead of monitoring and generating actual data as to the quantity and quality of the surface water and groundwater within and adjacent to the permit area." (**See**, Attorney General's Brief, p.53) Indeed, the Attorney General acknowledges that such reliance "is not wholly wrong because Rice Lake is adjacent to the permit area and there is consensus that groundwater flows from the permit area and through Rice Lake toward the Illinois

River." (**See**, Attorney General's Brief, p.53) The Attorney General, however, asserts that in this instance, "the consequences of relying upon the 1983 Land Report, instead of [the Company] performing an appropriate hydrologic investigation of the permit area to develop a factual baseline, are that the Company fails to demonstrate compliance and the Department's cumulative impact assessment is flawed." (**See**, Attorney General's Brief, p.54)

However, I do not agree. Indeed, I believe that the Company has sufficiently demonstrated compliance with the regulations to have permitted the Department to perform its hydrologic impact assessment as to this Application. Therefore, I find that the Attorney General and the Petitioners have not provided sufficient evidence to demonstrate that Capital failed to tender to the Department the requisite data and information regarding the quality and quantity, as well as the impact at the site, of groundwater and surface waters for the permit and adjacent area, as required by Section 1780.21.

The Department also noted that:

> Capital provided groundwater quality data from a minimum of six separate sampling events obtained from the seven groundwater monitoring wells located on the boundaries of the proposed mine area. These wells are completed or finished in both the unconsolidated sediments and the coal formation at the proposed mine site. The Department found that this data adequately determined the quality of the groundwater at the proposed mine site and of the water quality that flows toward Rice Lake. Further, the Department notes that the Rice Lake Land Report at page V-6 describes "the bluff is the primary source of the groundwater flowing into Rice Lake." The Land Report goes on to describe tests and calculations for the water quantity flow that moves through the groundwater system to Rice Lake. The Department determined that this information adequately characterized the groundwater flow of the area.

Mr. Norris Report, however, also contends that groundwater and surface water quality will be affected by the proposed mining, in light of the mining causing "mobilization of 'trace

elements.'" (**See**, Company's Brief, p.36, citing *AG Exhibit 2* at 19-22. As state within the Company's Brief:

> ....the Eagle Foundation [within its Brief] cites the testimony of Dr. Norris in support of its concerns regarding "heavy and toxic metals." *Eagle Nature Foundation ("ENF") Brief,* at 12. However, one important feature of the proposed Banner mining operation that will reduce the potential for hydrological impacts is that no coal processing, other than size redaction, will take place on the Banner property and coal waste will be generated. Tr. at 2637-8, 2642-3; *2004 Application* at IV-12 — IV-14 As William O'Leary testified:
>
> > Generally heavy metals are not an issue unless acid mine drainage is an issue...I think for all the reasons we just talked about that acid mine drainage is not going to be a problem, and hence heavy metals is not going to be a problem. Tr. at 1461.

Neither the Petitioners nor the Attorney General provided sufficient evidence to prove that "groundwater and surface water quality will be affected by the proposed mining, in light of the 'mobilization of trace elements.'" Indeed, the fact that no coal processing will occur at the site significantly reduces the potentiality that such "mobilization of trace elements" will occur. If, in fact, coal processing was to take place at the site, such "mobilization" may have been an impediment to approval of this application, but in light of the testimony that such mobilization is not likely to occur where the coal processing is done off site, I do not find that the Department's approval of the Application in this regard is in error.

The Attorney General also alleges that "[w]hat little information the Company provided [to the Department] was completely insufficient as to groundwater flows in and out of the proposed mine site." (**See**, Attorney General's Brief, p.51) Without such "flow characterization," according to the Attorney General, "there can be no reliable baseline for the existing hydrologic

balance." (**See**, Attorney General's Brief, p.51) Yet the Department notes that:

> Capital provided valid engineering estimates of the flows into the mine excavation pit based on several groups of data, as verified by the Department engineer review process. The Department notes that from the Rice Lake Land Report, an actual pump test was performed by the Illinois State Water Survey just south of the proposed mine area to define water flow through soils. Capital provided its estimates of water flows into that mine excavation pit[s] based on published hydrologic conductivity values of the anticipated soil units within the proposed mine area. Also, the groundwater flow into a mine pit can be estimated from the actual mining operations that occurred immediately to the east at Banner Marsh. (**See**, Department's Brief, p.41)

Thus, I find that the information provided by the Company to the Department concerning groundwater flows in and out of the proposed mine site sufficient for purposes of complying with the applicable regulations.

The Attorney General also contends that:

> ...the technological feasibility of strip mining at the Banner Mine site is....questionable. Without empirical data, the Company's estimates as to the amount of groundwater that must be removed (*i.e.*, "pit pumpage") to allow the extraction of coal so far below the water table may be doubted. One might say that this merely an engineering problem for the Company, which might affect the profit margin or productivity of the mine. This attitude would ignore the fact that the groundwater within and adjacent to the area proposed for mining serves as aquifers upon which all of the neighboring residents rely for water. The issue becomes one of public health and welfare, and not just a matter of practicality. The water pumped from the strip mining pit [] must be collected, stored, treated, and discharged. *Groundwater which formerly flowed through*[11] *Rice Lake will potentially become contaminated and then discharged indirectly into Rice Lake, affecting the water quality and other environmental resources, including fish and wildlife.* (**See**, Attorney General's Brief, pp.51-52) (Emphasis added)

The assumption that the water will become "contaminated" and, then indirectly discharged into Rice Lake is purely speculation. Indeed, the Department noted the same concern about the

---

[11] [footnote in Attorney General's Brief, p.52] The 1983 Rice Lake Land Report at page 47 describes Rice Lake as a "flow-through lake."

above-quote (a quote taken from the Attorney General's Brief):

> [a]t page 52 of the Attorney General's brief, its states that "[g]roundwater which formerly flowed through Rice Lake will potentially become contaminated and then discharged indirectly into Rice Lake, affecting the water quality and other environmental resources."[12] However, the Department notes that in the previous sentence, the Brief states that the water pumped from the strip mining pit must be collected, stored, treated, and discharged. The Department notes that if the mine operator must collect, store, and treat water prior to discharging such water from the site, as required by means of an NPDES permit issued by the Illinois EPA, there will not be contaminated water reaching Rice Lake. And, any such discharge excursions would be in violation of those permit terms and enforceable non-compliance events that would require remediation measures by both the Department and the Illinois EPA. (**See**, Department's Brief, p.41)

The Attorney General asserts that "[t]he residents [around the permit area] deserve more respect and protection than DNR's commitment to ensure an alternative water supply be provided when and if adverse impacts occur." (**See**, Attorney General's Brief, p.61) Similarly, Sierra alleges that Permit Application #355 "holds little regard for the actual impact of the Banner Mine" concerning private water wells and the municipal sewage treatment plant, located to the north of the proposed mine site. (**See**, Sierra 5)

In response the Department notes that if any impacts occur to the resident's water supply, such impact would be temporal during mining operations and until recharge of the groundwater system is adequate to resupply any impacted wells. The Department also notes that alternative water supply is required pursuant to 62 Ill.Adm. Code 1780.21(e):

> If the determination of probable hydrologic consequences required in subsection (f) indicates that the proposed mining operation may proximately result in the contamination,

---

[12] Note that the Department omits the Attorney General's footnote, and then does not quote the entire sentence, leaving out "*including fish and wildlife.*" Why the Department would not quote the entire sentence is perplexing, especially when the Department does not indicate that it is only quoting a portion of the sentence.

> diminution, or interruption of an underground or surface water source of water within the proposed permit or adjacent areas which is used for domestic, agricultural, industrial, or other legitimate purposes, then the application shall contain information on water availability and alternative water sources, including the suitability of the alternative water source for existing premining uses and approved post-mining land uses.

The Department then affirmatively states that "although Capital is not required by the State Act to prevent impacts to residents' water supplies, Capital must provide an alternative supply if impacts to surface mining activities should occur." (**See**, Department's Brief, p.44)[13]

The Attorney General excoriates the Department for this argument, initially citing Section 3.10(a) of the State Act ("Disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems shall be *minimized* both during and after surface mining operations and during reclamation."), and thereafter asserting that such statutory language "certainly" mandates "*prevention of water supply impacts.*" (**See**, Attorney General's Reply Brief, p.114) (Emphasis added) I simply don't agree. If, indeed, the Legislature intended to convey that which the Attorney General asserts, the Legislature would have specifically indicated that "[d]isturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems shall be a violation of the Act whether such occurs during or after surface mining operations or during reclamation." The Legislature did not enact an absolute injunction against adverse impacts to the hydrologic balance

---

[13] The Department also notes that "several groundwater monitoring wells, as described during testimony by Mr. Greg Arnett (TR.2533-2534, 2799, 2806-2807), were specifically located along the northern boundary of the proposed mine site as an early 'warning' mechanism to determine if mining operations in the vicinity of private residential wells would impact the water quality or quantity of these private wells." (**See**, Department's Brief, p.44)

at the mine site, but rather enacted a statute that mandates minimization of the potential of those adverse impacts occurring. Thus, the Department's assertion that "Capital is not required by the State to *prevent* impacts to residents' water supplies" is an extremely unfortunately manner in which to convey the statute's imperative. If, by the word "prevent," the Department is attempting to state that Capital does not have the obligation to *minimize* the potentiality of adverse effects to the hydrologic balance, the Department is wrong.[14] If, by the use of the word "prevent," the Department is attempting to convey that Capital is not obligated to *guarantee* that no adverse impact to the hydrologic balance will occur, the Department is correct. The real question is whether sufficient action has been taken to minimize the potential adverse effects mining will have on the hydrologic balance, and, if there is a foreseeable possibility that despite such actions, impacts will still occur, whether alternative sources of water have been located so as to assure that residents have sufficient sources of potable water. Appendix C of the Application provides, in part, that:

> Groundwater quantity within and adjacent to the permit area may be temporarily reduced as a result of this operation. Supplies from the coal seam and unconsolidated overburden may be disrupted, particularly if within 1000 feet of the active pit. No adverse impacts are anticipated to the deeper bedrock aquifers because they are hydraulically separated from the coal by at least 100 feet of low permeability rock layers.
>
> Impacts to groundwater quality are expected in the form of increases in dissolved solids and sulfate. Also, there may be changes in the concentration of iron and alkalinity, along

---

[14] Predictably, the Attorney General "jumps" on the notion, stating that "[p]erhaps the Department takes the position that "an *exhaustive academic exercise* to characterize all parts of the hydrologic balance" is simply unnecessary because in the event any wells are dewatered or contaminated, the mining company will have to provide an alternative water supply to the residents. However, if a well goes dry or becomes unfit for potable use, perhaps the mining company will take the position that it does not have to replace a particular water supply because proximate cause cannot be demonstrated." (**See**, Attorney General's Brief, p.115)

> with potential increases in trace concentrations. These increases should not be so great to interfere with adjacent water use as the general flow of groundwater is to the southeast, away from the majority of domestic water wells. However, the applicant's monitoring program, which monitors the groundwater during the mining, reclamation and until final bond release, is designed to detect any adverse impacts in sufficient time to take mitigating action.

Although Mr. Norris disagrees with this assessment, I find that the Department's requirement of monitoring — and the groundwater monitoring network was specifically designed to identify changes in groundwater quantity and quantity before private wells are impacted, in light of the monitoring placement along the northern boundary of the proposed mine site — is sufficient to comport with the requirements of the Act.

The Attorney General cites that testimony of Lowell Grieves, an adjacent landowner southwest of the proposed mine site, when Grieves testified that, "when deep holes are dug, water levels change. I've seem that on my property. And I would want someone to guarantee to me if this went through [*i.e.*, the Application is approved] that the uses on my property would not be impacted, and it would seem to me to be very hard to make that guarantee." (**See**, Attorney General's Brief, p.62, citing Tr.945) The Attorney General also affirmatively states that Mr. Grieves "wetlands are in jeopardy." (**See**, Attorney General's Brief, p.62)

First of all, if Mr. Grieves desires to have "guarantees," he should go to the Legislature and have that body incorporate such in the Act, inasmuch as such guarantees are not mandated in the Act. Secondly, the fact that Mr. Grieves has dug holes in the past, and when those holes were deep, the water levels changed, is not probative of the issues here, without more information. And no further information was forthcoming. The Department also notes that Mr. Grieves did not provide any prior comments during the public comment period (Tr.947-948), and except for

these anecdotal statements, he did not provide any factual information in support of his concerns.

The Attorney General alleges that the diversion of Baker Hollow will interrupt the subsurface water flow to Grieves' wetland (evidently accounting for the pronouncement that said wetlands are "in jeopardy"). As urged by the Department, the diversion of Baker Hollow will be toward the south of the proposed mine site and will actually direct water flows closer toward the Grieves' wetland areas. (**See**, Department's Brief, p.45) Also, again pointed out by the Department, a drainage way exists between the proposed mine site and Grieves' wetland area, a "way" that will act as a physical hydrologic divide on the shallow subsurface waters that support the Grieves' wetlands. (**See**, Department's Brief, p.45) Thus, I believe that the Department has adequately addressed Mr. Grieves' concerns, despite such concerns having been expressed in very broad, generic terms.

The Attorney General also asserts that "the surface water control and diversion system [proposed by the Company and approved by the Department] is likely to be overwhelmed by the imprecisely quantified flows from the north diversion ditch and the pumpage of infiltrated groundwater from the pit." (**See**, Attorney General's Brief, p.72) The Attorney General postulates that "[i]f there is insufficient detention time in the sediment ponds, the sediment and other contaminants within the impounded water are likely to be discharged at higher than projected levels." (**See**, Attorney General's Brief, p.73) I do not believe the Petitioners or the Attorney General has provided sufficient evidence to establish that the "surface water control and diversion system" is likely to be overwhelmed.

Section 1816.43 provides that, with the Department's approval, "any flow from undisturbed areas or reclaimed areas, after meeting the criteria of Section 1816.46 for siltation

structure removal, may be diverted from disturbed areas by means of temporary or permanent diversions." (62 Ill.Adm. Code 1816.43(a)) Dan Barkley, Greg Arnett, and Charles Norris attested to the importance of surface water management and diversion operations. (**See**, Tr.2847, 2161-2, 249)

Section 1816.43 provides that the diversion system proposed for the Banner mine site must be designed to: (1) be stable; (2) provide protection against flooding and resultant damage to life and liberty; and (3) prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to stream flow outside the permit area. (**See**, 62 Ill.Adm.Code 1816.43(a)(2))

As indicated by the Company within its Brief, Section 1816.43 of the regulations incorporates specific design requirements relating to construction and design capacity, including the requirement for the diversion to handle the runoff associated with specified storm events. (**See**, Company's Brief, p.38, citing 62 Ill.Adm.Code 1816.43(b) and ©))

The diversion system proposed in the November 2007 Filing and ultimately approved by the Department consists of the following features:

> [d]uring the normal mining operations, off-site drainage will be diverted around the proposed mining site. The offsite drainage originating from the west will be diverted by a ditch down the west side of the permit and around the southern border of the permit and eventually discharged to Rice Lake. Rice Lake is where the water currently reports to without the presence of the proposed mine. The off-site drainage from the north will be diverted by ditches and ponds along the northern boundary of the permit and down the east side of the permit area to the east sediment pond. The east sediment pond discharge will flow toward Rice Lake. Rice Lake is where the water currently reports to without the presence of the proposed mine. During times when flood waters of the Illinois River block the gravity flow discharge structure of the east sediment pond, the diverted water from the north may be pumped via a sump in the northeast corner of the permit across Banner Dike Road to Copperas Creek. (**See** . *Findings*, Appendix C)

As the Company notes within its Brief:

> [t]he November 2007 Filing incorporates two other surface water control features — the construction of a levee along the southern boundary of the permit area to prevent the encroachment of the Illinois River into the permit area, and the elevation of certain areas of Banner Dike Road, which runs along the east boundary of the permit area, to prevent the encroachment of Copperas Creek into the permit area. Tr. at 2505-6 and 2508-9.
>
> The final design of the diversion system is yet another example of the iterative process between the permittee and Department. The Department sought additional information concerning the proposed diversion system in the 2004 Modification Request (#22, 26 and 44-49) and 2007 Modification Request (#4), and Capital responded to the same. The Department also required Capital to make significant modifications to the design of the diversion system during the permit approval process. For instance, Capital's original design for the diversion system proposed using a sump area on the northeast side of the permit area to capture surface water flowing toward the permit area and pumpt it over the Banner Dike Road. Tr. at 2507. However, the Department required Capital to redesign and enlarge of the capacity [sic] of the diversion system and the sediment control structure to reflect the contingency that the sump may not be operational. Tr. at 2150-2151, 2284-5. Another significant modification resulted in Capitals commitment to raise the elevation of any low spots in Banner Dike Road to ensure that it is not overtopped during flood events. *2004 Modification Request #48; 2005 Modification #48;* Tr. at 2403-4, 2509, 2624. Capital also conservatively raised the design of the proposed levee by one foot above what is known to be the highest flood elevation level in order to ensure that the Illinois River will not infiltrate the permit area. Tr. at 2196, 2624. [footnote omitted]
>
> According to the Department's engineer, Capital's design of the diversion system utilized conservative assumptions that exceeded the regulatory requirements, therefore, the ditches and both sediment ponds are designed to exceed storm-events scenarios specified in Section 1816.43. Tr. at 2225-2226,2229-2230, 2198-99.
>
> Capital's proposed design of the diversion system was based on results provided by the HEC-1 model, which utilizes site-specific soil and topographic information to calculate flows within the diversion system. Tr. at 2491-2493. The Department reviewed the design of the diversion system utilizing a different model, the SEDCAD model, which confirmed the results of the modeling performed by Capital and demonstrated that the proposed design met all applicable regulatory performance standards. Tr. at 2145-6. Regarding the Attorney General's contention that Capital should have used site-specific precipitation information as an input to the HEC-1 and SEDCAD models, rather than the rainfall data presented in circulars published by the Illinois State Water Survey ("ISWS"), the Department's engineer testified that the best data available is provided by the ISWS circulars:

> [t]he single point data collection point as opposed to point source data had been determined to not be as reliable or accurate as the compilation of data that has been done in these reports that were assembled by authors within the Illinois State Water Survey and geologic surveys...Tr. At 2136-2139, 2190, 2222-2223, 23335-6- *See also* TR. at 221-2 (Norris testimony that ISWS is very well respected and ISWS data sets are well maintained).

The Attorney General, however, asserts that "the surface water control and diversion system [proposed by Company and approved by the Department (after modifications)] is likely to be overwhelmed by the imprecisely quantified flows from the north diversion ditch and the pumpage of infiltrated groundwater from the pit." (**See**, Attorney General's Brief, p.72) The Attorney General urges that "[i]f there is insufficient detention time in the sediment ponds, the sediment and other contaminants within the impounded water are likely to be discharged at higher than projected levels." (**See**, Attorney General's Brief, pp.72,73)

I don't believe there is sufficient evidence to demonstrate that said surface water control and diversion system is likely to be overwhelmed, nor do I believe that the Attorney General has demonstrated that the proposed system fails to meet the requirements of the Departments' regulations. Indeed, the Department, in response to the Attorney General's assertions, states that:

> [t]he Department notes that 62 Ill.Adm.Code 1816.46(c) requires the Applicant or Capital to design sedimentation ponds in order to contain or treat for a 10 year 24 hour precipitation event. The Department has reviewed the proposed sediment pond design for runoff from the required storm event and determined that Capital's design information concerning sediment storage and detention time was acceptable based on these regulatory requirements. For the[se] reasons [], Mr. Norris' assertions that [1] Permit Application #355 relied upon inappropriate rainfall data, or [2] insufficient estimates were made of groundwater infiltrating from surface pit and then pumped to the ponds are not based upon standard modeling resources, such [as] the ISWS reports, or the review methodologies, such a running dual modeling systems herein to cross-check calculations (*i.e.*, HEC-1 and SEDCAD models).

The Department further asserts that:

> ....Mr. Norris' concerns about direct ground water infiltration into these sediment ponds is unfounded and speculative. All sediments [sic] ponds have the potential for shallow ground water to seep into or out of the structure depending on the 'head' pressure present in the pond relative to the surrounding soils. The proposed design plans for these ponds were assessed assuming the pond water level to be at "normal pool" (*i.e.*, full to the inlet elevation of the primary discharge structure) at the onset of the designed storm event. Infiltration of groundwater therefore would have an insignificant effect on the storm volume. (**See**, Department's Brief, p.53)

I agree with the Department and the Company that the assertion that "seepage" or unidentified "infiltrating" flows should have been gauged by the Company as a component of its design of this surface water control and diversion system is unfounded. I find that Capital has fully complied with the regulatory requirements as to the design of its surface water control and diversion system at the Banner Mine site.[15]

The Attorney General also asserts that:

---

[15] The Department also notes within its Brief that:

> ....a joint review of all mining permit applications [is conducted] with [the Illinois Environmental Protection Agency]. The Department notes that IEPA comments were adequately addressed in the Permit Application #355, as modified and approved. If during the review of an NPDES permit application, the IEPA subsequently determines that pond volumes are inadequate to meet IEPA regulatory standards, the IEPA may authorize and require necessary technical revisions of the NPDES surface water containment and discharge system, such as sediment ponds, prior to IEPA [issuing a] decision for approval, or alternatively to deny the NPDES permit application. Any changes in final size and configuration of the ponds mandated by the IEPA would necessitate similar revisions to engineering plans approved by the Department and/or IEPA. Regardless of the final size and configuration of any approved sediment ponds, the Department monitors all permitted mine facilities for discharge compliance throughout the life of its operations. If violations of any discharge standard should occur, the Department, as well as the IEPA, could require modification of the permitted drainage control system to abate any conditions attributing to excursions of water quality discharge standards. (**See**, Department's Brief, pp. 53-54)

[t]he Department in November 2007 failed to specifically authorize mining within Baker Hollow Creek by finding, in accordance with 62 Ill.Adm.Code 1816.57(a), that any temporary or permanent stream channel diversion will comply with Section 1816.43. The Department in November 2007 also failed to make any finding that surface mining activities will not cause or contribute to a violation of Section 1816.42 and will not adversely affect the water quantity and quality or other environmental resources of the stream. (**See**, Attorney General's Brief, p.73)

The Department responds by stating:

[t]he applicable stream buffer zone requirements are provided for in the performance standards for surface mining activities, 62 Ill.Adm.Code 1816.57, as mandated by the State Act, specifically 225 ILCS 720/3.01 and 3.10. In general, these regulations prohibit surface mining disturbances of land within 100 feet from the "top of the bank of the normal channel of a perennial stream or an intermittent stream," unless the Department specifically authorized such mining activities close to or through such a stream upon finding that: [1] [a] the original stream channel and its associated riparian vegetation will be restored and [1] [b] mining activities will not cause violations of water quality standards and effluent limitations per 62 Ill.Adm.Code 1816.42 provisions, and will not adversely affect water quantity and quality or other environmental resources of the stream; and [2] any temporary or permanent stream channel diversion will comply with stream diversion requirement per 62 Ill.Adm.Code 1816.43.

The Attorney General alleges in its Brief (AG 73078) that the Department failed to authorize mining within Baker Hollow Creek by finding in accordance with 62 Ill.Adm.Code 1816.57(a) and 1816.43. The Attorney General refers to the deficiencies of 2004 Permit Application #355 which "inaccurately represented that there was no intermittent stream within the permit area." The Department again notes that the 2004 Permit Application was accepted as being "administratively complete" for purposes of technical review and comment. Based upon its review, public comments, and intergovernmental comments, the Department issued the November 9, 2004 Modification request letter, and specifically Modifications Nos. 21 and 22, the Department requested Capital to re-evaluate and revise Part V(6) of Permit Application #355, accordingly, with regard to "the existence of a significant stream channel with riparian vegetation which extends for over 1000 feet" within the proposed mine site. The Attorney General admonishes the Department for "not mention[ing] [] the stream buffer rule and the exception requirements." In response, the Department notes that it is the permit applicant Capital, *not the Department*, who bears the burden to insure the accuracy of the data and contents provided in a permit application per 62 Ill. Adm.Code 1773.15(a)(2). In its Modification Response Nos. 21 and 22, Capital, in fact, identifies Baker Hollow Creek as extending approximately 4,000 feet onto the proposed mine area, and provides extensive

information including, but not limited to, description of the water table at the upstream portion of the creek on the proposed mine area, and the revised pre-mining land use map, as referred to in the Attorney General's brief.

* * * * * *

The Department [] notes that the general identification of Baker Hollow by IDNR witness Mr. Bill O'Leary as an "important stream" or as a "habitat of unusually high value" were terms for regulatory criteria which triggered the need for protection and enhancement plans or "PE" plans pursuant to 62 Ill.Adm.Code 1861.57.

The Attorney General alleges that the Department failed to include a *written finding* or *verbatim statement* in its "Results of Review to Approve Permit Application #355," dated November 15, 2007, that the "original stream channel and its associated riparian vegetation will be restored and that any temporary or permanent stream channel diversion" would comply with the requirements of 62 Ill.Adm. Code 1816.43. The Department notes that the Attorney General's suggested inclusion for such *written findings* in Appendix D – "Decision on Proposed Post-Mining Land Use/Capability of Permit Area" of the "Results or Review" document is incorrect, because Appendix D does not address this particular hydrologic balance performance standard topic (*i.e.*, stream buffer zone). The Department further notes that the provisions of 62 Ill.Adm. Code 1773.15(c) describe the requirements for written findings for permit application approval.

In response to the above, the Department states that its "findings" regarding the approval of the stream diversion system for offsite surface water flows from Baker Hollow Creek toward the proposed mine site was, in fact, the Department's authorization for conducting of surface mining activities close to or through such a streams [sic] pursuant to 62 Ill.Adm. Code 1816.57(a)(2). This determination was based upon its technical review and engineering determination that the proposed design and operations for stream diversion will comply with said diversion requirements of 62 Ill.Adm.Code 1816.43. Likewise, the Department's "findings" as to 62 Ill.Adm.Code 1816.42 requirements concerning no adverse affect on water quantity, water quality, or other environmental resources of said stream was, in fact, included with the scope of the Department's findings at Section III-A of the 2007 Results of Review document, specifically 1773.15(c)(1) and (c)(2). The Department determined that the permit application as modified was accurate and complete in compliance with the requirements of the federal and state statutory and regulatory requirements, such as the 1972 Federal Water Pollution Control Act, the Illinois Environmental Protection Act and such federal effluent limitation for coal mining operations, as may be authorized under NPDES permit terms for the proposed mine site.

> The Attorney General also alleges that Capital did not provide sufficient data to allow the Department to make such a finding or to "specifically authorize the disturbance and diversion of the Baker Hollow drainage area on the proposed mine site by a *written finding* pursuant to 62 Ill.Adm.Code 1816.57, specifically in reference to the requirements of 1816.42 and 1816.43. The Department notes that the Attorney General merely opined, with no further specificity, as to inaccuracy or incompleteness, concerning the deficiencies of the data provided by Capital for its Permit Application #355. (**See**, Department's Brief, pp.65-66)

The Company likewise responds to the Attorney General's arguments in a similar vein. In its Brief, the Company argues that:

> [t]he Attorney General contends that the Department failed to acknowledge the applicability of the stream buffer rule in Section 1816.57 to Baker Hollow Creek. *AG's Brief* at 78. However Section 1816.57 specifically states that the buffer zone prohibition on mining (the "stream buffer zone") applies "*unless* the Department specifically authorizes surface mining activities close to or through such a stream upon [the findings delineated above]. Therefore, the buffer zone requirements of Section 1816.57 do not apply if the Department authorizes mining activities near or through the stream and the applicant demonstrates compliance with applicable restoration and regulatory requirements.
>
> The Department's 2004 Modification Request #21 reflects the Department's understanding that Capital was seeking authorization to temporarily divert the intermittent stream in order to perform surface mining, and, contrary to the assertion of the Illinois Sierra Club (*Illinois Sierra Club Brief*, at 3-4), Capital provided detailed information and diagrams describing the proposed diversion and stream restoration in its 2005 Modification. *2004 Modification Request #21, 2005 Modification #21 and 22.* The Department's Findings specifically reference the Baker Hollow drainage and include the finding that the Baker Hollow drainage will be restored during reclamation. *Findings, Appendix C* at 1,3. The Attorney General and Petitioner have presented no evidence to rebut this finding. Therefore, Baker Hollow Creek as an "intermittent stream," and its approval of the temporary diversion of this Baker Hollow Creek, meet and complied with all regulatory requirements. (**See**, Company's Brief, pp.41,42)

I concur. The Department's authorization for conducting of surface mining activities close to or through such a stream pursuant to 62 Ill.Adm. Code 1816.57(a)(2) was sufficient to remove the issue from the "stream buffer zone" controversy. The Department's "findings" as to 62

Ill.Adm.Code 1816.42 requirements concerning no adverse affect on water quantity, water quality, or other environmental resources of said stream was, in fact, included with the scope of the Department's findings at Section III-A of the 2007 Results of Review document, specifically 1773.15(c)(1) and (c)(2). Therefore, as to the issues raised by the Petitioners concerning alleged failure to make the "required" findings concerning a "stream buffer zone," I find that the Department made sufficient rulings to comply with both Sections 1816.42 and 1816.43.

The Attorney General asserts as well that:

> [t]he record shows that the Company's preliminary statement that probable hydrologic consequences would be minimal was not throughly re-evaluated by the Department during the modification process. For instance, Item 17 of the first request for modification required "site specific hydraulic conductivity values for utilization in the water infiltration calculation....[and] a discussion on how these infiltration rates will impact the Rice Lake Fish and Wildlife Area and water wells completed in the unconsolidated strata near the permit boundary." In response, the Company provided information from the 1983 Rice Land Lake Report, claiming that "the proposed Banner Mine property was specifically included in much of the discussion and is applicable to the regional characteristics evaluated therein." Mr. Arnett's testimony failed to support these claims. There is a difference between the request for "site specific hydraulic conductivity values" and the response with "regional characteristics." (**See**, Attorney General's Brief, p.80)

The Department takes exception to this analysis. The Department asserts that "the Rice Lake Land Report Modification No. 14, also submitted by Capital, provided adequate hydraulic conductivity values for the area." (**See**, Department's Brief, p.45) The Department notes that "[t]hese hydraulic conductivity values were actual test values within one mile of the proposed mine site, therefore specific to the site, and supplemented the hydraulic conductivity values [previously provided by the Department] in Modification No. 27." (**See**, Department's Brief, p.45)

In response to the Attorney General's assertion that "Item 31 [of the Modification] required [Capital to provide] 'baseline hydrologic information [from Rice Lake] to determine if adverse impacts may result to the hydrologic balance," the Department asserts that "the quality of [that] water body would not be impacted by the mining operations and therefore is not defined as part of the "adjacent area" next to the proposed mine site." (**See**, Attorney General's Brief, p.80; *see also,* Department's Brief, p.45) The Department affirmatively states that the conclusion reached as to Rice Lake not being impacted:

> .....relieves Capital from providing a detailed characterization of the water body. The Department determined that Capital will provide adequate monitoring of both the surface and groundwater systems surrounding the proposed mine site in order to determine whether or not onsite operations will cause any unexpected impact to the surface or groundwater systems. (**See**, Department's Brief, p.45)

The Attorney General does state that "[m]any of the Attorney General's arguments focus on the lack of the required factual information on numerous issues and the joint responsibility of the Company and the Department for the resulting lack of objective support for numerous determinations," and then indicates that the people affected by the proposed mining "do not trust the Department or the Company because of their collective failure to ascertain the 'premining quantity and quality' of the aquifers currently being used." (**See**, Attorney General's Brief, pp.85,86) The Attorney General continues by stating that:

> [t]he people in Banner also understand how the law is implemented by the Office of Mines and Minerals. They have reason to believe that it might soon be their obligation to prove to the Department or the Company or both that the contamination, diminution, or interruption to their water supply is the proximate result of the Banner Mine.
>
> The Norris report supports their fears but this report did not receive due consideration from the Department during the sixteen months the permit denial was pending and technical review of Application No. 355 was in limbo:

> The impact of the mine on the dozens and dozens of wells throughout the town that the residents depend upon will be severe. The wells in the unconfined aquifer depend solely upon precipitation for recharge. Natural discharge from the unconsolidated aquifer under the town is to the north, east and south. The proposed mining would not likely impact aquifer discharges to the north and east, but it would impact discharges to the south. Mining would drop the heads in the unconsolidated aquifer as it drains into the mine pit and recharging spoils. That would increase the gradient to the south, which would increase the rate of flow to the south.
>
> An increased southward discharge from under the town of Banner will reduce the water available to the residential wells throughout town. There is no upgradient source of water that will increase in response to the increased gradients induced by mining. There is only the taking of water from the unconsolidated aquifer under the town. Wells that currently go dry in droughts will go dry in moderately dry years. Wells that currently go dry for a few days or weeks each year will go dry for longer periods. Wells that have never gone dry will go dry occasionally or, some, perhaps permanently. Wells that don't go dry may need [to] have pumps lowered or wells deepened to provide more storage. The water supply for Banner collectively is already delicate; the mining will make it worse.
>
> Mining would impact all citizens who rely on the unconsolidated aquifers for their water supply; it is the inevitable result of the act of mining and of the unique hydrologic conditions of the mining site and of the town. Those whose water supply doesn't disappear completely will have an impaired and compromised supply. And the damage will be sequential, progressive and insidious; it may not be immediate apparent and not immediately its worst. Each year the mine will withdraw more water from under the town, dropping the water levels slightly below the previous year. Each year the wet-season recovery will be a little less. The declines will not quit once mining is completed, they will continue until the spoil recover to the elevations that presently occur, there will never be a full recovery. (Given what is discernable from the existing site data, it is unconscionable that there are no monitoring wells between the town and the mine or within the town in the aquifer system that is most used and most at risk.) (**See**, Attorney General's Brief, pp.86-87)

The Department takes exception to all of this, stating that "[t]he Attorney General again relies on the 2006 Norris Report to portray a hypothetical situation where the town's wells will be impacted and never recover." (**See**, Department's Brief, p.46) The Department states:

> [t]he 2006 Norris Report also claims there are no monitoring wells in the unconsolidated sediments between the town and the mine. As indicated above, the Department states that Capital has installed monitoring wells in the unconsolidated material between the twon and the mine to monitor groundwater impacts along the northern boundaries of the proposed mine area. These wells were installed as a result of the modification process. The background/baseline sampling plan includes the analysis of trace metals. The Company also provided data that shows that the impact to the town's residents' wells would be reduced based on the changes in character of the geologic units between the mine and the town. The Company showed in a geologic cross-section map of the north perimeter of the proposed mine area (TR.2794) that the water bearing sand strata lying beneath the town and the proposed mine site is not connected to the mine site, and is discontinuous. (TR. 2794, 2798, 2799, 2805-2807) This natural geologic feature in the underlying strata would serve to lessen or potential [sic] minimize water quality and/or quantity impacts on the town's residential wells. And as indicated above, Capital is responsible and required by law for replacing any water supply that would be impacted. (**See**, Department's Brief, pp.46,47)

I am simply unconvinced by the apocryphal predictions of Mr. Norris. He makes the predictions as to the dire consequences that will befall the residents' wells with a certainty that belies the evidence. Such outcomes are not an absolute certainty. Despite his expertise, Mr. Norris is not qualified to assert, without equivocation or uncertainty, that such results are "inevitable," or that "[t]hose whose water supply doesn't disappear completely will have an impaired and compromised supply." Frankly, it is the exaggerated, unconditional assertions of the consequences of the mining made by Norris that are most troublesome to me. I agree with the Department that sufficient hydrologic information was provided to satisfy the requirements of Parts 1780 and 1784.

However, I am not unmindful of the concerns of the residents. Although the Department asserts that monitoring wells have been installed "in the unconsolidated material between the town and the mine," as required by the Department's demands within its Modification Request, there is no reason that such issue cannot be examined by the Department to assure that adequate

monitoring is taking place. Mr. Norris states that, "[g]iven what is discernable from the existing site data, it is unconscionable that there are no monitoring wells between the town and the mine or within the town in the aquifer system that is most used and most at risk." I am remanding this application to the Department for it to determine whether this concern has been addressed. If, indeed, additional monitoring wells "between the town and the mine" (or within the town) will assist in assuring that the sanctity of the residents' source and quality of water is maintained, then so be it. I remand this matter for the Department to determine whether additional monitoring wells would better serve the purpose of warning when and if adverse impacts from mining may occur. If the Department determines that additional monitoring wells are appropriate for these purposes, then such shall be made a specific condition for issuance of the mining permit.

IV.

Unsuitability Proceeding

The Attorney General states that:

> [a]n unsuitability petition was filed on December 31, 2005 and designated by [the Department] as Petition LU-005. In January 2006, the Department provided the required governmental and public notifications. Section 1764.15(a)(1) of the rules requires, within 60 days of the filing of a designation petition, a determination whether the petition is complete under Section 1764.13(b). Instead of informing the petitioners that the petition is incomplete or untimely, and returning the petition, the Department at the close of the 60 day completeness review period requested supplemental information. Over the next year, the petitioners provided supplemental information, including the investigation of the "Surface and Subsurface Hydrology of Banner Basin," by a professional hydrologist. AG Exhibit 2. Then, two days before the hearing officer reversed the permit denial in Application No. 355 [*i.e.*, the instant application], the Department issued a final decision on April 25, 2007 rejecting LU-005 as untimely and incomplete. A complaint was timely filed in circuit court for judicial review of the decision and the improperly terminated administrative proceeding remains pending appeal.
>
> The Department relied upon Section 1764.15(a)(6) ("The Department shall not process any petition received insofar as it pertains to lands for which an administratively

complete permit application has been filed and the first newspaper notice has been published.") The Department changed its previously documented position that no application was pending after the December 6, 2005 permit denial. In its April 27, 2007 final decision on Petition LU-005, the Department claimed that Application No. 355 remained pending due to the timely filing by the Company for an administrative appeal of the permit denial.

Therefore, utilizing the same logic, the administrative proceeding initiated by DNR regarding LU-005 remains pending due to the timely filing by the petitioners for an appeal. Section 2.08(b)(4) of the Act prohibits the issuance of a permit where the area proposed to be mined is within an area under study for designation as suitable in an adminstrative proceeding commenced under Article VII of the Act. (**See**, Attorney General's Brief, p.89)

The logic of the Attorney General as to this issue is patently flawed. The *timing* of the particular filings dictate the legal effects to be given the documents. "Utilizing the same logic" does *not* mean that simply because the appeal filed with respect to the LU-005 was timely, necessarily means that an unsuitability petition is still "pending." The application was filed first, and though it was initially denied, the fact that it was appealed (according to the Department....and the "same logic") means that the application was still pending. Thus, when the unsuitability petition was filed, the Department ruled that the LU-005 petition was "untimely" because of the "pendency" of the permit application. But the fact that the petitioners then appealed *that* ruling does not mean that an unsuitability petition is still pending, inasmuch as the *effect* of the prior filing means that no unsuitability petition was ever "pending." That is, the effect of the pendency of the permit application precludes a simultaneous "pendency" of the unsuitability petition. It is not the fact that the appeal of the administrative decisions lengthened the "pendency" of the respective petitions; rather, it is the fact that the initial pendency (*i.e.*, the permit application) precludes the latter (*i.e.*, the unsuitability petition) from being initiated. That is, the pendency of the permit application (including its pendency on appeal to the Circuit Court) precluded the

unsuitability petition from being filed, and did so *ab initio*. The fact that the Department docketed the unsuitability petition does not alter such analysis. The regulations are clearly intended to preclude simultaneous petitions involving the same "permit area" processed within the context of an unsuitability petition and a permit application. The Attorney General is assuming that the initial filing of the unsuitability petition necessarily connotes that it was *ever* pending, despite the fact that the Department ruled (eventually) that unsuitability petition had to be dismissed due to the pendency of the permit application. My initial ruling as to the unsuitability petition stands. Section 2.08(b)(4) does not preclude the issuance of this mining permit.

V.

Agricultural Issues

The Attorney General "questions whether, as required by Section 1773.15(c)(8), at the time of the Department's final decision granting the permit, the Company had satisfied the applicable requirements of Part 1785." (**See**, Attorney General's Brief, p.90) The Attorney General asserts that:

> [t]he Department improperly found, pursuant to Section 1785.17(e)(5) that the aggregate total prime farmland acreage would not be decreased from that which existed prior to mining. (**See**, Attorney General's Brief, p.90)

It is difficult to follow just what the Attorney General is alluding to as to this objection. Concededly, the Company originally listed a total of 620.2 acres of prime farmland, but then indicates that "[o]f these 455.5 acres will be reclaimed in accordance with the standards of 62 Ill.Adm. Code 1823 or will remain unaffected while 164.7 acres have been granted a negative

determination." (**See**, Attorney General's Brief, pp.90, 91) Initially, the Attorney General asserts that:

> [t]he Company's May 2004 permit application [at Part II(13)(C)] sought a negative determination for 110.7 acres of prime soils in the mining area and for 55.1 acres in the support area. The request for negative determination is based on the unsupported contention that those specific sites fall into one of the following land use categories: Forested areas that have never been in row crop production or areas that meet all of the following criteria: a) Currently undeveloped; b) Soils listed as 3 series in the 2003 Fulton County Soils Survey; and c) Wetlands designated by Nature Resources Conservation Service ("NRCS") in its 2001 site-specific investigation and report. These is certainly no dispute that a portion of the proposed strip mine site is forested although the Company is apparently still unsure the extent to which the forested area will be disturbed. Tr.2724. However, despite the application form explicitly requesting that the applicant "provide documentation" on the land uses, the Company did not provide any documentation that the sites included forested areas and did not provide any documentation specifically referenced therein, including the 2003 Fulton County Soils Survey or the 2001 NRCS site-specific investigation and report.
>
> It is also undisputed that the NRCS report provided the farmed wetland determinations on agricultural lands and, as to non-agricultural lands, wetland delineations were completed by the Company's consultant; the application should not have been determined to be complete without the NRCS documentation as required by the Department.
>
> Affirmative statements in both the application and the final decision were misleading because of how the term "land use" is defined and how the Company elected to respond to the application requirements. The Company did submit as an attachment to the application a "Wetland Delineation Report" prepared by Greenleaf Consulting in January 2002. AG Exhibit 8. However, the Company's May 2004 permit application [at Attachment V(2)(A)] represents the pre-mining land uses for "Wetland Wildlife" at 0.0 acres inside the mining area and 0.0 acres outside the mining area.... (**See**, Attorney General's Brief, pp.16-17)

The Attorney General later states that:

> ....the Company's May 2004 permit application [at Part II(13)] sought a negative determination for 110.7 acres of prime soils in the Mining Area and for 55.1 acres in the Support Area. This totals 165.8 acres; however, on November 15, 2007 the Department found that *164.7* acres have been granted a negative determination. None of the 50 modifications requested by the Department on November 9, 2004, pertained directly to this issue, but Item 36 directed the Company to correct the discrepancy in the prime

farmland acreage and provide further justification for the loss of high capability land. The Company's November 7, 2005 response to Item 36 provided attachments addressing the prime farmland discrepancy. Attachment II-13D-2 revised the negative determination request to 164.7 acres and provided a revised total of 455.5 [acres] of prime farmland soils. So, two of the discrepancies were somehow rectified during the modification process, but anybody reviewing the Department's final decision for consistency with the application materials would have to question the statement that there are 620.2 acres of prime farmland soils identified in this permit area. First of all, this number is just as inaccurate and misleading as the Department's representation in the permit documents that no wetlands exist at the site. Secondly, it is explainable in a way that would only undermine the public's confidence in DNR's mining decisions. (**See**, Attorney General's Brief, p.92)

The whole issue of existing wetlands was bollixed by the Company and the Department from the outset. The Company's May 2004 permit application [at Part V(2)(B)(4)] represented that there would be post-mining land use of 27.5 acres of wetland wildlife habitat. The Company's November 7, 2005 modification of Application No. 355 represented at Items 16 and 18 that "approximately 362 acres of the proposed permit area will be reclaimed to conditions that are supportive of wetland vegetation and habitats." Although this level of wetland mitigation may be insufficient if mining were to be conducted, the Department's November 15, 2007 final decision erroneously represented that the reclamation would achieve only 27.5 acres of wetland wildlife habitat. The Department required these modifications and then failed to include the higher total acreage in the permit findings. (**See**, Attorney General's Brief, pp.92-93)

The Company took great exception to these arguments. In its Post-Hearing Brief, the Company stated:

[t]he Attorney General contends that the Application did not include the necessary information to support its request for a negative determination. *AG's Brief* at 16-17. Regarding an exemption or negative determination, 62 Ill.Adm.Code §1785.17(a)(4) states "All applicants for an exemption shall supply the Department with a scale map of the area proposed to be exempted, delineating all prime farmland soils and showing the total number of acres proposed for exemption to the nearest acre, and the numbers of acres of each prime farmland soil type in the area to be exempted." 62 Ill.Adm.Code Part 1701 defines prime farmland as "those lands which are defined by the Secretary of Agriculture in 7 CFR 657 (43 Fed. Reg. 4031 (1978)) and which have historically been used for cropland as that phrase is defined above."

The United States Department of Agriculture, Natural Resources Conservation Service, defines prime farmland soils as "soils that are best suited to food, feed, forage, fiber, and oilseed crops. Such soils have properties that favor the economic production of sustained high yields of crops. The soils need only be treated and managed by acceptable

farming methods." It goes on to say that they "are not excessively erodible or saturated with water for long periods, and they are not frequently flooded during the growing season or are protected from flooding. Soils that have a high water table, are subject to flooding, or are droughty may qualify as prime farmland were these limitations are [sic] overcome by drainage measures, flood controls, or irrigation." This definition is found in 2003 Soil Survey of Fulton County, Illinois Part II, page 154 under the Prime Farmland heading. Data from the 2003 Fulton County Soils Survey was used to make the Total Soils Map, the Soils Map, and provide information contained in Attachment II-13D-1, and Attachment II-13D-2. Attachment II-13D-2 specifically shows soil types and where negative determination on those soil types is requested.

According to 62 Ill.Admin.Code Part 1701, "Historically used for cropland" means:

> Lands that have been used for cropland for any five years or more out of the ten years immediately preceding the acquisition, including purchase, lease, or option, of the lands for the purpose of conducting or allowing through resale, lease, or option, the conduct of surface coal mining and reclamation operations; Lands that the Department determines, on the basis of additional cropland history of the surrounding lands and the lands under consideration that the permit area is clearly cropland but falls outside the specific five-years-in-ten criterion, in which case the regulations for prime farmland shall be applied to include more years of cropland history only to increase the prime farmland acreage to be preserved; or Lands that would likely have been used as cropland for any five out of the last ten years, immediately preceding such acquisition but for the same fact of ownership or control of the land unrelated to the productivity of the land. 62 IllAdm.Code Part 1701.

62 Ill.Adm.Code Part 1701 defines wetlands as "land that has a predominance of hydric soils (soils which are usually wet and where there is little or no fee oxygen) and that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of hydrophytic vegetation (plants typically found in wet habitats) typically adapted for life in saturated soil conditions."

Capital used these definitions, 62 Ill.Admin.Code §1785.17(1)(4), the 2003 Fulton County Soils Survey, and a 2001 site specific investigation by NRCS in the Wetlands study that accompanied the Application, to formulate its response in this portion of the application and develop the Negative Determination Map. *2004 Application, Part V.* Information regarding the site-specific investigation and report conducted in 2001 by Natural Resource Conservation Service is found in the 2001 Wetlands Delineation Report performed by Greenleaf Consulting Ltd., *2004 Application Part V. Greenleaf Wetland Delineation Report*, at 2,7, *and Figure 6.*

Page 2 of the Wetland Delineation Report states "Greenleaf collected soils

samples within the agricultural areas; however, Mr. Steven K. Higgins, Resource Conservationist, of the Milan, Illinois NRCS office was contacted to confirm the location of farmed wetlands within the boundaries of the subject partial. His notes are annotated on the 1985 NRCS Farmed Wetland Map provided as Attachment A, Figure 6." Page 7 of this report further states "On June 7, 2001 CRD formally requested Mr. Steve Higgins, Resource Conservationist, NRCS Milan field office to perform wetland delineations at the subject parcel. Mr. Higgins field map is provided as Attachment A, Figure 6." References to Mr. Higgins and his delineation of farmed wetlands are found throughout the report. Greenleaf Consulting, Ltd and Mr. Higgins collaborated in 2001 to complete the site specific investigation and report referred to. This information was includedf in the Application.

Forested areas that have never been in row crop production do qualify for a negative determination. 62 Ill.Adm.Code Part 1701 defines Forestry as "land used or managed for the long-term production of wood, wood fiber, or wood-derived products." The Pre-Mining Land Use Map shows land uses for the permit area and area adjacent to it. *2004 Application*, Attachment V(2)(A-1). Land uses of Cropland, Undeveloped/Oldfields, Water, Industrial, and Residential are shown within and adjacent to the permit boundary. Capital saw no evidence that the land within the permit area was used or managed for long-term production of wood, wood fiber or wood derived products. Likewise, Capital saw no evidence that the lands adjacent to the permit area were used or managed for long-term production of wood, wood fiber or wood derived products. Therefore no Forestry acres were delineated on this map and no documentation regarding a Forestry land use was necessary.

The fact is, no Forest land-use designation was delineated on the Pre-Mining Landuse Map and no Forest land-use designation was shown on the Negative Determination Map. Therefore, negative determination could not be sought under this criterion. The only areas that qualified for negative determination were those areas found listed in Item 2 on Page II-12 of the 2004 Application. The areas are shown on the Negative Determination Map.

Therefore....Capital's request for negative determination included all information required by the applicable regulations and was properly considered and approved by the Department. (**See**, Capital's Brief, pp. 52-54)

The Company also responded to the Attorney General's argument pertaining to the wetland designations. The Company argued that:

> [c]ontrary to the Attorney General's assertion, Capital took all steps necessary to accurately assess and quantify the wetlands in the permit area. The above-referenced Wetlands Delineation Report, prepared by the Greenleaf Consulting, Ltd., was commissioned by Capital and made a part of the 2004 Application. In response to a

Department modification, Capital provided additional wetland information in the 2005 Modification. *2005 Modification #15, 16 and 18.* In a separate proceeding, Capital is seeking a Joint Permit from the U.S. Army Corps of Engineers and Illinois Environmental Protection Agency, pursuant to Section 404 of the Clean Water Act, that will address jurisdictional wetlands. *2005 Modification, #16.*

The Application included a spreadsheet which referenced a "Wetland Wildlife" pre-mining land use category, and indicated that there were 0 acres associated with this pre-mining land use category. As Greg Arnett explained, there is no pre-mining "Wetland Wildlife" land use category, but this particular table also referenced post-mining land use categories. Tr. 2436-8; *see* 62 Ill.Adm. Code Part 1701. In her Brief, the Attorney General argues that the unnecessary reference to a pre-mining "Wetland Wildlife" category on this spreadsheet somehow rises to the level of a regulatory violation, but cites to no regulation in support of this contention. *AG's Brief* at 17-18.

The Attorney General further contends that the wetland acreage depicted in the Findings document was incorrect due to the statement in the Findings that the reclamation will achieve 37.5 acres of wetland wildlife habitat, when Capital represented in the 2005 Modification that "approximately 362 acres of the proposed permit area will be reclaimed to conditions that are supportive of wetland vegetation and habitats. *AG's Brief* at 92-3; *Modifications, #16 and 18.* Apparently unbeknownst to the Attorney General, William O'Leary cleared up any confusion regarding this issue through his testimony at the hearing when he explained the 37.5 acre description is for a post-mining land use category, which the 362 acres refers to acreage where wetland hydrology will be restored. Tr. At 1468-69. (**See**, Capital's Brief, pp.54-55)

The Department also responds that the "initial wetland acreage figures provided in the Applicant Capital's 2004 permit application (*i.e.*, 454.4 acres of prime soils and 165.2 acres of wetlands, or a total of 620.2 acres)," was subsequently modified per the request of the Department. The Department urges that the Attorney General erroneously cites to a 37.5 acreage figure as to the total acreage of wetland wildlife habitat, when this acreage figure represented "only one of three (3) designated categories of wetland acreage." (**See**, Department's Brief, p.80) The Department urges that the total post-mining wetland acreage was calculated to be 362.2 acres (IDNR Ex. 61a and 61b), and were described in the Department's Findings as "approximately 362 acres of the proposed permit area....to be reclaimed to conditions...supportive of wetland vegetation and

habitats." (**See**, Department's Brief, p.80, citing IDNR Ex. 13- Results of Review, Appendix B - Consideration of Comments and Objections.)

The Department further argued that:

> [i]n response to similar concerns raised by Sierra Club representative, Joyce Blumenshine, regarding the calculation of wetland acreage, the Department provided the testimony of Mr. Bill O'Leary, wildlife and wetland specialist for the Department, to further explain the review process and the calculations made concerning pre-mining wetland acres (*i.e.*, 302.2 acres), as reported in Capital modification Responses No. 16, dated 11/7/05, and post-mining wetland acreage (*i.e.*, 362.2 acres). The basis for of [sic] this detailed wetland acreage review and calculations are documented by Mr. O'Leary in two e-correspondence, dated 9/22/05 and 6/30/08. (IDNR Ex. 61[a] and 61[b]). And to further clarify the complexity of these review calculations, Mr. O'Leary offered extensive testimony at the August 29, 2008 hearing (TR.1464-1472) discussing the technical categories for pre-mining wetland wetlands [sic] acreage (*i.e.*, palustrine forested wetlands [102.09], palustrine shrug-scrub wetlands [37.8] and palustrine emergent wetlands [4.1] and farmed wetlands [157.4]) that would be applicable to the mine area proposed in Permit Application #355. His testimony also discussed his review and calculations for post-mining wetland acreage figures with recommended permit language in compliance with 62 Ill.Adm.Code 1816.97, as well as certain other technical guidelines form the U.S. Army Corps' and its 1987 Wetland Delineation Manual. (**See**, Department's Brief, p.80)

Thus, I do not see that the Attorney General or the Petitioners have raised any viable issue pertaining to the Department's handling of the post-mining issues relating to the designated wetland characterization. Thus, I overrule the Attorney General's and Petitioner's contentions of error in this regard. The Attorney General also asserts that:

> [t]he excess spoil pile....is going to be "high capability pasture" according to the Company....The term "pasture" is defined as "pastureland" within the category of "land use." This latter defined term means "specific uses or management-related activities..." The Company's contention that the "pre-mining land use" of the permit area includes "pasture" or "pastureland" is unsupported by the record, including the permit application materials. There is no factual support that 18.3 acres are being "used primarily for the long-term production of adapted, domesticated forage plants to be grazed by the livestock or occasionally cut and cured for livestock feed." Additionally, "pastureland" as defined "land use" may reasonably be considered inconsistent with the usage of "high capability

land" for row-crop agricultural purposes. The slopes of the "Banner Mound" apparently will have row-crops to be foraged by goats or other livestock.

The misuse of defined terms and the lack of attention to detail combine to cast serious doubt whether, as required by Section 1773.15(c)(9), at the time of the Department's final decision granting the permit, the Company had satisfied the requirements for approval of a long-term, intensive agriculture post-mining land use, in accordance with the requirements of Sections 1816.111(d) and 1817.111(d). (**See**, Attorney General's Brief, p.94)

I disagree with the Attorney General. I rule that the Department properly assessed the permit Application and properly approved the permit, inasmuch as the Company had satisfied the applicable requirements of Part 1785. I rule that the Department appropriately approved the negative determination, and the Company has satisfied the requirements for approval of a long-term post-mining land uses, in accordance with Sections 1816.111(d) and 1817.111(d).

VI.

Historical and Cultural Resource Issues

The Department issued the permit with Condition J:

[p]ursuant to 62 Ill.Adm.Code 1779.12, sites identified by the archeological and historic Phase I survey as potentially eligible for listing shall have a Phase II survey done prior to disturbance as proposed in the permit. No mining related disturbance shall be done until an eligibility determination is made and approval for disturbance is granted. Identified sites which are not proposed to be disturbed shall be identified in the field with markers and the Department's field representative notified after their installation.

The Attorney General asserts that "[t]he Department should have required the Company *prior* to issuance of the permit to perform a Phase I survey (regarding the archeological and historic resources identified as potentially eligible for listing)." (**See**, Attorney General's Brief, p.95)

I find nothing legally infirm as to the permit condition cited above (*i.e.*, Condition J). Therefore, I do not sustain the Attorney General's objection premised upon 1779.12(a).

VII.

Endangered or Threatened Species

The permit application requirements for fish and wildlife are set forth in Section 1780.16. Section 1780.16(a)(1) provides a "default level" of resource information; Section 1780.16(a)(2) mandates that site-specific resource information necessary to address the respective species or habitats shall be required. The Attorney General asserts that "[t]he Company failed to generate [the latter] data and the Department failed to require the Company to do so." (**See**, Attorney General's Brief, p.98)

The Attorney General readily admits that the Department performed the "default level" of consultation with State and federal agencies with responsibilities for fish and wildlife. (**See**, Attorney General's Brief, p.98) The Attorney General asserts, however, that "Section 1780.16(a)(2) was clearly applicable and, without the necessary site-specific resource information, any protection and enhancement plan cannot be considered to be factually supported to a sufficient degree to satisfy State and federal law." (**See**, Attorney General's Brief, p.98)

Section 1780.16(a)(2) provides that:

> Site-specific resource information necessary to address the respective species or habitats *shall be required* when the permit area or adjacent area is likely to include:
>
> A) Listed or proposed endangered or threatened species of plants or animals or

their critical habitats listed by the Secretary under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.) or those species or habitats protected by the Illinois Endangered Species Protection Act [520 ILCS 10] ;

B) Habitats of unusually high value for fish and wildlife such as important streams, wetlands, riparian areas, cliffs supporting raptors, areas offering special shelter or protection, migration routes, or reproduction and wintering areas; or

C) Other species or habitats identified through agency consultation as requiring special protection under State or Federal law. (Emphasis added)

The Department argues (as noted within the Attorney General's Brief) that Section 1780.16 does not require "actual site observation" or field survey" work and that the Attorney General "is again stating an undefined general preference" for a "proper biological site investigation" or "site-specific resource information necessary to address the respective species or habitats." (**See**, Attorney General's Brief, p.151) And there appears to be no doubt that such is the stance that the Department is taking with respect to this issue (*i.e.*, that site-specific resource information is, according to the Department, *not* necessary); here is what the Department argues:

> [a]t page 97 of Attorney General's brief, it alleges that "actual site observations" and/or "field surveys....conducted regarding wildlife...within the general area...within the flood plain of the Illinois River" was required for submittal with the Permit Application #355 for Department review. In its brief, Sierra also raised similar allegations and concerns regarding the need for "specific site information....that constituted a qualified biological assessment related to...endangered bird and plant species that could be existing on the mine property at the time of the application." (Sierra 3&5) The Department notes that the provision of 62 Ill.Code 1780.16 for "Fish and Wildlife Plan" information state [sic] that "fish and wildlife information for the permit area and adjacent area" is required for a permit application; there is no reference of such information or methodology as being "actual site observation" or "field survey" work. The Department notes that the permit application process is an iterative and ongoing dialogue between the permit applicant and various Department review staff concerning the scope and conduct of studies to design any required protection and enhancement plans. The Attorney General is again stating an undefined general preference for "proper biological site investigation" or "site-specific resource information necessary to address the respective species or habitats" (AG 100 &

98 respectively). Both the Attorney General and Sierra state their preference, but fails to cite any criteria for such site-specific studies. Aside from merely demanding more information, both the Attorney General and Sierra fails [sic] to explain their reasons for any alleged deficiencies in the information submitted or the technical basis for Department's acceptance of the various Protection and Enhancement Plans ("PE plans") as being sufficient. The IDNR expert witness, Bill O'Leary, testified and affirmed that these PE plans are specific to conditions on the site. (TR 1357)

The Department also notes that PE plans for the aster and the bald eagle were provided herein, notwithstanding the latter's federal "delisting" status, and approved. The Department notes that pursuant to its "best technology currently available" ("btca") obligations, 62 Ill.Adm. Code 1780.16(b), Capital also submitted extensive information to supplement its existing PE Plan concerning the decurrent false aster. This supplement dealt with this plant species newly discovered growing within the permit area during the Fall, 2008, *after the approval of Permit Application #355*, for Department review, as to compliance with 62 Ill.Adm.Code 1780.16 and 1816.97(b). The Department notes that the latter regulatory provisions reinitiated the consultation process with IDNR OREP and USFWS based on the discovery of the species. The Attorney General's and Sierra's allegations fail to identify such inadequacies of the PE plans and/or the Department's "initial inadequate determinations." These allegations as to the scope and level of detail necessary for sufficient development of Capital's PE plans are speculative and not supported with any specified technical fact. (**See**, Department's Brief, pp.69, 70)

The Attorney General asserts that:

> ...the Office of Mines and Minerals [does not] have any discretion to waive this requirement [*i.e.*, the requirement to have site-specific resource information as to endangered and threatened species]. When the proposed permit area or adjacent area is likely to include species or habitats protected by the Illinois Endangered Species Protection Act, site-specific resource information shall be required. When the proposed permit area or adjacent area is likely to include habitats of unusually high value for fish or wildlife such as important streams, wetlands, riparian areas, cliffs supporting raptors, areas offering special shelter or protection, migration routes, or reproduction and wintering areas, site-specific resource information shall be required. (**See**, Attorney General's Reply Brief, p.152)

I wholly agree with the Attorney General. Unless the Department is asserting that the permit area at issue in this application is not encompassed by the descriptions delineated in Section 1780.16(a)(2)(A) - (B) or (C), then I believe "site-specific resource information necessary to

address the respective species or habitats [is] required." Frankly, I think the Department would be hard-pressed to deny that the area at issue within this permit application is not encompassed by one or more of the subsections cited above (*i.e.*, 62 Ill.Adm.Code 1780.16(a)(2)(A) - (B) or (C))

The Attorney General cites within her initial Brief the recommendation of Bill O'Leary, dated March 26, 2002, contained in an e-mail, that a "completeness deficiency letter" regarding Capital's February 2002 application be included within the Department's ruling as to the Application:

> [t]he following habitats of unusually high value and listed species are known to occur within or adjacent to the proposed permit area: Rice Lake Fish and Wildlife Area, Banner Marsh Fish and Wildlife Area, Slim Lake Illinois Natural Area Inventory site, decurrent false aster, and bald eagle. Pursuant to Section 1780.16 the applicant shall provide site specific resource information necessary to address these species and habitats including a map identifying these habitats of unusually high value and known locations of the listed species. The applicant shall provide a protection and enhancement plan which shall include a description of how, to the extent possible using the best technology currently available, the applicant will minimize disturbances and adverse impacts to these habitats and species. The plan shall include protective measures that will be used during the active mining phase of operation and enhancement measures that will be used during the reclamation and postmining phase of operation to develop habitats. (**See**, AG Exhibit 104/document 642)

Pursuant to the recommendation, the Department requested site specific information, including habitat identification maps and a protection and enhancement plan, for the false aster and bald eagle. The Company, however, failed to provide any responsive information in Part II(8) of the May 17, 2004, and the permit application stated:

> [t]he Department has requested site specific resource information, including habitat identification maps and a protection and enhancement plan, pertaining to the Decurrent False Aster and the Bald Eagle. Capital Resources Development Company will hire a specialist to compile this information. The resulting report will be completed, submitted

and approved by the Department prior to the initiation of the mining operation.

The Attorney General states that:

> [t]he Company acknowledged the Department's explicit request for site-specific resource information, and the necessary habitat identification maps and protection and enhancement plans, regarding these threatened species, yet provided no such information as to the aster and the eagle. The Company provided only generalized fish and wildlife resource information for the permit area and adjacent area, which was not generated from a proper biological survey of the site. The May 2004 application did not provide any site specific resources information to address the Decurrent False Astor and the Bald Eagle [at Part II(8)]. Instead, the Company stated: "The Department has requested site specific resource information, including habitat identification maps and a protection and enhancement plan, pertaining to the Decurrent False Aster and the Bald Eagle. Capital Resources Development Company will hire a specialist to compile this information. The resulting report will be completed, submitted and approved by the Department prior to the initiation of the mining operation." *The Company did not hire a specialist and no such report containing the site specific resource information was done.* (**See**, Attorney General's Brief, pp.99-100) (Emphasis added)

In his testimony at the administrative hearings, Greg Arnett addressed the issue of Capital and its decision as to whether to hire a "specialist." Greg Arnett testified that he decided "it was not necessary to hire a biologist." (Tr.2453-54; 2647)

Mr. Arnett drafted the protection and enhancement plans. (Tr.2456) Arnett conceded that each of the plans "was pretty simple....basically a template we followed." (Tr.2460-61)

The Attorney General argues that:

> [t]he Department denies any validity of the Attorney General's numerous contentions that informational deficiencies in Application No. 355 resulted in flawed findings. Nowhere is this threshold issue more starkly evident than in regard to the likely adverse environmental impacts of strip mining this particular site. The Petitioners have repeatedly explained the objective concerns for wildlife in general and threatened and endangered species in particular. The record clearly shows the rationale for this site and its adjacent areas to receive the full extent of legal protection. The Department's denials in the face of these explanations are utterly unconvincing.

The Department asserts that "the permit application process is an iterative and ongoing dialogue between the permit application and various Department review staff concerning the scope and conduct of *studies* to design any required protection and enhancement plans." DNR brief at 69, emphasis added. This assertion is apparently intended to be a general statement, but the brief fails to acknowledge that the record in this present proceeding does not contain any studies to design the subsequently approved plans. The following several facts have been established by the evidence:

1) The justification for site specific resource information was derived very early in the permit application review process through the informal consultation between the Office of Mines and Minerals and Pat Malone in the Impact Assessment Section of the Ecosystems and Environment Division of the Office of Realty and Environmental Planning. Mr. Malone's March 5, 2002 memo identified Rice Lake, Banner Marsh and Slim Lake as being adjacent to the proposed permit area and explicitly recommended a "survey of the proposed mine" to determine whether the threatened plan species of *Boltonia Decurrens* (decurrent false aster) "occurs within the proposed permit area." AG Exhibit 104/document 148; DNR Exhibit 17. Mr. O'Leary consequently recommended in a March 26, 2002 e-mail that a "completeness deficiency letter" regarding Application No. 355 should be sent to the Company to require "site specific resource information necessary to address these species and habitats including a map identifying these habitats of unusually high value and known locations of the listed species." AG Exhibit 104/document 642.

2) The Department affirmatively communicated to the Company the applicability of the Section 1780.16(b) requirements of "site specific resource information, including habitat identification maps and a protection and enhancement plan, pertaining to the Decurrent False Aster and the Bald Eagle." Part II(8) of the May 17, 2004 permit application.

3) The Company acknowledged the Department's request for site specific resource information and made written commitments to "hire a specialist to compile this information" and to submit the "resulting report." Part II(8) of the May 17, 2004 permit application.

4) The Company provided only generalized fish and wildlife resource information for the permit area and adjacent area. Part II(8) of the May 17, 2004 permit application.

5) The Company stated: "Subject to the findings of the above-mentioned study, it is believed that there are no habitats for fish or wildlife of significantly high value within the permit area." Part V(3)(B)(3) of the May 17, 2004 permit application.

6) The "report" or "study" mentioned respectively in Part II(8) and Part V(3)(B)(3) of the May 17, 2004 permit application was never performed. The "specialist" mentioned in Part II(8) of the May 17, 2004 permit application was never hired. Mr. Arnett testified that he decided "it was not necessary to hire a biologist." TR 2453-54; 2647.

7) Modification Item 8 referred to the Company's commitment in Part II(8) of the May 17, 2004 permit application that "a report is forthcoming" and explicitly directed the application to comply with Section 1780.16(b). Modification Item 14 referred to the Company's commitment in Part V(3)(B)(3) of the May 17, 2004 permit application that "a report on habitat identification maps and protection and enhancement plans" will be submitted and explicitly directed the applicant to comply with Section 1780.16(b). Modification letter dated November 9, 2004.

8) The Company's response to Modification Item 14 indicated that "site-specific potential habitat maps were considered unnecessary." Modification responses dated November 7, 2005; TR 2647.

9) The protection and enhancement plans proposed in Application No. 355 were approved on October 26, 2007.

10) The Department possessed direct knowledge of an osprey nest at Bells Landing in Banner Marsh since at least August 2005. AG Exhibits 82, 83, 84, 85 and 86; TR 1103-05; 1138-39. Another osprey nest existed briefly in May and June 2008 in the Slim Lake Natural Area. TR 326-27; 1107-08; 1237-38; AG Exhibits 27 and 87.

11) A large population of decurrent false aster was discovered within the permit area in September 2008. TR 2927-28, 2931-33; AG Exhibits 121, 122, 123, 124 and 125.

Therefore, the record shows *how* the Department failed to obtain required information

from the permit applicant and *why* a proper investigation ought to have been conducted.

In contrast, the Department's brief does not explain *how* the protection and enhancement plans were approved without the "site specific resource information" it had required but the Company declined to provide.

* * * * * * * * *

The argument that Section 1780.16 does not require actual site observation or field survey work is also not consistent with the federal program requirements. Any statement of policy or position by the Illinois regulatory agency that "site-specific resource information" is not necessary to investigate wildlife species or habitats would render the Illinois program less effective than the federal program. Any permit finding or other final action premised upon such an unreasonable legal interpretation is indeed flawed.

The federal regulation at 30 CFR §780.16 is virtually identical in language to Section 1780.16. In the Federal Register publication of its final action on December 11, 1987 the Office of Surface Mining amended its rules with respect to fish and wildlife resource information and planning requirements, and standards applied to the protection of fish and wildlife values, so as to comply with recent court decisions and to revise and clarify the rules; the revised rules also provided "added protection to endangered or threatened species." 52 Fed. Reg. 47352. The formal statements by the Office of Surface Mining of its regulatory rationale refute and invalidate the Department's contention that site-specific resource information is not necessary to investigate wildlife species or habitats:

> The term "resource information" is intended to allow for the use of existing fish and wildlife information, in addition to any site-specific studies authorized under §780.16(a)(2).
>
> * * * * *
>
> As discussed in the preamble to the proposed rule, the authority to require site-specific studies has been retained but the restriction that a study be the only means to achieve compliance is removed. The need for site-specific studies will be determined by the regulatory authority through the consultation process required in the final rule. Site-specific studies could include aquatic sampling of streams to determine their "importance."
>
> The applicant is responsible for the accuracy and completeness of the submitted information and the regulatory authority is required to consult with agencies

which possess the needed resources to competently evaluate the applicant's data. 52 Fed. Reg. 47354-55.

The federal program explicitly acknowledges the need for site-specific studies in certain situations. (**See**, Attorney General's Reply Brief, pp. 153-157)

I frankly concur with the Attorney General as to this issue. I am especially concerned that Capital originally indicated that it would obtain the services of a "specialist" to address these issues, and then simply decided not to do so. Although Capital is correct that "[t]here is no requirement in State law or the Department's regulations for the hiring of an expert or the submittal of a report," when the Applicant has affirmatively indicated its intentions to do so, and then does not, such requires an examination of the information the Company *does* provide (or does not provide) with a jaundiced eye. The fact that both the Department and the Company assert that site-specific information was not necessary to comply with Section 1780.16 is troublesome (even though the Company then asserts that "William O'Leary testified that the information submitted by Capital consisted of site-specific information regarding the relevant habitats and species, and the protection and enhancement plan addressed all regulatory requirements.") (**See**, Company's Brief, p.60, citing Tr. 1795-6; 1908-10, 1947-8, 1981)

It is particularly troublesome when it is asserted that even though "site-specific resource information" is not needed, such information was provided anyway. The obvious question is if sufficient site-specific information was provided, then why assert that such site-specific information was not required in the first place? The Department concedes that much of the permit applicant's information concerning species and habitat issues was obtained on the Internet (but argues that the Attorney General also offered "a large amount of information as documented

evidence obtained from various Internet website [sic] regarding protected species issues in support of *its* case in chief"). (**See**, Department's Brief, p.72, citing AG's Exhibit 106, 109 through 114, & 121)

As indicated within the Attorney General's Brief:

> ....the Company contends that it collaborated with the Department and complied with Section 1780.16. In particular, it contends the Greenleaf Wetlands Report "provided very detailed information regarding plant species found in and around the permit area, and also identified the bald eagle and decurrent false aster as threatened and endangered species that were not observed within the permit area, but may be present in the vicinity of the permit are. *Greenleaf Wetlands Report* at 30." Company's Brief, at 57. Greenleaf's wetland specialist did not see any bald eagles during April 24 through May 2, 2001; as to the threatened plant species, the report concluded [at page 30]: "The Banner site reconnaissance was conducted during the species non-flowering months. Due to the early season, Greenleaf Consulting, Ltd. could neither negate nor confirm the Decurrent False Aster's presence within the proposed permit boundary." AG Exhibit 8.
>
> The field investigation and wetland delineation report provides site-specific data regarding soils (especially hydric soils indicating wetlands) and vegetation on te proposed site (which then comprised 738 acres). The Attorney General agrees with the Company that "detailed botanical information" was generated. Exactly 30 designated data points were utilized to identify approximately 164 acres of jurisdictional wetlands. However, the usefulness of the Greenleaf report for fish and wildlife habitat characterization and protection/enhancement planning is quite limited. Mr. O'Leary certainly did not testify that he relied upon it to any extent for those purposes. For instance, the results of the field investigations for each of the 30 data points are set forth at pages 7 through 28, yet there is not a single mention of any observation of fish or wildlife nor is any "botanica" information discussed in the context of habitat. AG Exhibit 8 (**See**, Attorney General's Reply Brief, p.158, 159)

Again, I must concur with the Attorney General. It appears that information other than site-specific resource information was relied upon with respect to the Company's attempt to comply with the requirements of the Application process and the delineation of endangered or threatened species of plants or animals or their critical habitats. I believe, as asserted by the Attorney General, that more is required than general reliance on Internet information to comply with such

application requisite. Therefore, I am remanding this matter to the Department with the directions that the requirements of Section 1780.16(a)(2) mandate the obtainment of site-specific resource information. The Department shall require the Company to fulfill the requirements of Section 1780.16 by obtaining such site-specific resource information. The permit application cannot be approved until such site-specific resource information pertaining to the investigation of wildlife species and habitats in and adjacent to the permit area is completed. If, indeed, the Department asserts that site-specific resource information already supports the findings required by Section 1780.16, such information shall be identified with specificity so that a reviewer may discern compliance with Section 1780.16(a)(2).

VIII.

Mandated Consultations

The Attorney General asserts that:

> [a]s of November 15, 2007, when the permit sought by Application No. 355 was issued, the Department's Office of Mines and Minerals failed to perform statutorily mandated consultations with the Department's Office of Realty and Environmental Planning and other activities required by the Illinois Natural Areas Preservation Act and the Illinois Endangered Species Protection Act. The Department failed to comply with the Consultation Procedures for Assessing Impacts of Agency Actions of Endangered and Threatened Species and Natural Areas at 17 Ill.Adm.Code Part 1075 and to thereby evaluate whether the actions authorized by the strip mining permit were likely to 1) result in the destruction or adverse modification of any natural area that is registered under the Illinois Natural Areas Preservation Act or identified in the Illinois Natural Areas Inventory and 2) to jeopardize the continued existence of Illinois listed endangered and threatened species or are likely to result in the destruction or adverse modification of the designated essential habitat of such species. (**See**, Attorney General's Reply Brief, pp.168, 169)

The Department responds by noting:

...that its coordinated permit review obligations at 62 Ill.Adm.Code 1779.12 includes federal wildlife protection laws as well as to the applicable requirements of State laws and its regulations, such as the Illinois Endangered Species Protection Act , 520 ILCS 10/1 *et seq.*, and the Illinois Natural Areas Preservation Act, 525 ILCS 30/1 *et seq.* The allegations fail to recognize that coordinated consultation discussions were occurring continuously throughout the entirety of the Banner #355 application process, which spanned a period of six (6) years: [1] beginning in 2002 with the so-called "early coordination" phase concerning "administrative completeness," (IDNR Ex. 17 & 19 - P.Malone, IDNR Office of Realty and Environmental Planning or "OREP", dated 3/5/02 and 2/20/02, respectfully), [2] then in 2004 durig public comment period with IDNR Land Management and OREP staff, (AG Ex.15 and IDNR Ex.20 - B. Douglass, Site Superintendent for Rice Lake and Banner Marsh State Fish & Wildlife Area, and P.Malone, IDNR/OREP, dated 9/09/04 and 8/10/04, respectfully), and [3] later again, in 207 and 2008, as documented in a detailed "wildlife" findings memorandum by the Department wildlife specialist. (TR.1379, 1380, 1388 & 1389), as well as archaeological consultation activities by the Illinois Historic Preservation Agency. (IDNR Ex. 12 and Administrative Record - D0028001.tif - Phase I archaeological comments by H.Hassen, dated 12/1/04 & 6/3/04.) The Department also states that the database for the EcoCAT online reporting system was developed and maintained by IDNR/OREP, formerly the Department of Conservation, as a consultation data and survey resource for IDNR staff in response to public and private inquiries; however, the electronic reporting system was not available for public access until 2007.

The Department notes that several federal agencies, including the U.S. Fish and Wildlife Service, were also consulted for comments during the review process. (IDNR Ex. 14, dated 6/30/04) (**See**, Department's Brief, pp.82-84)

The Attorney General acknowledges the testimony of Mr. O'Leary when he testified that although in comparison to the Illinois Endangered Species Protection Act, he was "less experienced" with the regulations at Part 1075, but O'Leary also testified that he specifically inquired "whether or not the consultation that is being done between [the Office of Mines and Minerals] and Pat Malone satisfies these consultation requirements [at Part 1075], and [it was his] understanding [] that the current view is that the answer to that is [']yes[']." (TR.1747) (**See**, Attorney General's Reply Brief, p.131) O'Leary testified that his understanding was based upon documents he described as "communications" and "legal opinions." (Tr.1747)

The Attorney General argues that:

> [i]n the redirect examination of Mr. O'Leary, the Department attempted to justify its undisputed noncompliance with the Section 1075.40 consultation process. Mr. O'Leary testified that when these rules were proposed in 1990 by the Department of Conservation, the Department of Mines and Minerals submitted comments and received a response from Deanna Glosser in the Department of Conservation's endangered species program, indicating (according to Mr. O'Leary's testimony) "the consultation process we were using that was already in place with Mr. Malone [at [the] Department of Conservation], that we would continue to use that same process, and that would suffice to meet the consultation requirements under the Illinois Endangered Species Protection Act." TR. 1988. The August 13, 1990 comments of the Department of Mines and Minerals and Ms. Glosser's September 5, 1990 response on behalf of the Department of Conservation were admitted into the record by the Department. DNR Exhibits 73A and 73B. No other "communications" or "legal opinions" were identified by the Department in support of what appears to be a rule of general applicability not promulgated pursuant to the Administrative Procedure Act. (**See**, Attorney General's Reply Brief, p.132)

I find that the Department has conducted the appropriate "consultations" that are envisioned by Section 1075.40. I also do not find that the Department promulgated a rule in violation of the Administrative Procedure Act. The Attorney General has failed to prove by a preponderance of the evidence that the Department has failed to comply with Part 1075 of the regulations.

PART III.
Unsuitability Petition

The Attorney General argues that:

> Section 2.08(b)(4) of the Act prohibits the issuance of a permit where the area proposed to be mined is within an area under study for designation as unsuitable in an administrative proceeding commenced under Article VII of the Act. The Attorney General contends that an administrative proceeding had commenced to determine whether the Banner Mine site ought to be designated as unsuitable for mining, that the administrative proceeding was terminated but (by virtue of a

> timely request for judicial review) was still pending when the permit was issued, and therefore the Department's final decision violated Section 2.08(b)(4) of the Act. The factual support for this contention is provided in the permit application record filed by the Department. However, the Attorney General attempted to introduce evidence and testimony regarding whether the termination of the administrative proceeding regarding unsuitability was legally appropriate. (**See**, Attorney General's Brief, p.134)

After the Hearing Officer rejected the Attorney General's initial attempts to present evidence in the context of this administrative hearing as to the unsuitability petition that was attempted to be filed encompassing all or some of the permit area, the Hearing Officer allowed the Attorney General an offer of proof as to the evidence pertaining to said unsuitability petition. But because of the previous ruling I made herein concerning the Department's rejection of said unsuitability petition, I confirm my original ruling and reject any evidence that pertains to said unsuitability petition in the context of this proceeding. The assertion that because the unsuitability petition is still "pending" because of the appeal perfected to the Circuit Court, the permit application must be denied, is hereby rejected. The unsuitability petition is a wholly separate proceeding, and one in which the Attorney General evidently did not even see fit to intervene. Her attempt to now invoke that petition (and its purported legal effect in barring the ruling on this permit application) is rejected.

PART IV

Allegations of Error in Administrative Hearing Rulings

(a)

The Department is a "Party" for purposes of Requesting a Pre-Hearing Conference

The Petitioner, Illinois Attorney General, correctly notes that:

> [a]n administrative agency possesses no inherent or common law powers, and any authority that the agency claims must find its source within the provisions of the statute by which the agency was created. "An administrative agency....has no greater powers than those conferred upon it by the legislative enactment creating it." (**See**, Attorney General's "Memorandum of Law," Part IV, "Administrative Review Proceeding," p.48, *citing Lombard v. Pollution Control Board* (1977), 66 Ill.2d 503, 506)

Likewise, the Attorney General is correct that:

> ...the authority of an administrative agency to adopt rules and regulations is defined by the statute creating that authority, and such rules and regulations must be in accord with the standards and policies set forth in the statute. An administrative body cannot extend or alter the enabling statute's operations by the exercise of its rulemaking powers. If an administrative agency promulgates rules that are beyond the scope of the legislative grant of authority or that conflict with the enabling statute, the rules are invalid. (**See**, Attorney General's "Memorandum of Law," Part IV, "Administrative Review Proceeding," p.49)

However, the Attorney General argues within its Memorandum that:

> ...the Department has implemented a regulatory scheme for permit review which improperly delegates responsibility to a hearing officer to make determinations on the merits and allows the Department to be an active litigant in the proceeding. *The Attorney General has timely raised objections to the Department assuming the status of a party and to the Department's failure to commence this hearing within 30 days after the Petitioners' requests for hearing.* The failure to timely commence the requested hearing violated the statutory mandate....In this particular matter, the untimely commencement of the review hearing was the result of the Department's request for a pre-hearing conference, and the hearing officer granting the Department's request to schedule a pre-hearing conference, without any notice to the Petitioners. (**See**, Attorney General's "Memorandum of Law," Part IV, "Administrative Review Proceeding," pp.50-51) (Emphasis added)

The Attorney General premises its argument concerning the necessity of commencing the administrative hearing within thirty (30) days of the Petitioner's request for a hearing on the

language contained within Section 2.11 of the Act (225 ILCS 720/2.11). Section 2.11 contains the "[p]rocedure for [a]pproval" of permit applications, and provides, in relevant part, that:

> [w]ithin 30 days after the applicant is notified of the final decision of the Department on the permit application, the applicant or any person with an interest that is or may be adversely affected may request a hearing on the reasons for the final determination. *The Department shall hold a hearing within 30 days after this request and notify all interested parties at the time that the applicant is notified.*

The *regulation* promulgated by the Department governing the commencement of the hearing ("within 30 days") is found in 62 Ill.Adm.Code §1847.3, which provides as follows:

> 1847.3 Permit and Related Administrative Hearings
>
> a) Within 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, a permit rescission 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 file a written request for a hearing to contest the decision. The procedures outlined in this Section apply to conflict of interest hearings requested under 62 Ill. Adm. Code 1705.21, review of valid existing right determinations under 62 Ill. Adm. Code 1761.12(g), review of exemption determinations under 62 Ill. Adm. Code 1702.11(f) and 1702.17(c)(2), formal review of decisions not to inspect or enforce under 62 Ill. Adm. Code 1840.17, review of a permit issued pursuant to 62 Ill. Adm. Code 1785.23, review of bond release decisions under Section 1847.9(i) of this Part and review of bond adjustment determinations under 62 Ill. Adm. Code 1800.15. Failure to file a request for hearing within this 30 day time period shall result in a waiver of the right to such hearing; requests for hearing filed after the expiration of the 30 day time period shall be dismissed on motion of the Department in accordance with 62 Ill. Adm. Code 1848.12. A request for hearing is deemed filed the day it is received by the Department.
>
> b) The hearing request shall state:
>
> 1) The petitioner's name and address;
>
> 2) A clear statement of the facts entitling the petitioner to relief, including the petitioner's interests which is or may be adversely affected by the Department's final decision;

3) How the Department's final decision may or will adversely affect the interests specified;

4) An explanation of each specific alleged error in the Department's final decision, including reference to the statutory and/or regulatory provisions allegedly violated;

5) The specific relief sought from the Department; and

6) Any other relevant information.

c) *Any party to the hearing may request that a pre-hearing conference be scheduled, in accordance with 62 Ill. Adm. Code 1848.7.*

d) *Unless a pre-hearing conference has been scheduled or unless the person requesting the hearing waives the 30 day time limit, the Department shall start the hearing within 30 days after the hearing request.* The hearing shall be on the record and adjudicatory in nature. No person who presided at an informal conference under 62 Ill. Adm. Code 1773.13(c) or a public hearing under 62 Ill. Adm. Code 1773.14 shall either preside at the hearing or participate in the decision following the hearing.

e) Notice of hearing. The petitioner and other interested persons shall be given written notice of the hearing in accordance with 62 Ill. Adm. Code 1848.5 at least 5 working days prior to the hearing. Notice of the hearing shall also be posted at the appropriate district or field office.

f) Record of hearing. A complete record of the hearing and all testimony shall be made by the Department and recorded stenographically. Such record shall be maintained and shall be available to the public until at least 60 days after the final decision referred to in subsection (j) is issued.

g) Burden of proof.

1) In a proceeding to review a decision on an application for a new permit:

A) If the permit applicant is seeking review, the Department shall have the burden of going forward to establish a prima facie case as to the failure to comply with the applicable requirements of the State Act or regulations or as to the appropriateness of the permit terms and conditions, and the permit applicant shall have the ultimate burden of persuasion as to entitlement to the permit or as to the inappropriateness of the permit terms and conditions.

B) If any other person is seeking review, that person shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion by a preponderance of the evidence that the permit application

fails in some manner to comply with the applicable requirements of the State Act or regulations.

2) In all other proceedings held under this Section, the party seeking to reverse the Department's decision shall have the burden of proving by a preponderance of evidence that the Department's decision is in error.

h) Within 30 days after the close of the record, the hearing officer shall issue and serve, by certified mail, each party who participated in the hearing with a proposed decision consisting of proposed written findings of fact, conclusions of law and an order adjudicating the hearing request.

i) Within 10 days after service of the hearing officer's proposed decision, each party to the hearing may file with the hearing officer written exceptions to the hearing officer's proposed decision, stating how and why such decision should be modified or vacated. All parties shall have 10 days after service of written exceptions to file a response with the hearing officer. Failure to file written exceptions or a response is not a failure to exhaust administrative remedies and does not affect a party's right to judicial review.

j) If no written exceptions are filed, the hearing officer's proposed decision shall become final 10 days after service of such decision. If written exceptions are filed, the hearing officer shall within 15 days following the time for filing a response either issue his final administrative decision affirming or modifying his proposed decision, or shall vacate the decision and remand the proceeding for rehearing.

k) Request for temporary relief.

1) Any party may file a request for temporary relief at any time prior to a decision by the hearing officer, so long as the relief sought is not the issuance of a permit where a permit application has been disapproved in whole or in part. The request for temporary relief shall include:

A) A detailed written statement setting forth the reasons why relief should be granted;

B) A statement of the specific relief requested;

C) A showing that there is a substantial likelihood that the person seeking relief will prevail on the merits of the final determination of the proceeding; and

D) A showing that the relief sought will not adversely affect the public health or safety or cause significant, imminent environmental harm to land, air or water resources.

2) The hearing officer may hold a hearing on any issue raised by the request for temporary relief.

3) Within 15 days after the close of the record on the request for temporary relief, the hearing officer shall issue an order or decision granting or denying such temporary relief. Temporary relief may be granted only if:

A) All parties to the proceeding have been notified and given an opportunity to be heard on the request for temporary relief;

B) The person requesting such relief shows a substantial likelihood of prevailing on the merits of the final determination of the proceeding;

C) Such relief will not adversely affect the public health or safety, or cause significant, imminent environmental harm to land, air or water resources; and

D) The relief sought is not the issuance of a permit where a permit has been denied by the Department, in whole or in part, except that continuation under an existing permit shall be allowed where the applicant has a valid permit issued pursuant to 62 Ill. Adm. Code 300.

l) Judicial review.

1) Following service of the Department's final administrative decision, any person with an interest which is or may be adversely affected and who has participated in the administrative hearing under this Section may request judicial review of that decision in accordance with the Administrative Review Law [735 ILCS 5/Art. III], if:

A) The person is aggrieved by the Department's final administrative decision; or

B) The hearing officer or Department failed to act within the time limits specified in the Surface Mining Control and Reclamation Act of 1977 (30 USC 1201 et seq.), the Surface Coal Mining Land Conservation and Reclamation Act (State Act) [225 ILCS 720] or this Section.

2) Review under this subsection (l) shall not be construed to limit rights established in Section 8.05 of the State Act [225 ILCS 720/8.05]. 62 IL ADC 1847.3 (Emphasis added)

The Attorney General urges that:

[t]he Department cannot confer upon itself the status of [a] party to the permit review proceeding in which it is statutorily obligated to render a final decision. The Department cannot delegate authority to a hearing officer to make the final decision on whether a

permit ought to be issued. In fact, Section 9.04 of the Act imposes a precise limitation on any delegation of the Department of the authority granted by the Act: "The Department may delegate responsibilities, *other than final action on permits*, to other State agencies with the authority and technical expertise to carry out such responsibilities, with the consent of such agencies." The Department's rules relating to procedure and practice expressly confer certain clearly defined powers upon the hearing officer (Section 1848.16 []) and other rules allude to the Department exercise of its own powers. For instance, Section 1848.15(c): "The Department's experience, technical competence and specialized knowledge may be used in the evaluation of the evidence." (**See**, Attorney General's "Memorandum of Law," Part IV, "Administrative Review Proceeding," p.51)(**See**, Attorney General's Brief, p.51)

In furtherance of its argument concerning the alleged inability of the Department to confer upon itself the status of a party, the Attorney General argues that:

> [t]he Seventh Circuit Court of Appeals in *Illinois South Project, Inc. v. Hodel*, 844 F.2d 1286 (7th Cir.1988), addressed the relative consistency of the State Act with the Federal Act on a variety of issues, including participation of the regulatory agency in administrative proceedings;
>
> > In administrative proceedings the "parties" include the mine operator and any intervenors; the agency (state or federal) is not a "party" to the proceeding in which it is adjudicator. In judicial proceedings, however, the agency may become a "party", as the defendant in the case, and the parties before the agency may not be parties in court (unless they intervene). [844 F.2d at 1294.]

The Department cannot be a party to this proceeding at this stage of the proceeding, *i.e.*, the administrative review of a permit issued by the Department. If judicial review is sought after the hearing officer distributes the Department's final decision granting or denying the permit, then the Department would be a party respondent in that circuit court action.

A quasi-judicial proceeding (such as this permit review) held before an administrative body is not a partisan proceeding, but, instead, an investigation to ascertain and make findings of fact; in such a proceeding the administrative agency cannot be said to represent one party against another or to be arrayed on one side against a party thereto. See, *e.g., Illinois Central RR v. Illinois Commerce Commission* (1948), 399 Ill. 67; *Inter-State Water Co. v. City of Danville* (1942), 379 Ill. 41.

There are numerous other boards, commissions, and agencies charged with adjudicatory duties in accordance with the APA's contested case requirements. The

general applicable process involves at least two and sometimes three steps between the request for hearing and the final decision; for instance:

> The primary purpose of an evidentiary hearing is to compile a record for examination by the ultimate decision maker. In turn, the record, together with the hearing officer's findings and recommendations, is reviewed by the Board. Thereafter, the record, together with the Board's findings and recommendations, is examined by the Department whose Director makes the decision. Accordingly, this three-step process indicates that the final decision maker, *i.e.*, the Director of the Department, is not concerned with nor dependent on the sequence of the testimony or evidence presented at the initial hearing stage.

Beckham v. Selcke, 216 Ill.App. 3d 453, 461 (1st Dist. 1991). The administrative law judge or hearing officer conducts the proceeding in an orderly fashion, issues subpoenas, supervises discovery, provides for adequate cross-examination, rules on evidence, and so forth, in order that an appropriate record is made for the decision maker.

The Court in *Homefinders, Inc. v. City of Evanstan* (1976), 65 Ill.2d 115, 128, emphasized that due process requirements are satisfied where the final decision maker relies upon the record created by a hearing officer:

> *Morgan [v. United States*, 298 U.S. 468 (1936)] and other Federal decisions have consistently recognized that, in the absence of statutory provisions to the contrary, it is not necessary that testimony in administrative proceedings be taken before the same officers who have the ultimate decision-making authority. They indicate to the contrary that administrative proceedings may be conducted by hearing officers who refer the case for final determination to a board which has not "heard" the evidence in person. The requirements of due process are met if the decision-making board considers the evidence contained in the report of proceedings before the hearing officer and bases its determinations thereon.

See also *Abrahamson v. Department of Professional Regulation* (1992), 153 Ill.2d 76; *Betts v. Department of Registration & Education*, 103 Ill.App. 3d 654-661-62 (1st Dist. 1981). Due process requires the hearing officer or administrative judge to convey his or her findings, conclusions, recommendations, and impressions of conflicting testimony and witness credibility to the decision-making body. *Starnawski v. License Appeal Commission of City of Chicago,* 101 Ill.App. 2d 1050 (1st Dist.1981). The ultimate objective is the issuance of written findings to allow judicial review of the agency's decision. *Reinhardt v. Board of Ed. of Alton Community Unit School Dist. No. 11* (1975), 61 Ill.2d 101.

Authority cannot be delegated *by rule* to the hearing officer to make the

Department's final decision granting or denying the permit. To the extent the Department's rules exceed or conflict with the authority and mandates of the State Act or APA, such rules are invalid. To the extent the rules are interpreted or implemented to exceed or conflict with the statutory authority and mandates, such interpretations must be rejected. The Department is itself the final decision-maker and finder of fact at this level of administrative review. (**See**, Attorney General's "Memorandum of Law," Part IV, "Administrative Review Proceeding," pp.51-53)

The Attorney General fails to cite any cases that are directly on point as to its contention that the Department is enjoined from possessing the status of a "party" in the context of a review of the Department's favorable decision as to an application for a mining permit. It should be noted that the regulations specifically provide the "burdens" of going forward (and the burdens of proof) in the various instances where administrative hearings are necessitated in the review process for applications for new mining permits. Again, the regulations provide that:

1) In a proceeding to review a decision on an application for a new permit:

A) If the permit applicant is seeking review, *the Department shall have the burden of going forward to establish a prima facie case* as to the failure to comply with the applicable requirements of the State Act or regulations or as to the appropriateness of the permit terms and conditions, and the permit applicant shall have the ultimate burden of persuasion as to entitlement to the permit or as to the inappropriateness of the permit terms and conditions.

B) If any other person is seeking review, that person shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion by a preponderance of the evidence that the permit application fails in some manner to comply with the applicable requirements of the State Act or regulations.

2) In all other proceedings held under this Section, the party seeking to reverse the Department's decision shall have the burden of proving by a preponderance of evidence that the Department's decision is in error. (Emphasis added)

The Attorney General fails to take note, within its arguments, that in the instance where it is the permit applicant that is seeking review, it is the *Department* that possesses the "burden of going forward to establish a prima facie case as to the failure [of the permit applicant] to comply with the applicable requirements of the State Act." The Attorney General fails to explain the manner in which the Department is to proceed in *that* capacity other than acting as a "party" for purposes of "going forward" and "establish[ing] a prima facie case." If, indeed, the Department is able to assume the mantle of a "party" in the instance of the administrative hearing conducted where the permit applicant is the party challenging the Department's decision to *deny* issuance of a mining permit, why would an injunction lie with respect to the Department assuming the mantle of a "party" in the instance where it is "responding" to challenges to a decision to *grant* issuance of a mining permit? The administrative hearings are conducted in the same manner (*i.e.*, before a duly appointed Hearing Officer), and the Department is participating within such administrative hearings in exactly the same manner (except with different burdens of proof or persuasion). The reason the Attorney General desires to deprive the Department such limited role as a "party" is in order to deprive the Department of the opportunity to request a pre-hearing conference, and thereby deprive the Department of an ability to potentially delay the commencement of the formal administrative hearing. The Attorney General argues that:

> [t]he Department and its hearing officer failed to timely commence this administrative review hearing. Section 2.11(c) of the Act provides: "Within 30 days after the applicant is notified of the final decision of the Department on the permit application, the applicant or any person with an interest that is or may be adversely affected may request a hearing on the reasons for the final determination. The Department shall hold a hearing within 30 days after this request and notify all interested parties at the time that the applicant is notified." Requests for hearing were filed by the petitioners on or before December 14, 2007. The Attorney General contends that the Department forfeited "jurisdiction" over the administrative review of the permit when it purposefully delayed the commencement

of the hearing.

> Section 1847.3(a) provides that the failure to request a hearing within 30 days after the Department's final decision results in a waiver of the right to such hearing. Section 1847.3(c) states: "Any party to the hearing may request that a pre-hearing conference be scheduled, in accordance with 62 Ill.Adm.Code 1848.7." Section 1847.3(d) provides: "Unless a pre-hearing conference has been scheduled or unless the person requesting the hearing waives the 30 day time limit, the Department shall start the hearing within 30 days after the hearing request." However, it is the practice of the Department to request a pre-hearing conference as if it were a litigant and without any regard to the statutory mandate of Section 2.11(c) of the Act.
>
> The Department's practice of unilaterally postponing the statutorily mandated hearing is inconsistent with the State Act and federal Act as well as other provisions of its own rules. For instance, Section 1847.3(1)(1)(B) provides for judicial review if "the hearing officer or Department failed to act within the time limits specified in the Surface Mining Control and Reclamation Act of 1977 (30 USC 1201 *et seq.*) the Surface Coal Mining Land Conservation and Reclamation Act (State Act) or this Section." This practice of unilaterally postponing the statutorily mandated hearing also renders the Illinois Regulatory Program less effective than the federal laws applicable to administrative appeals of surface mining permit decisions. (**See**, Attorney General's "Memorandum of Law," Part IV, "Administrative Review Proceeding," pp.54-55)

Several observations concerning the issue must be made. First, there is no evidence that the Department's request for a pre-hearing conference *in the context of this particular proceeding* actually caused a delay in the commencement of the administrative hearing that would not have occurred in the absence of the Department's request. As the regulatory language states, "*[a]ny* party to the hearing may request that a pre-hearing conference be scheduled, in accordance with 62 Ill. Adm. Code 1848.7." (**See**, 62 Ill.Admin. Code 1847.3(c)) (Emphasis added) Such request for a pre-hearing conference necessarily negates the necessity of commencing the administrative hearing within the thirty (30) days immediately subsequent to the Department's receipt of a request for an administrative hearing. (**See**, 62 Ill.Admin. Code 1847.3(d), "[u]nless a pre-hearing conference has been scheduled or unless the person requesting the hearing waives the 30 day time limit, the Department shall start the hearing within 30 days after the hearing request.")

Here, any number of entities ("the applicant, or any person with an interest which is or may be adversely affected, may file a written request for a hearing...") could have requested a pre-hearing conference, thereby negating such thirty (30) day time limit for the commencement of the formal administrative hearing. Indeed, as soon as *one* of the "parties" requested such a pre-hearing conference, the necessity of any of the other existing "parties' — or any of the potential parties that had not yet filed a request for review or petition to intervene — filing such a request seeking a pre-hearing conference was obviated. There is no evidence in this record that all of the other parties to this proceeding shared the Attorney General's desire to have the administrative hearing in this docket commenced within thirty (30) days of the initial request that was filed seeking said administrative hearing. Because the identity of the potential parties to the administrative hearing are not definitively established until those parties timely file the requisite requests for hearing (or petitions to intervene) with the Department (subsequent to the issuance of the Department's decision as to the mining permit application), it is impractical to require the Department to provide notification that a request for a pre-hearing conference has actually been filed by one of those "parties" properly seeking to have an administrative hearing conducted.

The Attorney General acknowledges that in this instance the Department timely sought to have a pre-hearing conference conducted (that is, the Attorney General concedes that the Department requested the hearing officer to conduct a pre-hearing conference and that such request was made in writing within thirty (30) days of the initial request made by a party seeking to have an administrative hearing conducted as to the Department's decision granting the mining permit application). The Department's regulations defines in Section 1848.7 the purpose of a pre-hearing conference, wherein it provides that:

[a]t the request of any party to a hearing, a pre-hearing conference shall be scheduled by the hearing officer:

a) To define the factual and legal issues to be litigated at the hearing;

b) To set a discovery schedule for the hearing, in accordance with 62 Ill. Adm. Code 1848.9;

c) To schedule a date for the hearing; and

d) To arrive at an equitable settlement of the hearing request, if possible. (**See**, 62 Ill.Adm. Code 1848.7)

Clearly, those objectives delineated within Section 1848.7 are ones desired to be achieved by the Department (as well as other parties to the proceeding) in the context of a mining application. And while it is true that the written request for a formal administrative hearing requires the "party" to state with specificity the basis of the request for said administrative hearing[16], certainly it can be easily envisioned that a pre-hearing conference would be useful in many cases — especially those with either complex legal and factual issues, or those with multiple parties having "interests" that will or may be adversely affected by the Department's decision in the matter — to facilitate the proper adjudication of questions raised by said requests for

---

[16] The request for an administrative hearing is required to include, among other information, the following:

(a) A clear statement of the facts entitling the petitioner to relief, including the petitioner's interests which is or may be adversely affected by the Department's final decision;

(b) How the Department's final decision may or will adversely affect the interests specified;

(c) An explanation of each specific alleged error in the Department's final decision, including reference to the statutory and/or regulatory provisions allegedly violated. (**See**, 62 Ill.Adm. Code 1847.3(b))

administrative hearing.

Unfortunately, the Department attempts to assert that its ability to request a pre-hearing conference pursuant to Section 1847.3(c) may be considered "as a mechanism of "temporary relief as it deems appropriate' where a hearing has been requested under Section 2.11(c) of the State Act..." (**See**, Department's Brief, p.32) The Attorney General urges that:

> [t]he Department certainly puts its credibility in jeopardy with this specious argument. It equates a pre-hearing conference with "temporary relief" and contends that, because it received "numerous requests for administrative review...from local residents and environmental advocacy groups, such as the Sierra Club and the Eagle Nature Foundation, as well as the unprecedented intervention of the Illinois Attorney General," it purportedly requested temporary relief in the nature of a pre-hearing conference. (**See**, Attorney General's Reply Brief, pp.27-28)

But the Attorney General is correct that the Department's request for a pre-hearing conference "cannot be construed as a motion for temporary relief." (**See**, Attorney General's Reply Brief, p.28) The letter sent to the Hearing Officer by the Department, dated December 20, 2007, requesting a pre-hearing conference:

> ....was sent by staff other than legal counsel and did not seek any "temporary relief" or even refer to Section 1847.3(k). This letter did not include (as would be required by Section 1847.3(k)) a detailed written statement setting forth the reasons why relief should be granted with any allegation of a substantial likelihood that the person seeking relief (*i.e.* the Department) will prevail on the merits of the final determination of the proceeding or the relief sought will not adversely affect the public health or safety or cause significant, imminent environmental harm to land, air or water resources. (**See**, Attorney General's Reply Brief, p.28)

Frankly, there is no reason to create an artifice about the request for a pre-hearing conference as a request for "temporary relief," and I find the Department's attempt to do so wrong-headed. The Department may properly be considered a "party" for the limited purpose of requesting a pre-

hearing conference in the context of a request for review of a permit decision. The Department timely requested such pre-hearing conference, and I find that the delay in scheduling the administrative hearing past the initial thirty (30) days did not deprive the Department (or me) of jurisdiction to hear this matter.

(b)

The Department Does Not Lack Jurisdiction

Because I have ruled that the Department was an appropriate "party" for purposes of seeking and obtaining a pre-hearing conference for purposes of scheduling the commencement of the permit application review, I correlatively rule that the Department did not lose jurisdiction by not commencing the administrative hearing within thirty (30) days of the request for review.

©)

Hearing Officer's Did Not Exceed or Abuse His Authority During Administrative Hearing

I find that the Attorney General's assertion, that my "procedural and substantive rulings [during the Administrative hearings] were arbitrary and capricious," as unfounded. (**See**, Attorney General's Brief, p.147) Certainly a reviewing Court may review such rulings to determine whether, indeed, the Attorney General's pejorative accusations are correct. I stand by the rulings made. As to the accusation of "impartiality," again the record speaks for itself. And lastly, as to the *ad hominem* comments concerning the Hearing Officer's character, motivation, or

competence leveled by the Attorney General's counsel and sprinkled throughout the Attorney General's pleadings, such are unprofessional and have been ignored.

Proposed Findings of Fact:

1. The permit at issue herein, Banner Application #355, filed with the Illinois Department of Natural Resources, Office of Mines and Minerals, Land Reclamation Division (hereinafter Department) involves a surface coal mining and reclamation operations permit covering a tract of land, approximately 600 acres, located in Banner Township, Fulton County, Illinois.

2. The parties challenging the Department's issuance of the permit are the Illinois Attorney General's Office (hereinafter "Illinois Attorney General" or Attorney General"), Joyce Blumenshine and Rudy Habben on behalf of the Illinois Sierra Club (hereinafter "Sierra Club"), Terrance N. Ingram on behalf of Eagle Nature Foundation (hereinafter "Ingram"), and local residents (12) which include Kenneth Fuller, Richard B. Fuller, John R. Grigsby, Sr., Kenneth Grigsby, Mike Grigsby, Naomi and William Lott, Robert L. Williams, Lavern and Jean Yeske, and Sheila and Joseph Cook, as well as other interested persons (5) that include Elizabeth Gray, Jane Johnson, Janis King, Margaret Mitchell, and Richard Stout (hereinafter Petitioners").

3. Capital Development Company, LLC, the permit holder for Permit #355, intervened in this proceeding as the Permittee and party-in-interest (hereinafter "Applicant" or "Capital").

4. On February 7, 2002, Capital submitted the initial permit application for surface coal mining and reclamation operations to the Department.

5. On May 4, 2004, the Department issued its determination that the application was administratively complete, and designated the application as Application No. 355.

6. On May 17, 2004, two copies of the administratively-complete Application were submitted to the Department.

7. The Application was filed with the Fulton County Clerk on May 18, 2004, and public notice of the complete Application was published in the Canton Daily Ledger for four consecutive weeks (5/27/04, 6/3/04, 6/10/04, and 6/17/04).

8. Written notice of the Application was provided to the governmental agencies and entities, required to receive notice under 62 Ill.Adm.Code 1773.13(a)(3). The following state and federal agencies provided written comments on the Application: Illinois Department of Agriculture, Illinois Environmental Protection Agency ("IEPA"), Natural Resources Conservation Service, U.S. Fish and Wildlife Service, U.S. Corps of Engineers. (**See**, November 15, 20087 Results of Review at p.3)

9. On August 31, 2004, following the published newspaper notice, a public hearing on the Application was held in Banner, Illinois. The hearing was attended by representatives of Capital and the Department, as well as various members of the public. (**See**, Transcript of August 32, 2004 Hearing on Application 355, Banner Mine)

10. On July 10, 2007, the Department issued a second request for modification in Capital. Capital submitted the written modifications required by the Department on September

27, 2007.

11. Capital was notified on October 26, 2007, that the Department had approved the Application. (**See**, Department Exhibit #95)

12. On November 7, 2007, Capital made its final, formal Application submitted to the Department, which included the payment of the permit fees and the posting of the required reclamation bond.

13. The Department issued Permit No. 355 to Capital on November 15, 2007.

14. On November 9, 2004, the Department submitted a request for modification to Capital which requested additional information regarding approximately fifty items concerning the Application (the "2004 Modification Request").

15. Capital's 884-page response to the modification request was sent to the Department on November 7, 2005.

16. The Department issued its denial of the Application, without prejudice, on December 6, 2005; The denial was predicated on a pending legal action filed in the Fulton County Circuit Court appealing the Fulton County Superintendent of Highway's decision to vacate a road within the permit area covered by the Application.

17. On January 3, 3006, Capital timely filed an administrative appeal of the Department's denial of the Application, and, on August 15, 2006, filed a Motion to Vacate and Remand the Department's permit denial.

18. On March 7, 2007, the Third District Appellate Court in *Michael Grigsby, el al. v. Richard Ball, et al.*, No. 05-MR-25 (Fulton County), affirmed the decision to vacate the road.

19. On April 27, 2007, after Capital appealed the permit denial, the Department's Hearing Officer issued an Order remanding the Application to the Department so that the Department could continue to process the Application (in light of the Department's denial having been effectively overruled by the Circuit and Appellate Courts).

20. Pursuant to the Order, the Department's Hearing Officer directed the Department to complete its review of the Application within thirty (30) days, but thereafter that deadline was extended on August 8, 2007, by an additional 180 days.

21. On November 16, 2007, Permit Application No. 355 was granted by the Department.

22. Thereafter, on December 17, 2007, the individuals previously cited (on behalf of themselves or as representative of their respective organizations or office) filed Petitions seeking review of that Permit approval.

23. Written notice of Application #355 was provided by the Department to the governmental agencies and entities (Illinois Department of Agriculture, Illinois Environmental Protection Agency ("IEPA"), Natural Resources Conservation Service, U.S. Fish and Wildlife Service, U.S. Corps of Engineers) as required pursuant to 62 Ill.Adm.Code 1773.13(a)(3). (**See**, November 15, 20087 Results of Review at p.3)

24. The federal Surface Mining and Control and Reclamation Act of 1977, 30 U.S.C. §§1201 *et seq.* (hereinafter "SMCRA" or "Federal Act") established the background for a "nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." (SMCRA, Sec. 102(a)).

25. SMCRA created the Office of Surface Mining Reclamation and Enforcement within the U.S. Department of Interior ("OSM"), which was charged with "assisting the States in development of State programs for surface coal mining and reclamation operations which satisfy the requirement of the Federal Act, and at the same time, reflect local requirements and local agriculture conditions." (SMCRA, Sec. 201(c)(9)).

26. The Secretary of the Interior, through OSM, was charged with administering the Federal Act and prescribing regulations to implement its provisions. (SMCRA, Secs. 201(c)(2) and 304); Such federal regulations are certified at 30 CFR 700 through 955.

27. Under the Federal Act, Congress recognized and declared that due to the "diversity in terrain, climate, biologic, chemical and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act rest with the States. (SMCRA, Sec. 101(f))

28. The State of Illinois and others that elected to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations within their state boundaries were given the opportunity to devise and submit to the Secretary of Interior a state program "which demonstrates that such State has the capacity of carrying out the provisions of [SMCRA] and meeting its purposes...." (SMCRA, Sec. 503(a))

29. The Secretary is precluded from approving a State program unless it was found that "the program provides for the State to carry out the provisions and meet the purposes of the ...[Federal Act and regulations]....within the State and that the State's law and regulations are in

accordance with the provision of the [Federal] Act and consistent with the requirement of the [Federal regulations]." (30 CRF 732.150)

30. Upon the Secretary's approval of a state program, the state assumes exclusive jurisdiction or "primacy" over the regulation of surface mining and reclamation operations within its borders. (SMCRA, Sec. 503(a)) OSM's role in a primacy state, such as Illinois, is one of oversight; that is, OSM is responsible for evaluating the administration of the state program. (30 CFR 701.4 and 733.12)

31. Illinois, through the Land Reclamation Division of the former Department of Mines and Minerals, currently the Office of Mines and Minerals for the Department of Natural Resources, assumed exclusive jurisdiction over the regulation of surface coal mining and reclamation operations within its borders upon OSM approval on June 1, 1982. (**See**, 30 CFR 913.10)

32. The Department's Land Reclamation Division on was bestowed with the full "regulatory authority" permitted under SMCRA for all surface coal mining and reclamation operations in Illinois. That is, the Secretary found in 1982 that Illinois' program met the intent and purpose of SMCRA and its regulations.

33. Pursuant to its authority under Section 215/4 of the Attorney General Act (15 ILCS 205/4), the Illinois Attorney General's Office also certified the Illinois program for regulation of surface coal mining and reclamation operations when federal approval was granted to Illinois on October 25, 1988. (53 FR 43112)

34. The Illinois program consists of the Surface Coal Mining Land Conservation and

Reclamation Act (State Act), 225 ILCS 720/1.01 *et seq.*, and regulations as promulgated thereunder at 62 Ill.Adm.Code 1700 through 1850.

35. Since its initial approval in 1982, the Department has amended the program by means of legislative and regulatory changes, all of which require approval by OSM before taking effect in the State. (30 CFR 732.17)

36. Amendments to the State Act and its regulations require approval of the State Legislature, its Joint Committee on Administrative Rulemaking, and other state entities, such as the Illinois Attorney General's Office.

37. All aspects of the regulatory program under the State Act are regularly audited by OSM every year under the terms of its federal funding grant from OSM to the Department in order to determine compliance of the Illinois program with federal SMCRA requirements.

38. Under the Illinois program, the contents of every permit application are reviewed by the Department pursuant to Section 2.02(a) of the State Act, 225 ILCS 720/2.02, and its regulations to first determine whether an application for permit approval is an "administratively complete application," as defined under Section 1701 Appendix A Definitions, 62 Ill.Adm. Code 1701.

39. The Department determines that an application is "administratively complete" if the application contains "information addressing each application requirement of the regulatory program" and "all information necessary to initiate processing and public review" pursuant to 62 Ill.Adm.Code 1773.

40. Upon submission of an "administratively complete application," the applicant is

required to file the application with the clerk at the courthouse for the county where the mining activity is proposed and to place a public notice pursuant to 62 Ill.Adm. Code 1773.13(a)(1).

41. Upon submission of an "administratively complete application," the Department sends written notification to local governmental agencies with jurisdiction over or an interest in the area of the proposed mining and reclamation operation, as well as to all federal or state governmental agencies with authority to: (a) issue permits applicable to the proposed mining and reclamation operations, and (b) participate in the permit coordinating process under Section 503(a)(6) of the Federal Act or 62 Ill. Adm. Code 1773.13(a)(3) and 1773.12.

42. Under the Illinois program and its provisions for public participation in the permit process, any person and/or agency having an interest, which is or may be adversely affected by the Department's decision on an application, may submit written comments or objections to a permit application.

42. Such persons as described in Finding 42 may also request an information conference and/or a public hearing on the permit application (62 Ill.Adm. Code 1773.13(c) and 1773.14)

42. At the "informal" public hearing, the moderating official is required to permit, among the moderator's other administrative duties, all participants to present data, view points or argument relevant to the permit application in order to develop a "clear and complete record." (62 Ill.Adm.Code 1773.14(d))

43. Following the close of the "informal" public hearing, the comment period is held open for ten (10) days, or for other reasonable time so as to allow inclusion of additional

responsive written or oral statements or presentations, pursuant to 62 Ill.Adm.Code 1773.14(d)(5).

44. After the close of the comment period, the Department may either grant, deny or require modification of the "administratively complete" application. (62 Ill.Adm.Code 1773.15(a))

45. In making this determination to grant, deny, or request modifications, the Department must review written comments and objections submitted as well as the records of any public hearings held on the "administratively complete" application. (62 Ill.Adm.Code 1773.15(a)(1))

46. Any decision for approval of an application requires that the Department find that the application was "complete, accurate...[and]...complied with the Federal Act, State Act and the regulatory program," including "public participation" requirements. (62 Ill.Adm.Code 1773.15(c) and 1773.19 respectively)

47. As to requests for modification of an "administratively complete" application, the Department must issue such written decision requiring modification of the application within 60 days after the close of the public hearing date. (62 Ill.Adm.Code 1773.15(a)(1)(B))

48. Unless just cause for extension of this time limit is demonstrated, the applicant must submit the required modifications within one year after the date of receiving the Department's written request for modification.

49. After receipt of the applicant's response to the required modifications, the Department reviews the responses and issues a written decision either granting or denying the

application. (62 Ill.Adm.Code 1773.15(a)(1)(B) and 1773.19)

50. Such final decision to grant or deny any pending "administratively complete" application, as modified, must be issued under the time limits prescribed by 62 Ill.Adm.Code 1773.19, unless waived by the applicant.

51. The burden of establishing that an application is in compliance with all the requirements of the regulatory program rests with the permit applicant. (62 Ill.Adm.Code 1773.15(a)(2))

52. Once the Department has made a final decision on a permit application, any person with an interest which is or may be adversely affected may request a hearing within 30 days after the mailing date of written notice of the final decision concerning the reason for the final determination. (225 ILCS 720/2.02(c) and 62 Ill.Adm.Code 1847.3(a))

53. Failure to file a request for hearing within this 30 day period results in a waiver to such hearing. (62 Ill.Adm.Code 1847.3(a))

54. The Department is required to "start the hearing within 30 days after the hearing request[s]...unless a pre-hearing conference has been scheduled or unless the person requesting hearing waives the 30 day time-limit." (62 Ill.Adm.Code 1847.3(d))

55. If an administrative review is requested, the Department "may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceedings" upon notice to all parties to the proceedings, showing of "substantial likelihood...[to]...prevail on the merits," and "such relief will not adversely affect the public health or safety or cause significant imminent environmental harm to land, air, or water

resources." (225 ILCS 720/2.01(e))

56. The State Act and its implementing regulations, in conformance with the Federal Act, also provides for the designation of certain lands as unsuitable for mining operations.

57. The substantive criteria for designating certain lands unsuitable for mining operations are as follows: (a) if reclamation of mine operations is not technologically and economically feasible, *or* (b) if such mine operations would be: (1) incompatible with existing state or local land use plans, (2) affect fragile or historic lands, (3) affect renewable resource lands and long-term loss or reduction in water supply or food/fiber productivity, *or* (4) affect natural hazard lands, such as areas of frequent flooding or unstable geology, that could endanger life and property. (225 ILCS 720.7.02(a) and (b), and 62 Ill.Adm.Code 1762.11))

58. Any person having an interest which is or maybe adversely affected has the right to petition the Department for designating such area as unsuitable for mining.

59. The merits of such petition (hereinafter, "lands unsuitability for mining petition") require "allegations of fact with supporting evidence which would tend to establish the allegations" and a finding that the petition is not "incomplete, frivolous, or submitted by a person lacking an interest which is or may be adversely affected" by the proposed coal mining operations." (225 ILCS 720/7.03(a) and (b))

60. The State Act authorizes additional procedures, namely 62 Ill.Adm.Code 1762, 1764, and more specifically 1764.13 and 1764.15 which describes information criteria for a "complete petition" and the "initial processing" requirements for a land unsuitable for mining petition, respectively. (225 ILCS 720/7.03(f))

61. The State program, in conformance with the Federal program, also prohibits processing "any petition received insofar as it pertains to lands for which an administratively complete permit application has been filed and the first newpaper notice has been published." (62 Ill.Adm.Code 1764.15(a)(6))

62. As to judicial review of a land suitability designation or the termination of a land unsuitability for mining petition, the State Act specifically provides that "all final administrative decisions of the Department under this Act are subject to judicial review pursuant to the Administrative Review Law..." (225 ILCS 720/8.10), with the exception of administrative remedies created by the State Act, such as hearings to contest the Department's final decision concerning a permit application for surface coal mining and reclamation operations.

Additional Proposed Findings:

63. Because the Attorney General has not shown nor proven that the Department and its hearing officer improperly failed to timely commence this administrative review hearing within 30 days of the requests as mandated by Section 2.11(c) of the Act, the Department possessed legal ability to conduct a hearing on the reasons for the final decision;

64. The Director of the Department finds that the petitioners timely filed requests for hearing on or before December 14, 2007.

65. The Director of the Department finds that the Department and its hearing officer did not fail to timely commence this administrative review hearing within 30 days of the requests for hearing, inasmuch as a timely pre-hearing conference was requested by the Department.

66. The Director of the Department concludes that the Department is not now

authorized to issue a final administrative decision, inasmuch as this matter must be remanded in accordance with the Hearing Officer's Recommended Order,

67. The Director of the Department finds that the Company submitted a permit application to the Department on February 7, 2002.

68. The Director of the Department finds that the Company did not at the time of the initial submission of the mining permit Application place a public notice of the application in a local newspaper of general circulation in the locality of the proposed mining operations to appear at least once a week for four consecutive weeks, nor file the application for public inspection at the county seat of each county containing land to be affected under the permit, inasmuch as the Department had not yet determined that the permit application "administratively complete."

69. The Director of the Department finds that the Company did timely place public notice of the application and timely filed the application for public inspection, after May 27, 2004, within the time limits after the permit application was deemed "administratively complete" by the Department.

70. The Director of the Department finds that the Department did not upon receipt of the initial permit application notify the various local governmental bodies, planning agencies, sewage and water treatment authorities, and water companies in the locality in which the proposed mining will take place, of the operator's intention to mine a particularly described tract of land and state the permit application's number and where a copy of the application may be inspected, nor was the Department obligated to do so, inasmuch as the Department had not yet determined that the application was "administratively complete."

71. The Director of the Department finds that the Department had no later than March 2002 assigned a number to the permit application submitted by the Company, to wit: Application No.355.

72. The Director of the Department finds that the Department provided the governmental notifications on or about June 3, 2004.

73. The Director of the Department concludes that the Company timely complied with the public notification requirements and thereby did not violate Section 2.04(a) of the Act.

74. The Director of the Department concludes that the Department timely complied with the governmental notification requirements and thereby did not violate Section 2.04(c) of the Act.

75. The Director of the Department finds that the permit application filed on February 7, 2002, was not accompanied by the statutorily required permit fee, but that such fee was not due and owing until the Department deemed the application "administratively complete" and the Company had responded to the modifications demanded by the Department.

76. The Director of the Department finds that the Company timely paid the statutorily required permit fee subsequent to October 26, 2007, which was subsequent to the Department's determination that the application was "administratively complete."

77. The Director of the Department concludes that the Company complied with the permit fee requirements and thereby did not violate Section 2.05 of the Act.

78. The Director of the Department finds that as of May 5, 2004, Application No. 355 was an "administratively complete application" because it contained information addressing

each of the relevant application requirements of the regulatory program required of the applicant to complete and it contained all information necessary to initiate processing and public review.

79. The Director of the Department concludes that its determination on May 5, 2004, that Application No. 355 was an "administratively complete application" was proper and appropriate.

80. The Director of the Department finds that the public hearing conducted on August 31, 2004, provided a reasonable opportunity for all parties to respond by oral or written testimony, or both, to statements and objections made at the public hearing.

81. The Director of the Department concludes that the public hearing conducted on August 31, 2004, satisfied the public participation requirements imposed by Section 2.04(e) of the Act.

82. The Director of the Department concludes that the public hearing conducted on August 31, 2004, satisfied the contested case requirements imposed by the Illinois Administrative Procedure Act, inasmuch as the hearing was only the initial hearing under the application process, and by the applicable regulations, was supposed to be "informal" in nature.

83. The Director of the Department finds that the Company's November 2005 modifications to Application No. 355 complied with the Act and applicable rules.

84. The Director of the Department finds that the Department did not improperly fail to process Unsuitability Petition LU-005, nor did the Department fail to timely determine the completeness of said petition in accordance with Sections 1764.13 and 1764.15.

85. The Director of the Department finds that the termination on April 27, 2007 of

the administrative proceeding as to Unsuitability Petition LU-005 was authorized by the Act, the Department's regulations, and applicable law.

86. The Director of the Department concludes that the hearing officer did not exceed his authority in the April 27, 2007 remand order when he imposed deadlines on the specific subsequent permit review at issue as to said Order.

87. The Director of the Department finds that the Company's November 2007 modifications to Application No. 355 complied with the Act and applicable rules.

88. The Director of the Department finds that the Company's November 2007 modifications to Application No. 355 were verified by Mr. Thomas Korman as president of Capital Resources Development Company and submitted at a time when Capital Resources Development Company was no longer a legal entity.

89. The Director of the Department finds that on October 26, 2007, when Application No. 355 was approved, the permit applicant, Capital Resources Development Company, a Delaware corporation, was no longer a legal entity.

90. The Director of the Department finds that on November 15, 2007, when the permit sought by Application No. 355 was issued, the permit applicant, Capital Resources Development Company, a Delaware corporation, was no longer a legal entity.

91. The Director of the Department finds that as of November 15, 2007, Application No. 355 was inaccurate and incomplete inasmuch as the requisite documents and information pertaining to the applicant's ownership and the applicant's right to legal access to the proposed permit area had not been made part of the administrative record.

92. The Director of the Department concludes that its November 15, 2007, written finding, pursuant to Section 1773.15(c)(1), that the permit application was accurate and complete and all the requirements of the Act had been complied with in the application was in error because of the lack of the requisite documents and information pertaining to the applicant's ownership and right to legal access to the proposed permit area.

93. The Director of the Department finds that as of November 15, 2007, Application No. 355 demonstrated that reclamation as required by this Act could be accomplished under the reclamation plan.

94. The Director of the Department finds that the excess spoil pile as part of the approved reclamation plan complied with the statutory requirement of approximate final contours, in light of all the evidence adduced at the administrative hearings concerning this issue.

95. The Director of the Department concludes that its November 15, 2007, written finding, pursuant to Section 1773.15(c)(2), that the applicant had demonstrated that reclamation as required by this Act can be accomplished under the reclamation plan, was correct.

96. The Director of the Department concludes that its November 15, 2007, final decision properly determined, as a minimum, that as to reclamation, the Company's operations could and did meet all applicable performance standards in Sections 3.03 and 3.04 of the Act.

97. The Director of the Department concludes that its November 15, 2007, final decision properly determined, as a minimum, that as to excess spoil, the Company's operations could and did meet all applicable performance standards in Section 3.17 of the Act.

98. The Director of the Department finds that on November 15, 2007, when the

permit sought by Application No. 355 was issued, the administrative proceeding as to Unsuitability Petition LU-005 was not still pending by virtue of the circuit court action appealing its termination in April, inasmuch as the Unsuitability Petition LU-005 had never been legally "pending," but was properly dismissed, previously, because of the pendency of permit application #355.

99. The Director of the Department concludes that its November 15, 2007, written finding, pursuant to Section 1773.15(c)(3), that the area proposed to be mined was not within an area under study for designation as unsuitable for surface coal mining, was correct.

100. The Director of the Department finds that on November 15, 2007, when the permit sought by Application No. 355 was issued, its assessment of the probable cumulative impact of all anticipated mining on the hydrologic balance in the cumulative impact area was supported by sufficient facts, and that site-specific data was not mandated as part of this portion of the application, as asserted by Petitioners.

101. The Director of the Department finds that on November 15, 2007, when the permit sought by Application No. 355 was issued, the Company sufficiently demonstrated that its operations had been designed to prevent material damage to the hydrologic balance outside the proposed permit area, according to the Department's assessment of the probable cumulative impact of all anticipated mining on the hydrologic balance in the cumulative impact area.

102. The Director of the Department finds that on November 15, 2007, when the permit sought by Application No. 355 was issued, the Company sufficiently demonstrated that its operations had been designed to adequately drain, impound, and treat the runoff water from

affected areas so as to reduce soil erosion, damage to unmined lands, and pollution of streams and other waters.

103. The Director of the Department concludes that its November 15, 2007, assessment of the probable cumulative impact of all anticipated mining on the hydrologic balance in the cumulative impact area, was correct.

104. The Director of the Department concludes that its November 15, 2007, written finding, pursuant to Section 1773.15(c)(5), that the operations had been designed to prevent material damage to the hydrologic balance outside the proposed permit area according to the Department's assessment of the probable cumulative impact of all anticipated mining on the hydrologic balance in the cumulative impact area, was correct.

105. The Director of the Department concludes that its November 15, 2007, final decision properly determined, as a minimum, that as to hydrology, the Company's operations met all applicable performance standards in Section 3.10 of the Act.

106. The Director of the Department concludes that its November 15, 2007, final decision properly determined, as a minimum, that as to runoff water, the Company's operations meet all applicable performance standards in Section 3.08 of the Act.

107. The Director of the Department finds that on November 15, 2007, when the permit sought by Application No. 355 was issued, the applicant had provided sufficient factual justification as to Section 1785.17 with respect to prime farmland.

108. The Director of the Department concludes that its November 15, 2007, written finding, pursuant to Section 1773.1 5(c)(8), that applicant had satisfied the requirements as to

Section 1785.17 with respect to prime farmland, was correct.

109. The Director of the Department concludes that its November 15, 2007, final decision properly determined, as a minimum, that as to prime farmland, the Company's operations meet all applicable performance standards in Section 3.07 of the Act.

110. The Director of the Department finds that on November 15, 2007, when the permit sought by Application No. 355 was issued, the applicant had provided sufficient factual justification as to Section 1816.111(d) with respect to agricultural post-mining land use.

111. The Director of the Department concludes that its November 15, 2007, written finding, pursuant to Section 1773.15(c)(9), that applicant had satisfied the requirements as to Section 1816.111(d) with respect to agricultural post-mining land use, was correct.

112. The Director of the Department finds that on November 15, 2007, when the permit sought by Application No, 355 was issued, the strip mining operation would not affect the continued existence of the endangered species of osprey or result in destruction or adverse modification of its "essential habitat" under State law.

113. The Director of the Department finds that on November 15, 2007, when the permit sought by Application No. 355 was issued, the strip mining operation would not affect the continued existence of the threatened species of bald eagle or result in destruction or adverse modification of its "essential habitat" under State law.

114. The Director of the Department finds that on November 15, 2007, when the permit sought by Application No. 355 was issued, the strip mining operation would not affect the continued existence of the endangered species of the black-crowned night-heron or result in

destruction or adverse modification of its "essential habitat" under State law.

115. The Director of the Department finds that on November 15, 2007, when the permit sought by Application No. 355 was issued, the strip mining operation would not affect the continued existence of the threatened species of the decurrent false aster or result in destruction or adverse modification of its "essential habitat" under State law.

116. The Director of the Department finds that on November 15, 2007, when the permit sought by Application No. 355 was issued, the protection and enhancement plans were adequate and the Company possessed the ability to maintain and preserve the buffer zones established in such plans.

117. The Director of the Department concludes that its November 15, 2007, written finding, pursuant to Section 1773. 15(c)(10), that the strip mining operation would not affect the continued existence of endangered or threatened species or result in destruction or adverse modification of their critical habitats, was correct.

118. The Director of the Department concludes that its November 15, 2007, final decision required the Company to minimize disturbances and adverse impacts upon wildlife and related environmental values.

119. The Director of the Department concludes that its November 15, 2007, final decision required, as a minimum, that as to wildlife and related environmental values, the Company's operations meet all applicable performance standards in Section 3.18 of the Act.

120. As to Finding of Facts 112 through 119, the Hearing Officer rules that such findings were made without the Department specifically reviewing site-specific data and habitat.

and therefore, such findings must be assessed again in light of site-specific data as mandated by 62 Ill.Adm.Code §1780.16(a)(2).

121[a]. The Director of the Department finds that on November 15, 2007, when the permit sought by Application No. 355 was issued, the Company adequately took into account the effect of the proposed permitting action on properties listed on and eligible for listing on the National Register of Historic Places.

121[b]. The Director of the Department concludes that its November 15, 2007, written finding, pursuant to Section 1773.15(c)(12), that it had taken into account the effect of the proposed permitting action on properties listed on and eligible for listing on the National Register of Historic Places, was correct.

122. The Director of the Department finds that on November 15, 2007, when the permit sought by Application No. 355 was issued, the Department made the necessary ruling as to permission to mine that was required to address the issue of the Stream Buffer Rule in Section 1816.57 and thereby specifically authorizing the diversion of Baker Hollow Creek.

123. The Director of the Department finds that its November 15, 2007, final decision did not include a written finding that the original stream channel of Baker Hollow Creek and its associated riparian vegetation will be restored, but affirmatively states that it was not required to make such a written finding for purposes of the Stream Buffer Rule.

124. The Director of the Department finds that its November 15, 2007, final decision did not include a written finding as to Baker Hollow Creek that any temporary or permanent stream channel diversion will comply with Section 1816.43, but affirmatively states that it was

not required to make such a written finding for purposes of the Stream Buffer Rule.

125. The Director of the Department finds that as of November 15, 2007, Baker Hollow Creek contained habitats of unusually high value for fish and wildlife.

126. The Director of the Department concludes that its November 15, 2007, final decision required, as a minimum, that as to Baker Hollow Creek, the Company's operations meet all applicable performance standards in Section 3.10 of the Act.

127. The Director of the Department finds that on November 15, 2007, when the permit sought by Application No. 355 was issued, the Department had properly performed all statutorily mandated consultations with the Department's Office of Realty and Environmental Planning.

128. The Director of the Department finds that on November 15, 2007, when the permit sought by Application No. 355 was issued, listed species and a designated Natural Area, Slim Lake, had been identified within the vicinity of the proposed strip mine.

129. The Director of the Department concludes that its November 15, 2007, final decision was issued in full compliance with the Illinois Natural Areas Preservation Act, and the Department did not fail to evaluate whether the actions authorized by the strip mining permit were likely to result in the destruction or adverse modification of any natural area that is registered under this Act or identified in the Illinois Natural Areas Inventory.

130. The Director of the Department concludes that its November 15, 2007, final decision was issued in full compliance with the Illinois Endangered Species Protection Act, and the Department did not fail to evaluate whether the actions authorized by the strip mining permit

were likely to jeopardize the continued existence of Illinois listed endangered and threatened species or are likely to result in the destruction or adverse modification of the designated essential habitat of such species.

131. The Director of the Department concludes that its November 15, 2007, final decision was issued in full compliance with the Consultation Procedures for Assessing Impacts of Agency Actions on Endangered and Threatened Species and Natural Areas at 17 Ill. Adm, Code Part

1075.

132. The Director of the Department finds that on November 15, 2007, when the permit sought by Application No. 355 was issued, the Department had ensured the Company would use the best technology currently available, so that the Company would minimize disturbances and adverse impacts upon wildlife and related environmental values.

Proposed Conclusions of Law

1. The contents of permit application #355 were reviewed by the Department pursuant to Section 2.02(a) of the State Act, 225 ILCS 720/2.02, and its regulations to first determine whether an application for permit approval is an "administratively complete application," as defined under Section 1701 Appendix A Definitions, 62 Ill.Adm. Code 1701.

2. The Attorney General and the Petitioners, pursuant to Section 1847.3(g)(1)(B) of the Department's rules, have the burden of persuasion in this matter, and therefore the Attorney General and the Petitioners shall have the burden of going forward to establish a prima facie case

and the ultimate burden of persuasion by a preponderance of the evidence that the permit application fails in some manner to comply with the applicable requirements of the State Act or regulations.

3. The Company erred in asserting that the "role of the Hearing Officer in this proceeding is not to reweigh evidence or substitute its [sic] judgment for that of the Department; rather it is the Hearing Officer's job to determine whether the Department's findings in support of its decision to grant the Banner Permit are against the preponderance of the evidence. (**See**, Company's Brief, p.6, *citing Excelon Corporation v. Department of Revenue*, 2009 Ill.LEXIS 188, *6-7, Illinois Supreme Court Docket No. 105582 (Feb.20, 2009))

4. Neither the *Excelon* decision nor the Illinois Administrative Review Act has any relevance as to the burden or proof or the burden of persuasion for this proceeding.

5. The Department erred when it asserted that the Department's "decisions on questions of fact are entitled to deference and are [to be] reversed only if against the *manifest weight of the evidence*." (**See**, Department's Brief, p.12, *citing Friends of Israel Defense Forces v. Department of Revenue*, 315 Ill.App.3d 298, 302, 248 Ill.Dec. 114, 733 N.E.2d 789, 792-93 (2000))

6. The Attorney General and the Petitioners had the burden of going forward to establish a prima facie case, and the ultimate burden of persuasion, by a preponderance of the evidence that the permit application fails in some manner to comply with the applicable requirements of the State Act or regulations.

7. As to the issue of standing, because in Illinois standing is an affirmative defense,

Greer, 122 Ill.2d at 494, the Department and Capital had the burden to plead and prove lack of standing of the Attorney General.

8. In the context of an administrative proceeding such as the instance cause, allegation of 'a statutory violation by an administrative agency' by the Attorney General is in itself a sufficient interest for standing purposes.

9. That Attorney General has standing in this matter.

10. The Company and the Department complied with their respective statutory obligations imposed by Section 2.04 of the Act regarding notifications to the public and governmental agencies and availability of the application for public inspection.

11. The Department's determination that "as of May 5, 2004 Application No. 355 was an 'administratively complete application' was correct in that the application did then contain all necessary information addressing the application requirements of the regulatory program and necessary to initiate processing and public review.

12. The public hearing conducted on August 31, 2004 by the Department satisfied the public participation requirements imposed by Section 2.04(e) of the Act and did not violate the contested case requirements of the Illinois Administrative Procedure Act ("APA").

13. Neither the Act nor the Department's regulations require that the Department or the permit applicant be subject to cross-examination at the informal public hearing contemplated by Section 1773.14, and I do not find any violation of the law by virtue of the Department not permitting such cross-examination by the participants at the August 31, 2004 informal hearing.

14. Section 2.11 of the Act specifies that the focus of the instant administrative review proceeding is to be on the Department's 'final determination,'" and not necessarily on the preliminary determination by the Department concerning the "completeness" of the filed application, and therefore I find that the Department possesses significant discretion when determining whether a permit application is "administratively complete" and when modification requests have been adequately addressed by the applicant.

15. The Department's May 4, 2004 completeness determination was not contradicted by the Department's subsequent 50 item modification request on November 10, 2004.

16. The Attorney General contention that the assessments and evaluations performed by the Department following the April 27, 2007 order of remand may have been adversely affected by the imposition of deadlines by the hearing officer, which required the Department to resume its review of the permit application and make specific findings within 30 days, is not supported by the evidence and is therefore mere speculation.

17. The establishment of a deadline in the April 27, 2007 Order was an act that did not exceed the authority of the hearing officer.

18. Section 1778.13(a) of the Department's regulations requires the permit application to state "whether the applicant is a corporation, partnership, single proprietorship, association, or other business entity."

19. Section 1778.13(b) of the Department's regulations requires the application to identify "the applicant, the operator (if different from the applicant), the person who will pay the abandoned mine land reclamation fee, and the applicant's resident agent who will accept service

of process."

20. Section 1778.13(c) of the Department's regulations requires that each person who "owns or controls" the applicant (as specifically defined in Sectoin 1773.5) be identified.

21. Section 1778.13(c) of the Department's regulations also mandates application information regarding: the person's "ownership or control relationship to the applicant, including percentage of ownership and location in organizational structure;" the "title of the person's position [and] date position was assumed;" and the "application number or other state or federal identifier of, and the regulatory authority for, any other pending surface coal mining operation permit application filed by the person in any State in the United States."

22. Section 1778.13(d) of the Department's regulations requires that "any surface coal mining operation owned or controlled by either the applicant or by any person who owns or controls the applicant under the definition of 'owned or controlled' and 'owns or controls'" must be identified in the application.

23. Sections 1778.13(e) and 1778.13(f) of the Department's regulations respectively require the application to contain the names and addresses "of each legal or equitable owner of record of the surface and mineral property to be mined, each holder of record of any leaseholder interest in the property to be mined, and any purchaser of record under a real estate contract for the property to be mined" and "of each owner of record of all property (surface and subsurface) contiguous to any part of the proposed permit area."

24. Section 1778.13(h) of the Department's regulations requires that "a statement of all lands, interest in lands, options, or pending bids on interests held or made by the applicant for

lands contiguous to the area described in the permit application," must be included in the application.

25. Section 1778.13(i) of the Department's regulations provides that "after an applicant is notified that his or her application is approved, but before the permit is issued, the applicant shall, as applicable, update, correct, or indicate that no change has occurred in the information previously submitted under subsections (a) through (d)."

26. The administrative record does not include the requisite information mandated by Section 1778.13, and therefore this matter must be remanded so that such information is properly filed with the Department.

27. Section 1816.71(g)(2) of Department regulations establish requirements for boxcut spoils, including the requirement that "boxcut spoils shall blend with undisturbed land with a maximum outslope steepness of twenty-five (25) percent (4h:1v)."

28. The Company complied with the Department regulations with respect to the excess spoils in that the ultimate slope contour is well within the purview permitted by the Department's regulations and statute, and therefore I find that the Attorney General has not proven, by a preponderance of the evidence, that such "approval [by the Department] of the excess spoils is more likely than not contrary to law."

29. The Department possesses considerable discretion to determine the type of information and data it may require of an applicant to comply with the requirements of Section 1780.21 (hydrology issues), and such discretion includes utilization of information other than site-specific testing if the other information provided by the applicant is otherwise probative of

the issues raised by the regulations.

30. The Department is not required to mandate utilization of site-specific data for an applicant's compliance with the requirements of Section 1780.21 of the regulations.

31. The Department's determination, that the Company's characterization of the groundwater quantity was sufficient for a proper assessment of cumulative hydrologic impacts, was supported by a preponderance of the evidence.

32. The Company has sufficiently demonstrated compliance with the regulations to have permitted the Department to perform its hydrologic impact assessment as to this Application.

33. The Attorney General and the Petitioners have not provided sufficient evidence to demonstrate that Capital failed to tender to the Department the requisite data and information regarding the quality and quantity, as well as the impact at the site, of groundwater and surface waters for the permit and adjacent area, as required by Section 1780.21.

34. The Company has sufficiently demonstrated compliance with the regulations to have permitted the Department to perform its hydrologic impact assessment as to this Application.

32. The Attorney General and the Petitioners have not provided sufficient evidence to demonstrate that Capital failed to tender to the Department the requisite data and information regarding the quality and quantity, as well as the impact at the site, of groundwater and surface waters for the permit and adjacent area as required by Section 1780.21.

33. Neither the Petitioners nor the Attorney General provided sufficient evidence to

prove that "groundwater and surface water quality will be affected by the proposed mining, in light of the 'mobilization of trace elements.'"

34. The fact that no coal processing will occur at the site encompassed by Application #355 significantly reduces the potentiality that such "mobilization of trace elements" will occur.

35. The information provided by the Company to the Department concerning groundwater flows in and out of the proposed mine site was sufficient for purposes of complying with the applicable regulations.

36. Section 3.10(a) of the State Act ("Disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems shall be minimized both during and after surface mining operations and during reclamation.") does not mandate absolute "prevention of water supply impacts."

37. The Department's requirement of monitoring at the permit site — and the groundwater monitoring network was specifically designed to identify changes in groundwater quantity and quantity before private wells are impacted, in light of the monitoring placement along the northern boundary of the proposed mine site — is subject to the remand directed by this Order.

38. Neither the Petitioners nor the Attorney General provided sufficient evidence to establish that the "surface water control and diversion system" at the mines site is likely to be overwhelmed.

39. Capital has fully complied with the regulatory requirements as to the design of

its surface water control and diversion system at the Banner Mine site.

40. The Company satisfied the applicable requirements of Part 1785; the Department appropriately approved the negative determination, and the Company has satisfied the requirements for approval of a long-term post-mining land uses, in accordance with Sections 1816.111(d) and 1817.111(d).

41. This permit application encompasses areas that are covered by one or more of the subsections of 62 Ill.Adm.Code 1780.16(a)(2), specifically (A) - (B) or (C).

42. The Department shall require the Company to fulfill the requirements of Section 1780.16 by obtaining site-specific resource information; the permit application cannot be approved until such site-specific resource information pertaining to the investigation of wildlife species and habitats in and adjacent to the permit area is completed.

43. The Department has conducted the appropriate "consultations" that are envisioned by Section 1075.40; the Department did not promulgate a rule in violation of the Administrative Procedure Act as to said "consultations" requirement, and the Petitioners have failed to prove by a preponderance of the evidence that the Department has failed to comply with Part 1075 of the regulations.

44. The Department was a proper "party" for the purposes of seeking a pre-hearing conference pursuant to 62 Ill.Adm.Code §1848.7.

45. There was no violation of 62 Ill.Adm.Code §1847.3 when the initial administrative hearing in this matter was not scheduled within thirty (30) days of the Department's approval of the permit, inasmuch as the Department requested the scheduling of a

pre-hearing conference.

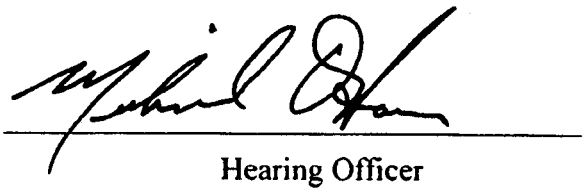
46. The Department timely requested a pre-hearing conference, and the delay in scheduling the administrative hearing past the initial thirty (30) days did not deprive the Department or its Hearing Officer of jurisdiction to hear this matter.

47. The procedural and substantive rulings made by the Hearing Officer during the Administrative hearings were not arbitrary and capricious.

Conclusion

In light of my ruling within this Final Order that this matter must be remanded, the permit application approval is vacated and this matter is remanded to the Department for further action as the Department deems fit, in light of the rulings made herein.

Dated: September 15, 2009



Hearing Officer

PROOF OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Final Order was mailed to the following addressees on the 16th day of September 2009.

Virginia Yang
IL. Department of Natural Resources
One Natural Resources Way
Springfield, IL 62702-1271

Thomas Davis
Assistant Attorney General
500 S. Second Street
Springfield, IL 62702

Jennifer Martin
Hodge, Dwyer & Driver
3150 Roland Avenue
Post Office Box 5776
Springfield, IL 62705-5776

Terrence Ingram
Eagle Nature Foundation Ltd.
300 East Hickory Street
Apple River, Illinois 61001

Joyce Blumenshine
Conservation Committee
Sierra Club
2419 East Reservoir
Peoria, Illinois 61614

Richard B. Fuller
2200 West Hyman Street
Banner, Illinois 61520

Elizabeth Gray
431 East High Point Drive
Peoria, Illinois 61614

Rudy Habben
Heart of Illinois Seirra Club
P.O. Box 3593
Peoria, IL. 61614

Kenneth Fuller
Village of Banner
360 South Fulton Street
Banner, Illinois 61520

Sheila Cook
Joseph Cook
21602 North U.S. Hwy 24
Canton, Illinois 61520

Janis King
Citizens Organizing Project
1455 Knox Station Road
Knoxville, Illinois 61448

Dr. Richard Stout
Knox College
2 East South Street
Galesburg, Illinois 61520

Mike Grigsby
21474 North U.S. Hwy 24
Canton, Illinois 61520

Robert L. Williams
26712 East McKinley Road
Canton, Illinois 61520

Ken Daviess
Hassleberg, Williams, Grebe,
Snodgrass & Birdsell
124 Southwest Adams Street
Suite 360
Peoria, IL 61602

Margaret Mitchell
2009 N. Board
Galesburg, IL 61401

Naomi Lott
William Lott
22031 North U.S. Hwy 24
Canton, Illinois 61520

Laverne Yeske
Jean Yeske
20044 North U.S. Hwy 24
Canton, Illinois 61520

Kenneth Grigsby, Sr.
19942 North U.S. Hwy 24
Canton, IL 61520-8683

Jane Johnson
1776 Knox Hwy 11
Gilson, IL 61436

John R. Grigsby, Sr.
19942 North U.A. Hwy 24
Canton, IL 61520-8683

Michael W. O'Hara
CAVANAGH & O'HARA
Attorneys at Law
407 East Adams Street
Post Office Box 5043
Springfield, IL 62705
Telephone: (217) 544-1771
Facsimile: (217) 544-9894