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

IN RE:

PERMANENT PROGRAM PERMIT APPLICATION NO. 282, MIDLAND COAL COMPANY, DIVISION OF ASARCO INCORPORATED, RAPATEE MINE



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

**Appearances:**

Patrick D. Shaw, Attorney
Mohan, Alewelt, Prillaman & Adami
on behalf of Citizens Organizing Project

Linda L. Laugges, Attorney
Thomas, Mamer & Haughey
on behalf of Mid State Coal Co., Inc
and Midland Coal Company

Karen Jacobs, Attorney
on behalf of the Illinois Department of
Natural Resources, Office of Mines and Minerals

**Nature of the Case:**

Citizens Organizing Project (hereinafter "Citizens") initiated this cause pursuant to Section 2.11 of the Illinois Surface Coal Mining Land Conservation and Reclamation Act (225 ILCS 720/2.11) so as to contest the reasons provided by the Illinois Department of Natural Resources, Office of Mines and Minerals, Land Reclamation Division (hereinafter "Department") for approving an application for a surface coal mining permit filed by Midland Coal Company, a Division of ASARCO Incorporated (hereinafter "Midland"). The application

encompassed the operation of a surface coal mine located in Knox County, Illinois by Midland, as owner of the mine identified as the Rapatee Mine and to be operated by Mid State Coal Company, Inc. (hereinafter "Mid State"). Citizens has and continues to object to the Department's decision to approve the subject matter.

**Background Facts:**[1]

On January 5, 1994[2], Midland filed an application for a permit to engage in surface coal mining and reclamation operations on 445 acres of land located in Knox County, Illinois. (**See**, Jt.Ex. #1, p.1146) The permit application (hereinafter "Permit Application No. 282") was deemed complete by the Department on January 12, 1994 and forwarded for review to the Natural Resources Conservation Service (formerly the Soil Conservation Service within the U.S. Department of Agriculture) and the Interagency Committee, comprised of the Illinois Department of Transportation, the Illinois Environmental Protection Agency, the Illinois Department of Conservation, the Illinois Department of Agriculture and the Illinois Historic Preservation Agency. (**See**, Jt.Ex. #1, p.1147) Commencing on January 21, 1994, Midland published notice of the permit application in the **Peoria Journal Star**. (**See**, Jt.Ex. #1, p.1147) The Department received comments from the Natural Resources Conservation Service and each member of the Interagency Committee. (**See**, Jt.Ex. #1, pp.472, 484, 491-495)

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[1]Many of the facts set forth herein are taken *verbatim* from the Department's post-hearing Brief, as I found such recitation of facts to be the least polemic of those proffered by the parties.

[2]Citizens identify this date as "[o]n or about January 21, 1994." (**See**, Citizens "Brief," p.4) I believe the January 21, 1994 date is the commencement of the publication of the proposed mining operation within the **Peoria Journal Star, Inc.**, rather than the filing date of the application. (**See**, Jt.Ex. #1, p.1147)



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The Knox County Board, Knox County Farm Bureau and two individuals requested a public hearing on Permit Application No. 282 (See, Jt.Ex. #1, pp.609-612), pursuant to 62 Ill.Adm.Code §1773.14, which hearing was held in Galesburg, Illinois on April 21, 1994. All present were given an opportunity to present oral and/or written testimony and documentation at the hearing. At such public hearing, the Knox County State's Attorney, Mr. Raymond Kimbell, submitted into the record selective excerpts of sworn testimony taken before Hearing Officer Michael W. O'Hara (the same Hearing Officer who presided over the instant application review) during the administrative review hearing concerning Midland's Permit No. 227. State's Attorney Kimbell requested that the transcript from the administrative hearing concerning Permit No. 227 be "judicially noticed," since the issues presented therein were purportedly "identical" to the issues properly considered at the Permit No. 282 public hearing (the "central issue being whether prime farmland can, in fact, be restored to prior use"). (See, Jt.Ex. #1, p.697) Because only selective portions of the transcript of Permit No. 227 were entered into the administrative record at the public hearing, the parties to this proceeding stipulated that the **entire** transcript from the Permit No. 277 hearing would be admitted into the record of the instant proceeding. The public hearing record was left open for fifteen additional days for the submission of additional written comments. (See, Jt.Ex. #1, p.1143)

After reviewing the permit application, and relevant information, and considering the comments of the Interagency Committee, together with those comments received during and subsequent to the public hearing conducted with respect to Permit No. 282, the Department notified that Midland would be required to submit twelve (12) modifications to the permit application. (See, Jt.Ex. #1, pp.498-502) Midland submitted the required modifications on May 27, 1994 (Jt.Ex., pp.503-511). By letter dated June 16, 1994, the Department required Midland



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to show the location from which coal seam samples were taken (Jt.Ex.#1, pp.521-22), to which letter Midland responded by correspondence dated June 17, 1994. (Jt.Ex.#1, pp.523-525)

On July 5, 1994, the Department issued its Results of Review of Permanent Program Permit Application No. 282, approving (as modified) Permit Application No. 282. (Jt.Ex.#1, p.1145-1189) In accordance with Section 2.11(d) of the Illinois Surface Coal Mining Land Conservation and Reclamation Act (herein after "State Act"), 225 ILCS 720/2.11(d), Permit No. 282 was issued simultaneously with the Department's approval of the permit application. Citizens thereafter filed a request for hearing pursuant to 62 Ill.Adm.Code 1847.3 to contest the Department's issuance of Permit No. 282. A formal administrative hearing was conducted on July 10-11, 1995, wherein Citizens presented the testimony of two lay witnesses and two expert witnesses. Neither the Department, Midland, nor Mid State presented any testimony. The Department and Midland submitted into the record the U.S. Department of the Interior, Office of Surface Mining Reclamation and Enforcement's study entitled "Knox County, Illinois Prime Farmland Study" as Department's and Midland's Exhibit #1. The administrative record, consisting of the permit application and related correspondence, was admitted into the record as Joint Exhibit #1.

**Preliminary Procedural Issues:**

Citizens, contemporaneously with the filing of its initial post-hearing Brief in this matter, filed a Motion to Correct Transcript. Neither the Department, Midland nor Mid State filed objections to the Motion. Therefore, the Motion to granted.

Citizens also filed a "Motion to Strike Response Briefs, or, Alternatively, Designated Portions of Response Briefs," therein asserting that:



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> [n]either the Department nor Mid State and Midland have complied with the Hearing Officer's scheduling order since briefs were neither sent so as to arrive at the Hearing Officer's office on or before their due date, let alone sent in the mail or by facsimile on the due date. (**See**, Citizens' "Motion to Strike Response Briefs, or, Alternatively, Designated Portions of Response Briefs," ¶9, pp.2,3)

Citizens also correctly points out within its "Motion" that:

> ...the Hearing Officer entered a scheduling order for post-hearing briefs as follows: [Citizens] to file their initial brief "on or before September 1, 1995," the Department and Mid State and Midland to file their responsive briefs "on or before October 1, 1995," and [Citizens] to file their reply brief, if any, "on or before November 15, 1995." (**See**, Citizens' "Motion to Strike Response Briefs, or, Alternatively, Designated Portions of Response Briefs," ¶2, p.1)

Citizens also quotes me during the instant proceedings as stating that:

> I have a quirky way of requiring people, parties that appear before me to have the briefs in my hand on the due dates set. That is, if you're going to mail them to me, make sure they are mailed soon enough that they get in my hands on the due dates required. If you want to hand walk [sic] them, that's fine, not a problem. You're in Springfield. You'd have to send yours early, speed mail. Faxes are all right as well, just as long as I have all of them in my hand on the due dates required. (Hrg. Tr., p.380) (**See**, Citizens' "Motion to Strike Response Briefs, or, Alternatively, Designated Portions of Response Briefs," ¶3, pp.1,2)

Although Citizens is correct that I am "quirky" as to the receipt of briefs and motion filings in my office in a timely manner (**i.e.**, filed in my office on or before the due date set), I cannot fault either the Department, Mid State or Midland for filing their respective briefs on October 2, 1995. The Department hand-delivered its brief on Monday, October 2nd; Mid State and Midland "faxed" its brief on the same date. Although it is true that I had previously set October 1, 1995 as the due date for these briefs, I did so not realizing that October 1st fell on a Sunday. The Department is correct that 62 Ill.Adm.Code 1700.15 is applicable to this procedural controversy. Part 1700 of Title 62 of the Illinois Administrative Code is specifically intended to "apply to all coal exploration and surface coal mining and reclamation operations (with stated exceptions) (**See**, 62 Ill.Adm.Code 1700.11), and §1700.15(b) specifically provides that:



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> [i]n computing any period of prescribed time, the day on which the designated period of time begins is not included. The last day of the period is included **unless it is a Saturday, Sunday, or legal holiday on which the Department is not open for business, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday**. (**See**, 62 Ill.Adm.Code 1700.15(b)) (Emphasis added)

Further, I find disingenuous Citizens' claim that it "has been prejudiced by opposing parties' failure to comply with the Hearing Officer's Order by a diminished time to reply to their briefs and any further extension of time would allow Mid State and Midland to continue even further mining activities in the area of the subject permit being contested herein." (**See**, Citizens' "Motion to Strike Response Briefs, or, Alternatively, Designated Portions of Response Briefs," ¶11) Citizens filed its Reply Brief on or about October 13, 1995, some thirty-two (32) days **prior** to its due date of November 15, 1995. Thus, Citizens' assertion that it had "a diminished time to reply to [the Department's, Midland and Mid State's] briefs" rings woefully untrue. Likewise, the assertion that "any further extension of time would allow Mid State and Midland to continue even further mining activities in the area of the subject permit being contested herein" is woefully flawed. A one day extension premised upon the briefing due date falling on a Sunday is hardly an "extension of time...allow[ing] Mid State and Midland to continue even further mining activities in the area of the subject permit being contested herein." Citizens is well aware that there is a procedure under the Department's regulations for temporary relief, should Citizens deem such relief a necessity. (**See**, 62 Ill.Adm.Code 1847.3(k)) Citizens has not requested such temporary relief, so I deem the "extension" purportedly bestowed upon the Department, Midland and Mid State to be **de minimis**.

Within its "Motion to Strike Response Briefs, or, Alternatively, Designated Portions of Response Briefs," Citizens also asserts that:



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> ...both [the Department's and Midland/Mid State's] Response Briefs contain arguments based on citations to matters not admitted into evidence, [**i.e.,**]the permit application from Permit Number 227. Department Brief, p.14, Mid State and Midland Brief, pp. 22-25.
>
> []While the hearing transcript [for Permit 227] was entered into evidence by stipulation for the purposes of authenticating an abstract already contained in the record, neither the permit application, nor any other portion of the record of the proceeding identified as Permit Number 227 were admitted into evidence. (**See**, "Motion to Strike Response Briefs, or, Alternatively, Designated Portions of Response Briefs," ¶¶12,13, p.3)

Premised upon such, Citizens requests that the Department's and Midland/Mid State's Response Briefs "be stricken in full for asserting matters not of evidence which are inextricably intertwined with the bulk of their briefs." (**See**, "Motion to Strike Response Briefs, or, Alternatively, Designated Portions of Response Briefs," ¶14, p.3, **citing**, **Athens v. Prousis**, 190 Ill.App.3d 349, 351 (1st Dist.1989)) In the alternative, Citizens requests that certain portions of the Response Briefs be stricken "which [allegedly] are based upon matters not properly entered into evidence." " (**See**, "Motion to Strike Response Briefs, or, Alternatively, Designated Portions of Response Briefs," ¶15, p.4, **citing**, **In re Saline Branch Drainage Dist.**, 172 Ill.App.3d 574, 584 (4th Dist.1988), **appeal denied**, 123 Ill.2d 558 (1988))

In response, the Department states that Citizens wrongfully:

> ...asserts that the Permit No. 227 transcript was "entered into evidence by stipulation for the purposes of authenticating an abstract already contained in the record", an assertion which is unsupported on the record and in fact untrue. Counsel of [Citizens] was well aware that both the Department and Midland intended to use testimony from the Permit No. 227 transcript in their post-hearing briefs. As early as January 1995 counsel for [Citizens] was informed by counsel for the Department and Midland that given the similarities between Permit No. 282 and Permit No. 227, the Permit No. 227 transcript would be used as evidence by the Department and Midland. Counsel for [Citizens] was asked to stipulate to its admission, which was readily done without objection. Counsel for [Citizens] was certainly free to refuse such stipulation, in which case the Department would have used another means of admitting the transcript (e.g., request that it be

officially noticed, or provide a certified copy pursuant to 20 ILCS 1905/45.2)[3]

It is simply dishonest at this stage of the game for [Citizens] to claim that the Permit No. 227 transcript was admitted into the record solely for the purposes of authenticating an abstract. Nothing in the record supports such a statement. One might ask why in the world the Department and Midland would want to add some 2000 plus pages to the already extensive Permit No. 282 record if such 2000 plus pages were not intended to be used.

Citizens contends that the Department and Midland's use of the Permit No.227 transcript is somehow unfair because [Citizens'] counsel neither had a complete version of the transcript nor felt it necessary to obtain such. However, [Citizens'] counsel was informed on July 11, 1995 that the Permit No. 227 transcript was available at the Department's office and would be made available to [Citizens'] counsel upon request. Never having bothered to obtain the transcript, it is wholly inappropriate for [Citizens] to now attempt to rectify such omission via a motion to strike.

[Citizens] deems the Department and Midland's use of the Permit No. 227 transcript "scandalous" because "[Citizens] has never been informed that the Permit Application in Permit Number 227 was to be considered in this case." [Citizens] evidently believes that the transcript and the application are two separate and distinct documents with no relation to one another. However, had counsel for [Citizens] bothered to obtain and review the Permit No. 227 transcript, he would have known that the permit application was extensively discussed in the transcript via expert testimony, with such testimony being cited by the Department and Midland in their briefs in the instant case.

In short, it is a little late for [Citizens] to object to the admission of evidence, or attempt to add limiting conditions to the admission of evidence. [Citizens] had its chance at the hearing and freely stipulated to the admission of the Permit No. 227 hearing transcript. [Citizens] after the fact claim that such stipulation was solely for certain limited purposes is wholly unsupported on the record. (**See**, Department's "Response in Opposition to [Citizens'] Motion to Strike Response Briefs," pp.2,3) (Emphasis in original)

Citizens responded within its Reply Brief, asserting that Midland and Mid State:

...present factual testimony from a wholly different proceeding in their statement of facts without any reference to its context or explanation of its relevancy. As stated by the Illinois Department of Natural Resources, Office of Mines and Minerals [] in its response brief:

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[3][Hearing Officer's footnote] 20 ILCS 1905/45.2 provides that:

[t]he papers, entries and records of the Department of Mines and Minerals [now, the Department of Natural Resources] or parts thereof may be proved in any legal proceeding by a copy thereof certified under the signature of the keeper thereof in the name of the Department with a seal of the Department attached. A fee of $1.00 shall be paid to the Department of Mines and Minerals for such certification.

> **Because only selective portions of the Permit Number 227 transcript was [sic] entered into the administrative record at the public hearing, the parties to this proceeding stipulated that the entire Permit Number 227 transcript be admitted into the record of this proceeding.**
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> Department Brief, p.2.
>
> Despite the context of this stipulation and the limited relevancy grounds upon which it was based, Mid State and Midland incorporate testimony from Permit Number 227 as if it had occurred in these proceedings without explanation as to why it should be treated as such. As such, the statement of facts is scandalous for failing to distinguish between Permit Number 227 and the current proceeding, or at the very least reserving such allegations of fact for argument. The Hearing Officer is asked to ignore pages four through eight of Mid State and Midland's Brief as being a statement of facts from some other proceeding. (**See**, Citizens' "Reply Brief," p.1) (Emphasis in original)

Citizens' arguments are disturbing, to say the least. I have perused the record and find that the Department is correct, that there is no reference whatsoever that the transcript from Permit No. 227 was stipulated into the record for "purposes of authenticating an abstract already contained in the record," as asserted by Citizens. In fact, the record reveals the following:

**Hearing Officer:** Any other preliminary matters we have to take up?

**Attorney Jacobs:** Yes, sir. We discussed, counsel discussed earlier the record from permit 227, which involved Midland Coal as well. We stipulate that transcript of that proceeding will be entered into the record.

**Hearing Officer:** Any objection? Do you so stipulate?

**Attorney Shaw:** We stipulate.

**Hearing Officer:** For Midland and Midstate [sic]?

**Attorney Laugges:** We also stipulate. (Vol.I, Tr. 6,7)

Citizens' attempt to limit the stipulation by means of an alleged understanding outside the record is exactly the legal infirmity of which Citizens accuses the Department, Midland and Mid State, to wit: citing matters which are not contained within the record to substantiate an objection. Such appears to be duplicitous on the part of Citizens. The matter is only exacerbated by

Citizens' accusation that Midland's and Mid State's "statement of facts is scandalous for failing to distinguish between Permit Number 227 and the current proceeding." On the contrary, scandalous is the selective reading by Citizens of Midland's and Mid State's "statement of facts." Midland's and Mid State's response Brief, within their "statement of facts," states:

> Robert Dunker, an agronomist for the University of Illinois and a technical manager for the Prime Farmland Reclamation Research Project at that University, was contacted by [the Department] to review the prime farmland restoration plan contained **in Midland's prior permit application no. 227** and to offer an opinion on its plan for reclaiming soils under the [Department's] prime farmland requirements. (PR1540; 1551)
>
> Mr. Dunker testified at prior proceedings that he had reviewed Midland's prime farmland restoration plan **in the 227 application**...
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> * * * * * * * * * * * *
>
> He stated the soil types **in the 227 area** included Tama, Ipava and Sable soils. (PR1599)
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> * * * * * * * * * * * *
>
> In fact, he personally had performed research on the specific deep tillage equipment which Midland planned to use **for 227**, and his studied supported the conclusion that the DMI deep plow is successful in alleviating compaction to the depth of application. (PR1559-60; 1574; 1599-1600; 1608)
>
> Finally, Mr. Dunker concluded that **permit no. 227** contained all of the keys [sic] features needed for reclamation success, namely, high quality soil materials, compaction techniques to avoid excessive compaction, and a good management plan to reduce soil erosion, and it was his opinion that the reclamation plan **contained in Midland's application for permit no. 227** should result in meeting productivity requirements for prime farmland as outlined by [the Department]. (PR1614-15; 1618)
>
> Dr. Robert Darmody also testified for [the Department] **at the prior proceedings on permit no. 227**.
>
> * * * * * * * * * * * *
>
> While Dr. Darmody reviewed the entire application **for permit no. 227**, including its reclamation plan, he did focus upon the issues of compaction and the chemical components and texture of the reconstructed root zone and soil.
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> * * * * * * * * * * * *
>
> Finally, Dean E. Wesley testified on behalf of Midland and Mid **State at the previous 227 proceedings**.



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> Dr. Wesley testified that he had reviewed Appendix F **of the application for permit no. 227** and, in doing so, had paid particular attention to the way in which materials were going to be handled and to the quality and chemical/physical qualities of the soil materials proposed for the B/C mix. (PR1913-14)

* * * * * * * * * * * *

> In sum, Dr. Wesley stated it was his opinion that the reclamation plan **contained in the application for permit no. 227** met the Illinois Permanent Program requirements for the reclamation of prime farmland. (**See**, Midland/Mid State's Response "Brief," pp.4-8) (Emphasis added)

Clearly, **all** of the references to the testimony contained within the transcript of Permit No. 227 were properly identified as such by Midland and Mid State within their "statement of facts." To assert otherwise, as does Citizens, is outright misleading.

Neither **Athens v. Prousis**, 190 Ill.App.3d 349, 351 (1st Dist.1989) nor **In re Saline Branch Drainage Dist.**, 172 Ill.App.3d 574, 584 (4th Dist.1988), **appeal denied**, 123 Ill.2d 558 (1988) offers any solace to Citizens. In **Athens**, the First District Appellate Court simply states that a plaintiff's brief "consist[ed] almost entirely of matters outside the record and unjustified slurs against the defendant's attorney," and therefore would be stricken as violative of Supreme Court Rule 341(e)(7). (**Athens**, 190 Ill.App.3d at p.351) In **Saline**, the Fourth District Appellate Court stated that:

> [r]egarding the four exhibits, courts have held that **in the absence of a stipulation** between the parties, matters not properly part of the record cannot be considered by a court on review (**People v Haas** (1981), 100 Ill.App.3d 1143, 427 N.E.2d 853) even though they may be included in the record or transcript. (**Iczek v. Iczek** (1963), 42 Ill.App.2d 241, 191 N.E.2d 648; **People v. Sheridan** (1977), 51 Ill.App.3d 963, 367 N.E.2d 422, **cert denied** (1978), 435 U.S. 975, 56 L.Ed.2d 68, 98 S.Ct. 1622; **People v. Reese** (1984), 121 Ill.App.3d 977, 460 N.E.2d 446.) In the instant case, we find no reference to defendant's exhibit No. 1 in the report of proceedings. Defendant's exhibits Nos. 2, 3, and 4 were marked, identified by a defense witness, and used briefly in connection with the direct examination of that witness. However, none of the four

> exhibits were [sic] ever filed in the circuit court and none were [sic] introduced, much less proffered, into evidence during the proceedings below. (See **People v. Gholston** (1984), 124 Ill.App.3d 873, 464 N.E.2d 1179.) As these documents are **dehors** the record and **there was neither a stipulation** between the parties, nor a request made to this court seeking to supplement the record with four exhibits, the Drainage District's motion to strike is allowed as to the defendant's four exhibits, as well as to any facts or arguments contained in the defendant's brief which pertain to these exhibits. (**Saline**, 172 Ill.App.3d at pp.584,585) (Emphasis added)

Here, on the contrary, there was a **specific** and **unequivocal** stipulation to include the transcript from Permit No.227 within this proceeding. The only matter which **dehors** the record here is the alleged limitation placed upon such transcript's use and upon which unrecorded limitation Citizens relies in its Motion. Citizens' argument as to this matter leaves much to be desired, so much so that the Hearing Officer is compelled to state that Citizens was wrong in raising the issue in the first instance. Citizens' Motion is denied in its entirety.

**Issues Identified by Citizens to be Resolved:**

1. Whether the appropriate burden of proof in this proceeding is based on the "clearly erroneous" standard of review.

2. Whether the permit applicant failed to comply with publishing notice of application requirements, thus rendering the permit application void.

3. Whether there was no opportunity for public review and comment on the permit application, including its modifications, thus rendering the permit application void.

4. Whether the permit application was incomplete, thus precluding the Department from granting the subject permit.

5. Whether the permit application affirmatively demonstrates that reclamation can be accomplished by restoring all land use.

6. Whether the permit application affirmatively demonstrates that prime farmland can be restored to equivalent or higher yield as non-mined prime farmland in the surrounding area.

7. Whether the Department failed to make written findings in the manner required by law, thus rendering the permit decision invalid.

8. Whether the Department failed to consider all relevant comments, thus rendering the permit decision invalid.

9. Whether the Department erred in granting a permit to an applicant whose license to transact business in the State of Illinois has been withdrawn.

10. Whether the Department erred in granting a permit without conducting a violation history search of the applicant, ASARCO, Inc.

I.

**Whether the appropriate burden of proof in this proceeding is based on the "clearly erroneous" standard of review.**

Citizens renews an objection it raised by prior motion in this proceeding, to wit:

> ...the appellate standard of review [**i.e.**, the "clearly erroneous" standard] which the Department has so artfully granted itself is fundamentally unfair in the context of an adjudicatory hearing, and should not be applied in this proceeding. [Citizens] asks that the burden of proof located in 62 Ill.Adm.Code §1847.3 not be applied in this proceeding... (**See**, Citizens' "Brief," p.16)

The Section of the Department's regulations to which Citizens' objection refers states that:

> ...[t]he party seeking to reverse the Department's decision shall have the burden of proving that the Department's decision was clearly erroneous. (**See**, 62 Ill.Adm.Code §1847.3(g))

Although I rejected Citizens' motion which first raised this "burden of proof" issue, I indicated

within my written ruling that:

> I was intrigued by Citizens' contention, which at first blush appeared to be meritorious, especially in light of Citizens' assertion that "[t]he Illinois Supreme Court has ruled directly on point [concerning the application of the 'clearly erroneous standard] in the context of environmental permits. (**See**, Citizen's "Dispositive Motions of Law," p.7, citing **Environmental Protection Agency v. Pollution Control Board**, 155 Ill.2d 65 (1986)) (**See**, "Order as to Objectors' Dispositive Motions of Law," p.8)

Ultimately, I rejected Citizens' arguments premised upon my finding "that the statutory and regulatory administrative frameworks governing the Illinois Environmental Protection Agency and the Pollution Control Board differ, significantly, from the statutory and regulatory administrative framework governing the Illinois Department of Mines and Minerals." (**See**, "Order as to Objectors' Dispositive Motions of Law," pp.8,9) Citizens, within its post-hearing Brief, renews its assertion that the statutory and administrative frameworks governing the Illinois Environmental Protection Agency are "substantial[ly] similar[]" to those governing the Illinois Department of Mines and Minerals.[4] I am no closer to being convinced of such "substantial" similarity as I was when Citizens first raised the issue.

However, Citizens' citation to **IEPA v. IPCB**, 115 Ill.2d 65 (1986) and **IEPA v. IPCB**, 138 Ill.App.3d 550 (3rd Dist.1985), together with the analyses contained within relevant federal cases cited by Citizens (**Woody v. Immigration Serv.**, 385 U.S. 276, 284, 17 L.Ed.2d 362, 368 (1966); **Bender v. Clark**, 744 F.2d 1424 (10th Cir.1984); **Steadman v. S.E.C.**, 450 U.S. 91, 67 L.Ed.2d 69 (1981)), gives me significant pause. Unfortunately, neither the Department, nor Midland, nor Mid State chose to provide any response to these arguments, relying instead on my

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[4]By asserting that the regulatory and statutory strictures governing the two administrative bodies are "substantial[ly] similar[]", it appears Citizens has receded somewhat from its initial contention that the administrative decisionmaking process for the two bodies are "completely analogous." (**See**, Citizens' "Dispositive Motions of Law," p.9)



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initial rejection of Citizens' objection.

Citizens' citations give me pause because a real question arises as to whether application of the "clearly erroneous" standard in the context of a Department hearing pursuant to 62 Ill.Adm.Code §1847.3 affords a contesting litigant appropriate due process. For instance, in **Bender**, the Tenth Circuit Court of Appeals set forth an extended discussion concerning the appropriate burden of proof to be applied in administrative hearings, and indicated therein which body (**i.e.**; the judiciary) should prescribe such burdens. In **Bender**, where a bidder on a noncompetitive oil and gas lease on government land sought judicial review of the government's decisions that that bidder failed to show by "clear and definite" evidence that the agency erred in subsequently determining that the land was defined as such to require competitive bidding, the Appellate Court stated that:

> [t]he government maintains that the [Interior Board of Land Appeals] did not err in requiring [the bidder] to make a clear and definite showing that the [United States Geological Survey] erred in its [known geologic structure] determination. This heightened standard is necessary, the government asserts, because the present "case involved merely the application, in an administrative hearing rather than a judicial review context, of the familiar and well settled principle that agency determinations involving technical questions are entitled to great weight and will be deferred to if supported by substantial evidence." Brief for the Appellants at 7-8 (citing **FPC v. Florida Power & Light Co.**, 404 U.S. 453, 463-67, 92 S.Ct. 637, 643-46, 30 L.Ed.2d 600 (1972), **reh'g denied**, 405 U.S. 948, 92 S.Ct. 929, 30 L.Ed.2d 819 (1972) and **Environmental Defense Fund v. Andrus**, 619 F.2d 1368, 1382 (10th Cir.1980)). Further, the government contends that the "preponderance of the evidence" standard is applicable only to hearings subject to the provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§551 **et seq.**, 701 **et seq**. Thus, because the hearing conducted in this case was not one "required by statute," 5 US.C. §554, the government reasons that the preponderance standard is not appropriate; "clear and definite evidence" is the proper standard. We disagree.
>
> In applying the clear-and-definite evidence standard in this proceeding, the [Interior Board of Land Appeals] followed a rule established solely by the Department of Interior for informal adjudicatory proceedings. **See Bender II**, [54 IBLA 375 (19810] (**citing Donnie R. Clouse**, 51 IBLA 221 (1980) and **United States v. Alexander**, 41 IBLA 1, 11 (1979)). Our research substantiates the district court's finding that no statutory or judicial authority exists for this standard of proof in such a situation. [Court's

footnote omitted] See Jack J. Bender v. James G. Watt, No. 81-682-JB. at 4 (D.N.M. Dec. 28, 1982). It is well settled that where Congress has failed to establish the degree of proof required in an administrative proceeding, the judiciary is the traditional, and the most appropriate, forum to prescribe the standard. Herman & MacLean v. Huddleston, 459 U.S. 375, 103 S.Ct. 683, 691, 74 L.Ed.2d 548 (1983); Steadman v. SEC, 450 U.S. 91, 95, 101 S.Ct. 999, 1004, 67 L.Ed.2d 69 (1981), reh'g denied, 451 U.S. 933, 101 S.Ct. 2008, 68 L.Ed.2d 318 (1981);Woody v. INS, 385 U.S. 276, 284, 17 L.Ed.2d 362, 368 (1966). Hence, we must determine the appropriate standard of proof required in an administrative proceeding conducted to decide whether a particular tract subject to federal oil and gas leasing is with a [known geologic structure].

The traditional standard required in a civil or administrative proceeding is proof by a preponderance of the evidence. Sea Island Broadcasting Corp. v. FCC, 627 F.2d 240, 243 (D.C. Cir.1980), cert. denied, 449 U.S. 834, 101 S.Ct. 105, 66 L.Ed.2d 39 (1980); Collins Securities Corp v. SEC, 562 F.2d 820, 823 (D.C.Cir.1977). The government's contention that such a standard is applicable only in [Administrative Procedure Act] hearings is without merit. If an administrative hearing is not required by statute, it does not necessarily follow that the traditional standard of proof---preponderance of the evidence---is inapplicable. Although the procedure safeguard elicited in §556 of the [Administrative Procedures Act] do not apply to informal administrative hearings [Court's footnote omitted], see Wong Yang Sung v. McGrath, 339 U.S. 33, 50, 70 S.Ct. 445, 454, 94 L.Ed 616 (1950), the agency's ultimate review of the evidence presented at any hearing must not controvert basic principles of fairness. If an agency elects to conduct an informal hearing, the proper standard of proof---one which considers all the interests concerned---must be invoked.

The traditional preponderance standard must be applied unless the type of case and the sanctions or hardship imposed require a higher standard. See Woodby v. INS, supra 385 U.S. at 286, 87 S.Ct. At 488; Collins Securities Corp. v. SEC, supra at 823-26. Indeed, the clear-and-definite standard is ordinarily reserved for situations "where particularly important individual interests or rights are at stake," such as the potential deprivation of individual liberty, citizenship, or parental rights. Herman & MacLean v. Huddleston, supra, 103 S.Ct. At 691. Cf. United Stated v. F/V Repulse, 688 F.2d 1283 (9th Cir.1982) (preponderance standard properly applied in "civil penalty" case). The federal courts have not waivered from this analysis in the administrative setting. See, e.g., Woodby v. INS, supra (deportation requires clear and convincing evidence); Decker v. SEC, 631 F.2d 1380, 1383-84 (10th Cir.1980) (because the interests at stake are not substantial enough, a civil violation by a preponderance of the evidence); Sea Island Broadcasting Corp. v. FCC, supra at 244 (where license revocation tantamount to loss of livelihood, clear-and-convincing standard applicable; otherwise, preponderance standard may be appropriate); Collins Securities Corp. v. SEC, supra at 823-26 (clear-and-convincing standard applicable in SEC proceeding to revoke broker-dealer registration for violation of antifraud provisions of 1934 Securities Exchange Act where type of case (fraud) and possible heavy sanction (deprivation of livelihood) are present).

In the present case, the government's interest in implementing Congressional leading policy on federal lands simply falls short of requiring a heightened standard of proof. Further, the government does not present convincing reasons beyond its interest



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> justifying application of the clear-and-definite standard in such a case. It argues merely that the fundamental principle of judicial deference to an administrative agency's determination of a technical factual question should translate into a higher standard of proof required of private parties contesting agency decisions at an informal hearing. This argument, however, confuses the scope of judicial review of factual determinations by an agency with the standard of proof applicable in administrative hearings conducted to determine such matters. The deference given to an agency's decision on a matter requiring expertise would be made only in the judicial forum, after the final agency determination is made following its review of all the evidence presented. **See FPC v. Florida Power & Light Co., supra** 404 U.S. at 463, 92 S.Ct. At 643. Hence, the scope of judicial review of final agency action has no effect on the requisite standard of proof in the administrative hearing itself. (**Bender**, 744 F.2d at pp.1428-1430)

Such analysis is compelling. Indeed, when the fact that the permit application herein was modified subsequent to the informal public hearing conducted pursuant to 62 Ill.Adm.Code §1773.14 (thereby not providing objectors to such modifications an opportunity for **de novo** review of such modifications), such analysis becomes even more compelling.

In light of such, I have once again reviewed the Court decisions in **IEPA v. IPCB**, 115 Ill.2d 65 (1986) and **IEPA v. IPCB**, 138 Ill.App.3d 550 (3rd Dist.1985), and despite my rejection of the assertion that there exists "substantial similarity" between IEPA procedures and those of the Department, I find that my previous narrow interpretation of such decisions was perhaps as misplaced as that of Citizens' over-extrapolation from such decisions. In **IEPA v. IPCB**, 138 Ill.App.3d 550 (3rd Dist.1985), the Third District Court stated:

> [i]n a permit case, such as this, the process involving the EPA and the [Pollution Control Board] is an administrative continuum. It became complete only after the PCB had ruled. The EPA permit denial did not involve the issuance of detailed findings of fact and conclusions of law. EPA is only required to give **reasons** for denial, the basis for which the applicant had no opportunity to challenge. [The Plaintiff] had no means of disputing any contrary evidence relied on by [the] EPA until the PCB hearing was held. In short, as to the EPA hearing alone, there is nothing resembling a hearing where adversaries submit proofs to a neutral and detached decisionmaker. The hearing before the PCB, however, includes consideration of the record before the EPA together with the receipt of testimony and other proofs under the full panoply of safeguards normally associated with a due process hearing. That is why, in this case, the PCB is not required to apply a "manifest weight" test to decisions of the EPA, and it is also why we, as a

> reviewing court, are required to apply a manifest weight test to decisions of the PCB. (**IEPA v. IPCB**, 138 Ill.App.3d at pp.551-552) (Emphasis in original)

Likewise, the permit case herein is an administrative continuum. Although the Department **is** required to provide detailed findings of fact and conclusions of law (unlike the EPA process in **IEPA v. IPCB**), the objectors have not had an opportunity to dispute any evidence contrary to its legal positions. Further, although I continue to believe that the Illinois Surface Coal Mining Land Conservation and Reclamation Act (225 ILCS 720/1.01 **et seq.**) provides "for a meaningful opportunity for parties to be involved in the agency's decisionmaking process," the "clearly erroneous" standard does not "fit" into such "meaningful opportunity." In revisiting this issue pursuant to Citizens' post-hearing brief, I find that the Department's arguments (set forth within its response to Citizens' pre-hearing Motion) echo those of the government in **Bender** which are ultimately rejected by the federal Appellate Court:

The government in **Bender**, like the Department here, asserts that:

> ...the fundamental principle of judicial deference to an administrative agency's determination of a technical factual question should translate into a higher standard of proof required of private parties contesting agency decisions at an informal hearing. This argument, however, confuses the scope of judicial review of factual determinations by an agency with the standard of proof applicable in administrative hearings conducted to determine such matters. The deference given to an agency's decision on a matter requiring expertise would be made only in the judicial forum, after the final agency determination is made following its review of all the evidence presented. (**See, Bender,** 744 F.2d at pp.1428-1430, **citing, FPC v. Florida Power & Light Co., supra** 404 U.S. at 463, 92 S.Ct. At 643)

Such is not intended to imply, I assert, that I am not empowered to place significant weight on the expertise of the Department in rendering a decision on a mining permit application, just as I am empowered to place significant weight to the objector's expert testimony. But under the circumstances herein, I do not believe that the "clearly erroneous" standard is appropriate in the context of §1847.3. In ruling in such manner, I am cognizant of Midland's and Mid State's



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previously stated observations:

> ...that administrative regulations enjoy the same presumption of validity as statutes. (**Pre-School Owners Ass'n of Illinois, Inc. v. Department of Children and Family Services,** 119 Ill.2d 268, 518 N.E.2d 1018, 116 Ill.Dec. 197 (1988).) The person questioning the validity of an administrative regulation bears the burden of establishing its invalidity. (**Beggs v. Board of Fire and Police Com'rs. Of City of Park Ridge,** 99 Ill.2d 324, 459 N.E.2d 925, 76 Ill.Dec. 790 (1984).) Those regulations will not be set aside unless they are clearly arbitrary, unreasonable or capricious. (**See,** Mid State and Midland's "Response" to Citizens' Dispositive Motions of Law, pp. 5,6, **citing, Begg, supra**.)

Within a footnote to my previously issued Order in this docket, I refused to make a:

> ...ruling as to whether §9.01 of the [State] Act (225 ILCS 720/9.01) constitutes the exclusive means of "adopt[ing], amend[ing], or repeal[ing]" a rule promulgated by the Illinois Department of Mines and Minerals. Although §9.01 clearly affords a statutory avenue for seeking the repeal of a Department rule, Citizens' citation to **Smith v. Department of Professional Regulation,** 202 Ill.App.3d 279, 287 (1st Dist.1990) offers equally compelling support for the proposition that "[t]he appropriate standard of review of an administrative body should be questioned before the administrative body." (**See,** Citizens' "Reply" to Department, p.4) (**See,** "Order as to Objectors' Dispositive Motions of Law," footnote 3, p.15)

I find that it is appropriate for Citizens to contest the burden of proof in the context of this hearing, and further, I find that in the context of this particular case, the "clearly erroneous" standard is inappropriate, and the "preponderance of the evidence" is the proper standard to impose. However, in light of my rulings below, such imposition does not alter my affirmance of the Department's decision to approve Midland and Mid State's Permit Application No. 282.

## II.
## Whether the Permit Applicant Failed To Comply with Publishing Notice of Application Requirements, Thus Rendering the Permit Application Void.

Citizens next raises an issue it first enunciated within a pre-hearing Motion, to wit:

> ...that the Notice by Publication Act (725 ILCS 5/5) applies in this case. The Notice by Publication Act requires notice of the activity, and the State Act requires notice of the

> permit application "in a local newspaper in the locality of the proposes mining operation." 225 ILCS 720.2.04. These two provisions can and should be construed in a manner which "avoids an inconsistency and gives effect to both enactments, where such a construction is reasonably possible." (**See**, Citizens' "Brief," pp.17-18. **citing**, **Lily Lake Road Defenders v. County of McHenry**, 156 Ill.2d 1, 9 (1993) and 225 ILCS 720/1.02(a))

Premised upon such, Citizens argues that Midland's and Mid State's publication of the notice of the permit application in the **Peoria Journal Star**, when the proposed mining activity was to take place in Knox County, was violative of both acts and that therefore the Department's decision approving the application was void.

Initially it should be pointed out that Citizens miscites the applicable statute. The Illinois Notice by Publication Act is found at 715 ILCS 5/1 **et seq**. This is the second filing in which Citizens has miscited the statutory provision. Further, I do not believe that Citizens has raised objections which have not been addressed in my initial rulings as to the publication matter. In my initial ruling I found that:

> Citizens' initial objections stems from the statutory language found in Section 2.04 of the Illinois Surface Coal Mining Land Conservation and Reclamation Act (225 ILCS 720/1 **et seq**.) (hereinafter "State Act"), which provides, in part, 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...(**See**, 225 ILCS 720/2.04(a)(1))
>
> The Certificate of Publication contained within the record of the instant permit application indicates that the notice of the permit application was published in the Peoria Journal Star, a newspaper Citizens asserts is "published in the City of Peoria, County of Peoria." (**See**, Citizens' "Dispositive Motions of Law and Fact," p.1) Citizens urges that:
>
> > [p]ublishing notice in a Peoria newspaper does not satisfy the mandatory requirements of Section 2.04(a)(1) of the State Act since the Peoria newspaper is not a "local newspaper," 225 ILCS 720/2.04(a)(1), nor is it sufficient to inform members of the community surrounding the landfill or proposed modifications to mining operation.



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The Notice by Publication Act (725 ILCS 5/5) states in part as follows:

> When any notice is required by law or contract to be published in a newspaper..., it shall be intended to be in a secular newspaper of general circulation, published in the city, town or county, or some newspaper specially authorized by law to publish legal notices, in the city, town, or county. (**See**, Citizens' "Dispositive Motions of Law and Fact," p.2, **citing**, 715 ILCS 5/5)

Premised upon the "Notice by Publication Act," Citizens asserts that "publication in the locality of the mining operation requires publication in either the city, town or county of the mining operation, and not a newspaper from another county." (**See**, Citizens' "Dispositive Motions of Law and Fact," p.2) Citizens relies heavily for such assertion upon the Illinois Supreme Court's decision in **North Shore Sav. & Loan Ass'n v. Griffin, 75 Ill.2d 166, 172(1979)**, wherein the Supreme Court determined that notice published in the Chicago Daily News does not provide notice in the outlying suburban communities of Downers Grove and Waukegan since the Chicago Daily News is published in Cook County and not in either of the counties of DuPage or Lake (which latter counties encompass the communities of Downers Grove and Waukegan, Illinois). Citizens claims that:

> [s]uch construction was found to be in keeping with the legislature's intent to give affected residents of the local community notice of the proposed action so that they would be able to express their views to the governmental agency. [citation omitted] Due to this deficiency [in notice], the Illinois Supreme Court affirmed the appellate court's decision to vacate the agency's decision. [citation omitted] (**See**, Citizens' "Dispositive Motions of Law and Fact," p.3)

Citizens further asserts that the notice deficiency which it purports to identify herein is "jurisdictional," "the failure of with which [sic] to comply divests the agency from [sic] jurisdiction to act in the matter." (**See**, Citizens' "Dispositive Motions of Law and Fact," p.2, **citing**, **Kane County Defenders v. Pollution Control Bd.**, 139 Ill.App.3d 588, 593 (2nd Dist. 1985); **Concerned Boone Citizens v. M.I.G. Investments**, 144 Ill.App.3d 334,339 (2nd Dist. 1986); **Browning-Ferris Indus. v. Pollution Control Bd.**, 162 Ill.App.3d 801,805 (5th Dist. 1987))

In response to these arguments, the Department points out that Section 2.04(a)(1) of the State Act requires that notice of a permit application be published "in a local newspaper of general circulation in the locality of the proposed mining operations..." The Department asserts that "[t]he [subject] permit area is approximately one mile from the Fulton County line and approximately two miles from the Peoria County line." (**See**, Department's "Response to Objectors' Dispositive Motions of Law and Fact," p.1) The Department asserts, without contradiction from Citizens, that "the Peoria Journal Star is in general circulation in, among others, Fulton, Knox and Peoria counties, portions of

which are all int he locality of the [subject] mining operations." (**See**, Department's "Response to Objectors' Dispositive Motions of Law and Fact," p.2) Further, the Department asserts that:

> ...mining operations are not typically located within cities or towns, as is the case here. Secondly, mining operations do not respect county lines, often stretching into two or more counties. The legislature presumably was aware of this fact when Section 2.04(a)(1) was enacted. Had the legislature intended that notice be published in a newspaper published in the city, town or county of the mining operation, it could have easily required such in Section 2.04(a)(1). However, Section 2.04(a)(1) of the State Act is unambiguous--it does not require that notice of a permit application be published in a newspaper published in the city, town or county there the mine is located. The operative statute requires that the newspaper be one of "general circulation in the locality of the proposed mining operations."

* * * * * * * * * * **

In **North Shore Save. & Loan Ass'n v. Griffin**, 75 Ill.2d 166, 387 N.E.2d 680 (1979), cited by Objectors, at issue was the proper interpretation of a notice provision within the Illinois Savings and Loan Act. That notice provision, according to the court, was "virtually identical to the **general** statutory notice provision in section 5 of [the Notice by Publication Act]..." **Id.** at 169, 387 N.E.2d at 681 (emphasis added). As stated by the court:

> Although both the trial court and the appellate court relied on this general notice provision, we think it more appropriate to base a decision on an interpretation of the Illinois Savings and Loan Act notice provision, which is more directly at issue.

**Id.** at 169, 387 N.E.2d at 681. The Department submits that the logic of the Supreme Court of Illinois must e followed here. That is, the focus must be whether the requirements of Section 2.04(a)(1) of the State Act were met, not whether the requirements of the general Notice by Publication were met.

* * * * * * * * * * *

The notice provision in **North Shore** is clearly distinguishable from the notice provision in Section 2.04(a)(1) of the State Act. There, the statute plainly required that the newspaper actually be published, **i.e.**, first printed or issued for distribution, in the community or county involved. Section

2.04(a)(1) contains no such requirement. The operative language in Section 2.04(a)(1) is that the newspaper be of general circulation in the locality of the mining operations.

The Peoria Journal Star, circulated in Fulton, Knox and Peoria counties, is undeniably a local newspaper of general circulation in the locality of Midland's mining operations. Accordingly, Midland's publication therein of notice of its permit application was entirely proper under the operative statute. (**See**, Department's "Response to Objectors' Dispositive Motions of Law and Fact," pp.2-4)

Midland's and Mid State's "Responses" were more emphatic:

A brief review of the quadrangle map submitted as part of Midland's application reveals that the area of the proposed mining operation is located in the far southeast corner of Knox County, just miles from the Knox County, Peoria County border. [citation omitted] It is not located within any city or town. The closest towns are Farmington, Yates City, Pleasant Grove and Uniontown, none of which has newspapers of general circulation.

The closest cities having newspapers of general circulation are Galesburg (**The Register-Mail**) and Peoria (**Journal Star**). Both cities are approximately equidistant from the area of the proposed mining operation. However, the **Journal Star** has a much larger circulation, having a circulation of approximately four and one-half times that of **The Register-Mail**; 81,013 daily, 100,248 on Saturday and 108,407 on Sunday, in contrast to **The Register-Mail**, which has a circulation of only 17,758 daily and 18,098 on Saturday. (citation omitted)

* * * * * * * * * * *

...as between the specific requirements of the [State] Act and the obscure provisions of the Notice by Publication Act, the former should clearly control and apply exclusively to the circumstances present here. [footnote omitted] The [State] Act and its provisions specifically apply to these administrative proceedings and are designed to address the unique types of issues which may arise.

* * * * * * * * * * *

...[Citizens] contend[] that, if notice was not properly given here, then the Department lacked jurisdiction to approve the permit application. However, the Project cites no authority which directly involved the Illinois Department of Mines and Minerals. In addition, the cases [Citizens] do[] cite hold that agencies must follow the notice requirements contained **in their own enabling statute** or jurisdiction may be lost. (**See**, **Kane County Defenders v. Pollution Control Board**, 139 Ill.App.3d

588, 487 N.E.2d 743, 93 Ill.Dec. 918 (2d Dist. 1985).) [Citizens] here [are] curiously turning this argument on its head and asking this hearing officer to apply a notice provision located in an act other than the applicable enabling statute but to still conclude that jurisdiction has been lost. It appears self-evident that [Citizens] cannot go forward with both arguments simultaneously simply to try and obtain the relief it seeks. (**See**, Mid State's and Midlands's "Response in Opposition to Objector's [sic] Dispositive Motions of Law and Fact, pp.2-5)

After careful consideration of the respective parties' arguments, and in light of the statutory language and case law cited, I find that the statutory interpretation proffered by the Department, by Midland and by Mid State to be the correct one. I find that by publishing the notice of the permit application within the Peoria **Journal Star**, Midland and Mid State fully complied with §2.04 of the State Act. I find that by publishing the permit application notice within the Peoria **Journal Star**, Mid State and Midland placed its notice "in a local newspaper of general circulation in the locality of the proposed mining operation...," and therefore such published notice fully complied with the Illinois Surface Coal Mining Land Conservation and Reclamation Act. (**See**, Order, dated June 27, 1995, pp.1-6)

I believe my initial ruling on these issues to be correct, and I therefore decline Citizen's invitation to reconsider such.

III.

**Whether There Was No Opportunity for Public Review and Comment**

**On The Permit Application, Including its Modifications,**

**Thus Rendering the Permit Application Void.**

Citizens next urge that because the permit application was modified twice by direction of the Department prior to the Department's approval:

members of the public...lost the opportunity to comment on the permit application through public participation provisions. 225 ILCS 720/2.04. In addition, the opportunity for submitted comments by the Interagency Committee and County Boards has also expired by the time of these modifications. **Id**. 225 ILCS 720/2.08(c).

* * * * * * * * * * * *

> Since a complete permit application was not submitted for public review or subject to opportunities for public comment, the Department's decision to grant the permit application was a nullity. (**See**, Citizens' "Brief," pp.20-21)

I reject this contention. The Department's rules specifically provide that:

> [t]he Department shall review the application for a permit, revision, or renewal; written comments and objections submitted; and records of any informal conference or hearing held on the application and issue a written decision, in accordance with Section 1773.19, either granting, **requiring modification of**, or denying the application. (**See**, 62 Ill.Adm.Code 1773.15(a)(1)) (Emphasis added)

Citizens' arguments purport to require an applicant to start anew each and every time the Department requires any modification of a permit application subsequent to conducting the informal hearing pursuant to 62 Ill.Adm.Code 1773.14. I reject such arguments. The applicable law and regulations do not support Citizens' contention in this regard.

IV.

**Whether the Permit Application Was Incomplete, Thus Precluding the Department From Granting the Subject Permit.**

Citizens next urge that:

> [t]he Department may only grant or deny a permit "[o]n the basis of a complete application, or a revision thereof." 225 ILCS 720/2.08(a) (emphasis added). Furthermore, "[n]o permit or revised permit shall be issued unless the application affirmatively demonstrates, and the Department finds that the applications is accurate and complete. **Id**. §2.08(b)(1); **see also Illinois South Project v. Hodel**, 844 F.2d 1286, 1291 (7th Cir.1988) (construing the "completeness" requirement)...

* * * * * * * * * * * *

The following items are required to be contained in the permit application, but were not present:

> **1. THE RECLAMATION PLAN DOES NOT CONTAIN A DETAILED TIMETABLE FOR THE COMPLETION OF EACH MAJOR STEP IN THE RECLAMATION PLAN.**

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2. THE RECLAMATION PLAN DOES NOT CONTAIN A COMPLETE PLAN FOR BACKFILLING AND GRADING.

* * * * * * * * * * * *

3. THE RECLAMATION PLAN DOES NOT CONTAIN A DEMONSTRATION OF THE SUITABILITY OF TOPSOIL SUBSTITUTES.

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4. THE PERMIT APPLICATION FAILS TO DESCRIBE THE MEASURES PROPOSED TO DEMONSTRATE SUCCESS OF REVEGETATION.

* * * * * * * * * * * *

5. THE RECLAMATION PLAN DOES NOT CONTAIN A SOIL TESTING PLAN.

* * * * * * * * * * * *

6. THE RECLAMATION PLAN DOES NOT DISCUSS PLANNED FINAL GRADED SLOPES OF REPLACED HIGH CAPABILITY STATUS AREAS.

* * * * * * * * * * * *

7. THE PRIME FARMLAND RESTORATION PLAN DOES NOT CONTAIN A DESCRIPTION OF THE UNDISTURBED SOIL PROFILE.

* * * * * * * * * * * *

8. THE PRIME FARMLAND RESTORATION PLAN DOES NOT CONTAIN A SHOWING THAT THE B AND C HORIZONS CAN BE LAWFULLY COMBINED.

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9. THE PRIME FARMLAND RESTORATION PLAN DOES NOT CONTAIN SCIENTIFIC DATA SUPPORTING THE ASSERTION THAT THE PROPOSED METHOD OF RECLAMATION WILL ACHIEVE APPROPRIATE LEVELS OF YIELD.



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**10. THE PRIME FARMLAND RESTORATION PLAN DOES NOT CONTAIN A RECLAMATION PLAN FOR EROSION CONTROL AND SOIL MANAGEMENT.**

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**11. THE PERMIT APPLICATION DOES NOT CONTAIN A "LAST MINE" MAP.**

* * * * * * * * * * * *

The State Act clearly precludes issuance of any permit which is incomplete. In almost a dozen different places discussed immediately **supra**, **Wiley Scott testified that the permit application was in fact incomplete and did not provide the required information**. No contradictory testimony was offered by the Department, Midland or Mid State. As such, [Citizens] has proven by a preponderance of the evidence that the permit application is incomplete and that therefore the permit should not have been issued since any one of these occurrences of specific authority are sufficient to divest the Department of authority to issue the permit. 225 ILCS 720/2.08(a), (b)(1). (**See**, Citizens' "Brief," pp.21-37) (Emphasis added)

The Department takes grave exception with reliance upon Mr. Wiley Scott's opinions concerning the "completeness" of the instant permit application. The Department states that:

> ...[Citizens] hired Mr. Wiley Scott to "critique" the application and testify at the hearing (Tr.157, 168, 171). Such critique consisted of a "paper review" of the application, the Department's findings and applicable laws and regulations (Tr.171). Out of the 450 plus page permit application, excluding the corresponding maps, profiles, cross-sections and similar items, Mr. Scott was unhappy with approximately ten of Midland's responses in the permit application. Some of these were too general for [Scott's] liking, he expected more "discussion" and "description" and he was inconvenienced by having to look at maps and data submitted with the application to ascertain contours, slopes and chemical soil properties (Tr. e.g.. 117-118, 120-121, 126-127, 175, 180-189).
>
> It is certainly not surprising that Mr. Scott had some difficulty reviewing and understanding the permit application. Despite his having worked for the Soil Conservation Service (now known as the Natural Resources Conservation Service) for 30 years, Permit Application No. 282 was the first permit application Mr. Scott had ever reviewed (Tr.156-157). In addition, it was his first time to review the Department's governing laws and regulations in any detail (Tr. 158). Moreover, Mr. Scott has zero experience with, has conducted zero research on, has taken zero coursework in, and has generated zero publications on the subject of surface mining and reclamation, which is what the permit application and this proceeding is all about (Tr.158-159, 163-169).

Again, it is no great surprise that Mr. Scott had some "problems" with the application. Unlike the directions to cooking macaroni and cheese, permit applications are voluminous and contain complex, technical information which is undoubtedly overwhelming to the first-time, inexperienced reviewer. Individual questions and responses cannot by necessity be reviewed in isolation from the remainder of the application. In short, Mr. Scott's critique of and problems with the application deserve very little, if any, weight.

Mr. Scott's ineptitude at permit review and comprehension is further underscored by the fact that none of the agencies charged with permit application review had "problems" with or failed to understand the information contained in the application, nor did any of those agencies find it "incomplete". (See Interagency response letters at Jt.Ex.1, pp. 472, 484, 491-494). (**See**, Department's "Brief," pp.5-6)

Likewise, Midland and Mid State were highly critical of the "expertise" Mr. Wiley Scott lent to this matter:

...Midland and Mid State maintain that the testimony of Wiley Scott should be given little, if any, wight by this Hearing Officer, especially as it relates to the completeness or adequacy of a permit application. As indicated earlier, while Mr. Scott may have had extensive prior experience as a soil scientist and was accepted as an expert in this area, he conceded during his own testimony that he had had no experience in completing and reviewing surface mining permit applications.

He stated during his testimony that permit nol. 282 was the **first and only** permit application he had ever reviewed. This was also the first time he had done an "in-depth" study of federal and state law as it related to surface mining in Illinois. ([Tr.]156-59) He conceded he had never completed a mining application before and had never had any kind of training on how to complete one. ([Tr.]171-72)

His role in the instant proceedings, as he viewed it, was to look at what the application requested or called for and then determine whether he **thought** the response provided was either incomplete or inadequate. ([Tr.]115) The opinions he provided as to the completeness or adequacy of certain identified portions of the permit application were based solely upon his own personal feelings about the responses, without the aid of any education or experience whatsoever in this regard.

Thus, at the outset and for all of the foregoing reasons, Midland and Mid State maintain the conclusions as to the completeness or adequacy of the permit application as stated by Mr. Scott during this testimony should be wholly rejected by this Hearing Officer.

Moreover, even if Mr. Scott's testimony is to be considered in judging the completeness of the application in question, on most, if not all, occasions he himself admitted that the information requested by IDDM had been provided by Midland, just not in the format or to the extent that he would have liked. (**See**, Midland's and Mid State's "Brief," pp.13-15)

Curiously, Citizens cited to the Seventh Circuit Court of Appeals' decision in **Illinois**

**South Project v. Hodel**, 844 F.2d 1286, 1291 (7th Cir.1988) as probative of the manner in which I should construe the "completeness" requirement contained in §2.08(b)(1) (the Department may only grant or deny a permit "[o]n the basis of a **complete application**, or a revision thereof." 225 ILCS 720/2.08(a)). (Emphasis added) However, the **Illinois South Project** decision dealt only with a regulation promulgated by the Department **construing** the meaning of "a complete application," and that regulation was subsequently repealed at 11Ill.Reg. 8118, effective July 1, 1987. The **Illinois South Project** decision dealt with a now **repealed** regulation which purported to impose "an apparent good faith effort" upon the applicant "to adequately address the portions of the application pertaining to the operation to be permitted." (**See**, repealed 62 Ill.Adm.Code §1771.11(b)(1)) The Department's new regulations are devoid of such "good faith" reference (presumably in light of the Seventh Circuit's discussion concerning the potential conflict such regulation had with its federal regulatory counterpart), and simply defines a "[c]omplete and accurate application" as "an application for permit approval or approval for coal exploration where required, which the Department determines contains all information which the State Act and 62 Ill.Adm.Code 1700-1850 require." (**See**, 62 Ill.Adm.Code Ch.1, §1701. APPENDIX A) Thus, the Department's, Midland's and Mid State's arguments concerning Mr. Wiley Scott's personal opinions concerning the "completeness" of the permit application are well taken. That is not to say that in every instance, simply because the Department deems an application "complete," that such determination is **per se** correct. Rather, unless the Department has egregiously erred with respect to the determination that a permit application is complete (so that it may be further processed), such determination will withstand objection by those purporting to disagree with the quality and quantity of the initial responses set forth by applicants to the application process.

For instance, Citizens objects to the general "timetables" set forth within the instant permit application, stating that the Department's regulations require that a reclamation plan include:

> [a] detailed timetable for the completion of each major step in the reclamation plan. (**See**, Citizens's "Brief," p.23, **citing**, 62 Ill.Adm.Code §1780.18(b)(1))

And Citizens is correct that I have previously expressed concerns "regarding the suffiency of the permit application in this respect." (**See**, Citizens' "Brief," pp.23-24) But the Department argues forcefully that:

> Mr. Scott's dissatisfaction with the level of "detail" provided in the reclamation timetable result from his lack of understanding that mining and reclamation operations are dependent upon and affected by many events -- regulatory deadlines, Department approvals, external factors such as weather and ground conditions, equipment, labor supply and so on. It would be nonsensical for an applicant to state that each reclamation phase will begin and end on a date certain, and such is not required by the regulatory authority charged with reviewing applications. No other agency responsible for permit review, including the Soil Conservation Service, was dissatisfied with the "timetable" or level of detail provided in the application. (**See**, Department's "Brief," pp.6-7)

The Department **is** correct. The regulations do **not** require **specific** dates in formulating a timetable. Rather, a "detailed timetable" is required. I believe, in light of the unforeseeable factors enunciated by the Department above which could skew a timetable, that the Department's interpretation of 62 Ill.Adm.Code 1780.18(b)(1) is not unreasonable, and that the "detail[s]" required refer to the steps to be taken sequentially by the applicant in the mining and reclamation process.

Further, I think it appropriate to address each of the remaining "incompleteness" infirmities delineated by Citizens:

**Plan for backfilling and grading**:

Citizens asserts, through Mr. Wiley Scott, that the permit application does not "describe



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how approximate original contour will be achieved," and that such is required by 62 Ill.Adm.Code §1780.18(b)(3). The Department takes grave exception to such, stating that had Mr. Scott:

> ...known what is meant by "approximate original contour", which is defined at 62 Ill.Adm.Code 1701.Appendix A, and had he known anything about mine and permit applications, he would have known to review that Post-Mining Land Use Map and Typical Cross Section of Anticipated Final Surface Configuration (Jt.Ex.1, pp.337,338), and additional information provided in the application (Jt.Ex.1, pp. 326,345-353). No other agency responsible for permit review, including the Soil Conservation Service, expressed concerns about Midland's plan for backfilling and grading. (**See**, Department's "Brief," p.7)

"Approximate original contour" as defined by 62 Ill.Adm.Code 1701.Appendix A means that:

> ...surface configuration achieved by backfilling and grading of the mined areas so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls, and spoil piles and coal refuse piles eliminated. Permanent water impoundments may be permitted where the Department has determined that they comply with 62 Ill.Adm.Code 1816.49 and 1816.56, 1816.133 or 1817.49, 1817.56 and 1817.133. Section 1.03(a)(2) of the Surface Coal Mining Land Conservation and Reclamation Act (Ill.Rev.Stat.1991, ch.96½, par.7901.03(a)(2)) [225 ILCS 720/1.03(a)(2)].

I have personally reviewed the application's Post-Mining Land Use Map and Typical Cross Section of Anticipated Final Surface Configuration (Jt.Ex.1, pp.337,338), and I have reviewed the additional information provided in the application cited by the Department. (Jt.Ex.1, pp. 326,345-353) I find the requisite information contained therein to satisfy the Department's regulations. I find that Citizens has failed to demonstrate by a preponderance of the evidence that the permit application is "incomplete" in regards to the plan for backfilling and grading.

**Suitability of Topsoil Substitutes**:

The Department's regulations require that a permit application contain a reclamation plan which includes:

> [a] demonstration of the suitability of topsoil substitutes or supplements under 62 Ill.Adm.Code 1816.22(b) shall be based upon analysis of the thickness of soil horizons total depth, texture, percent course fragments, pH, and areal extent of the different kinds of soils. The Department shall require other chemical and physical analyses, field-site trials, or greenhouse tests if determined to be necessary or desirable to demonstrate the suitability of the topsoil substitutes or supplements. (**See**, 62 Ill.Adm.Code §1780.18(b)(4))

Citizens states that "[t]he absence of an identification **of the source** of these substitute materials and a demonstration of their suitability renders the application incomplete. (**See**, Citizens' "Brief," p27) I disagree. As pointed out by both the Department and Midland, the "source" of the substitute material is not even a requisite for response to the application's question in this regard. (**See**, Department's "Brief," p.8; Midland's "Brief," p.16) Further, Midland responded to the inquiry within the application in the following manner:

> Topsoil substitution is proposed for the Lenzburg soils 871B, 871D and 871G. Fertility and texture analysis for the existing Lenzburg soils in the proposed permit area are shown in Attachment #1 in this Appendix. The location of the two Lenzburg soil samples, L-1 and L-2, is shown on the Soils Map. A fertility and texture analysis from an area reclaimed to non-cropland capability pasture in permit #132 is shown on Attachment #2 in this Appendix and is the quality of the expected post mining substitution. I both instances, Permit #132 and the proposed permit, the existing soils classified as Lensburg were the result of mining activities associated with the recovery of the #6 coal seam in the late 1940's and early 1950's. (**See**, Jt.Ex. #1, p.315)

I find such response, coupled with the information contained within the Soil Analysis and Physical Properties Reports compiled by Key Agricultural Services, Inc., sufficient to overcome any assertion of incompleteness. The agencies making up the Interagency Committee charged with reviewing the permit application found no "completeness" deficiency in this regard. Therefore, I find that Citizens failed to prove by a preponderance of the evidence that "[t]he absence of an identification of the source of these soil substitute materials and a demonstration of their suitability renders the application incomplete."

**Revegetation Plan**:



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Citizens complains that Midland and Mid State failed to adequately respond to the directions of the application with respect to a "revegetation plan." Citizens correctly cite the applicable regulation, which provides that a permit application will include:

> [a] plan for revegetation as required in 62 Ill.Adm.1816.111 through 1816.117, including, but not limited to, descriptions of the...measures proposed to be used to determine the success of revegetation as required in 62 Ill.Adm.Code 1816.116....(**See**, 62 Ill.Adm.Code §1780.18(b)(5)(F), **cited by Citizens** at "Brief," p.27)

Citizens urges that Midland's response, that "[t]he applicant will abide by the applicable rules and regulations," is insufficient and the permit application is therefore "incomplete." The problem with Citizens' assertion is that it fails to correctly cite the question to which said response was made. The application question states as follows:

> Question: Provide measures proposed to be used to determine success of revegetation required under 62 Ill.Adm.Code 1816.116.
>
> [Midland's] Answer: The applicant will abide by the applicable rules and regulations. (**See**, Jt.Ex. #1, p.315)

At first blush, the response of Midland seems cursory, even to the limited inquiry made within the application form. But an examination of 62 Ill.Adm.Code 1816.116 reveals that the "measures...to be used to determine success of revegetation" are provided within the extremely detailed regulation itself. Thus, the Department is correct that the regulation "contains the standards for revegetation success," and that such standards are determined "by the Department." Thus, the application's inquiry appears to be redundant. Further, the Department notes that "a number of questions in the application relate to the sequence of mining and reclamation operations (**See**, **e.g.**, Jt.Ex.#1, pp.314-315, 347-355), and therefore the "revegetation plan" must be construed in conjunction with the all of the responses contained within the application, not just the question which relates to the "measures...to be used to

determine success of revegetation." I think this is an instance where Citizens is focusing in on a particular response to a particular question and ignoring the remainder of the application. The Department deemed the permit application complete and the Interagency Committee, by placing its imprimatur upon such, did so too. I therefore find that Citizens failed to prove by a preponderance of the evidence that the responses submitted by Midland with respect to the inquiries concerning the revegetation plan rendered the permit application incomplete.

**Soil Testing Plan**:

Citizens urge that because the Department's regulations provide that a permit application will include "[a] soil testing plan for evaluation of the results of topsoil handling and reclamation relating to revegetation," that Midland's response in the application that "[s]oil amendments will be applied as per the results of soil tests," is insufficient and, thus, the permit application is incomplete. (See, Citizens' "Brief," p.28) But clearly the type of "soil amendments," and the manner of application, will be dependent upon the subsequent results of soil tests taken upon commencement of the reclamation operation. The fact that Mr. Wiley Scott would have responded differently to the inquiry does not make the permit application legally infirm. I find no fault with the permit application in this regard. Therefore, I find that Citizens failed to prove by a preponderance of the evidence that the permit application was "incomplete" because of the response Midland provided with respect to soil testing.

**High Capability Slopes**:

The Department's regulations require that a permit application show the manner in which high capability status areas will "be graded to the approximate original contour of the land prior to mining," and the manner in which "length of slope and contour of the restored surface shall be conducive to those farming operations normally associated with row crop production." (62



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Ill.Adm.Code §1780.18(a)) Citizens assert that "Wiley Scott testified that no such discussion of slope lengths and slope steepness was contained in the applicant's response to this requirement. (**See**, Citizens' "Brief," p.29, **citing**, Tr. 120-121) However, the Department notes that "Midland states in the application that all land will be reclaimed to approximate original contour." (**See**, Department's "Brief," p.9) Further, the Department states that:

> ...had Mr. Scott known anything about approximate original contour and permit application review, he could have easily determined the slope steepness and lengths by reviewing the Post-Mining Land Use Map and Typical Cross Section of Anticipated Final Surface Configuration submitted with the application. Neither the Department nor any other agency responsible for permit review had questions or concerns about final graded slope steepness or length. The mere fact that Mr. Scott did not like the format of the information provided simply does not render the application incomplete. (**See**, Department's "Brief," pp.9,10)

Midland and Mid State echo this sentiment by stating that:

> Mr. Scott again admitted that the term "discussion" as contained in this particular request "could mean different things to different people." He also state that the approximate original contours of the land could be determined from soils maps included in other parts of the application. ([Tr.179-81; C324)

I again concur with the Department and with Midland and Mid State. The permit application **does** contain sufficient information concerning the final graded slopes of replaced high capability status areas. I therefore find that Citizens failed to prove by a preponderance of the evidence that the permit is incomplete with respect to the information required as to the final grading of slopes of replaced high capability status areas.

**Soil Profile**:

Citizens state that "[t]he Department's Regulations require that a permit application contain a restoration plan for prime farmland that includes:

> ...a representative soil profile as determined by the [Soil Conservation Service], including, but not limited to, soil horizon depths, pH, and range of soil densities for each prime farmland soil map unit within the permit area. (**See**, Citizens' "Brief," pp.29,30,

**citing**, 62 Ill.Adm.Code §1785.17(c)(1)(B))

Citizens assert that:

> [t]he only testimony on this issue was from an employee of the Soil Conservation Service for over thirty years who testified that Attachments 1 and 2 [of the permit application] did not constitute the required soil profile. Hrg Trans., pp. 122-28; **see also** Cit.Ex. 6, p.4. Instead, in Mr. Scott's professional opinion, the numbers given for depth and thickness of each horizon reflect only arbitrary depths which are highly unlikely to reflect actual soil horizons. Hrg. Trans., pp. 124-25. Similarly, Attachment 1 is intended to contain texture analysis of each horizon, along with present pH and state of fertility, but instead contains data in arbitrary one foot and two feet increments that are not analyzed by horizon, not discussed as required by the permit application and overall do not consist of a representative soil profile as required by the Department's Regulations. Hrg. Trans., pp. 125-28. (**See**, Citizens' "Brief," p.30)

In response the Department states that:

> [i]n Mr. Scott's opinion, the analytical information provided in the application (Jt.Ex. #1, pp. 360-428) "did not constitute the required soil profile" ([Citizens'] Brief, p.30). This information, consisting of approximately 68 pages entitled "Soil Data Taken and Analyzed by Key Agricultural Services, Inc.", was evidently difficult for Mr. Scott to interpret. However, although the format was not to his liking, he did admit that all the data was there (Tr.186). The soil profile description provided by Midland was not problematic for the Department or any other agency responsible for permit review. Mr. Scott's inability to interpret technical analytical data does not render the application incomplete. (**See**, Department's "Brief," p.10)

Likewise, Midland and Mid State objected to Mr. Scott's conclusions, stating that

> Mr. Scott attacked the soil profiles provided in attachment #2 to Appendix F and opined it was unlikely the information represented horizon breaks. However, he also stated he had no factual basis for his opinion and had not conducted any independent borings to confirm the data. ([Tr.]124-25; 185; C340)...Mr. Scott stated the data in [regard to pH and state of fertility] was present, but one had to search through the tabular format to find the information. Also, he objected to the use of allegedly arbitrary one foot and two feet increments but provided no independent corroboration in this regard. ([Tr.]125-26; 186; C340) (**See**, Midland's and Mid State's "Brief," pp.16,17)

I once again concur with the Department that the sixty-eight (68) pages entitled "Soil Data Taken and Analyzed by Key Agricultural Services, Inc." contains the data required by the Department for a "complete" permit application with respect to undisturbed soil profiles. Mr.



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Scott did acknowledge that all of the data was present, but was simply not in the form he expected. Such is insufficient to render the permit application "incomplete." Therefore, I find that Citizens failed to prove by a preponderance of the evidence that the permit application was "incomplete" in so far as not containing the data pertaining to undisturbed soil profiles.

**B/C Horizon Mix**:

Citizens asserts that:

> [t]he State Act requires that a permit application demonstrate that if a combination of B horizons and C horizons are to be used to create the root zone, they can be used only if:
>
> > a combination of such horizons or other strata...are shown to be both texturally and chemically suitable for plant growth and...can be shown to be equally or more favorable for plant growth than the B horizon. (**See**, Citizens' "Brief," p.31, **citing**, 225 ILCS 720/3.07(a)(2) and 720/2.08(b))

Citizens relies upon Mr. Wiley Scott's opinion that the information provided by Midland and Mid State within the permit application was "confusing and contradictory." (**See**, Citizens' "Brief," p.31, **citing**, Tr.128-32) Midland responds by stating:

> [w]ith respect to the proposal to mix the B and C horizons, Mr. Scott did not say the requested information was not present [in the permit application], just that the information was confusing to him and that he had to make certain assumptions as to what was meant. Upon questioning by this Hearing Officer, though, Mr. Scott did state that there is information in the application which indicates that the unconsolidated material goes from 22 feet to 39 feet. [Tr.202,203] The description and supporting attachments also contain detailed information on soil samples from the existing B and C horizons, pH, phosphorous and potassium levels and soil texture as well as a discussion of how the horizons will be mixed. While Mr. Scott disagreed with combining the B/C horizons under any scenario, he did admit that such a combination was permitted under existing law. ([Tr.]128-29; 160; 190-91; 203; C340-44)

I concur with Midland and Mid State that the requisite information concerning the mixing of the B and C horizon is contained within the permit application. I do not agree with Citizens that "[t]he permit application contains either no information on the depth of C horizon and the extent of the mixture of the C horizon, or its information is so contradictory and confusing as to be

meaningless." (**See**, Citizens' "Brief," p.32) Therefore, I find that Citizens failed to prove by a preponderance of the evidence that "the application is incomplete for failure to show that the combination of the B and C horizons is lawful." (**See**, Citizens' "Brief," p.32)

**Scientific Data in Support of Prime Farmland Reclamation Levels of Yield**:

Citizens next correctly state that the Department's regulations require that a permit application include:

> [s]cientific data, such as agricultural school studies, for areas with comparable soils, climate, and management that demonstrate that the proposed method of reclamation, including the use of soil mixtures or substitutes, if any, will achieve, within a reasonable time, levels of yield equivalent to, or higher than, those of nonmined prime farmland in the surrounding area. (**See**, Citizens' "Brief," p.32, **citing**, 62 Ill.Adm.Code §1785.17(c)(3))

Citizens then go on to assert that "[t]he permit application attempts to meet this requirement by claiming that the reclamation procedure proposed is similar to the procedures used at the Elm and Rapatee Mines", and that "[t]he yields identified as having been obtained at these mines are contained in Attachments 6 and 7 of the permit application and are incomplete on their face." (**See**, Citizens' "Brief," p.33, **citing**, Dept. Rec. 344-345, 429-30) Citizens attacks Attachments 6 and 7 for their lack of completeness and alleged inaccuracies, and conclude its argument by stating:

> [t]hese charts, Attachments 6 and 7 of the permit application, purport to show that "[t]arget yields established by the Agricultural Lands Productivity Formula have been met on corn, soybeans, and wheat since cropping of reclaimed lands began in 1985." Dept. Rec., p.344. They do not do so. Therefore, the permit application is incomplete for failing to contain scientific data that demonstrate reclamation of prime farmland soil will succeed. (**See**, Citizens' "Brief," p.34)

The Department and Midland accuses Citizens of setting up a "strawman" and then knocking it down. The Department and Midland assert that Citizens is wrongfully focusing in on only one sentence of Midland's response to the inquiry concerning the reclamation of prime farmland soil

while wholly ignoring the rest of Midland's response. The Department asserts:

> [Citizens] focuses upon one sentence out of an eight paragraph response for its assertion that the prime farmland restoration plan does not contain scientific data supporting the assertion that the proposed method of reclamation will achieve appropriate levels of yield. The sentence targeted by [Citizens] reads as follows: "The reclamation procedure proposed is similar to the procedures used at the Elm and Rapatee Mines which produced the yields identified in Attachments #6 and #7." (Jt.Ex1, pp.344-345, 429-430). Dr. Richard Stout, hired statistician and fellow member of the Citizens Organizing Project, appeared on its behalf to testify regarding his analysis of productivity at the Elm mine. (Tr.278). Dr. Stout found that Attachment #6 was difficult to use for a meaningful comparison (Tr.246), and Mr. Scott could not "determine anything" without looking at additional data. (Tr.199)
>
> The Department fails to understand [Citizens'] myopic emphasis of Attachment Nos. 6 and 7 in the application. These attachments are simply compilations of productivity from the Elm and Rapatee mines, data which is collected annually by the Department and the Illinois Department of Agriculture. Reduced compilations of such data are hardly newsworthy. Moreover, Midland simply states in the application that the reclamation procedure proposed for Permit No. 282 is similar to the procedures used by the Elm and Rapatee mines, and then goes on to reference the following information in support of the proposed prime farmland restoration plan:
>
> 1) A letter from Dean E. Wesley, Ph.D., Certified Professional Soil Scientist, supporting the position that the proposed B/C horizon mix in conjunction with the rest of the prime farmland restoration plan can achieve required productivity levels based on the soil cores taken from the proposed permit area. See Attachment #5 in this Appendix.
>
> 2) A report titled "Correlation of Selected Physical Properties with Crop Production on Reclaimed Strip Mined Land" by Dean E. Wesley, for Midland Coal Company's Elm Mine. See Attachment #8 in this Appendix.
>
> 3) A letter from Dean E. Wesley, dated August 6, 1990, to the Department of Mines and Minerals, containing comments to the Final Land Report for the Lands Unsuitable for Mining Petition No. LU-003. See Attachment #9 in this Appendix.
>
> 4) "Summary and Discussions of the Spoil Samplings at the M-Farm", a study by Dean Spindler on far owned and managed by Midland Coal Company. This study shows crop production on older reclaimed graded cast overburden without topsoil is productive and exceeded the county average for corn production. See Attachment #10 in this Appendix.
>
> For additional information and scientific papers, see part D. Additional

Information in this Appendix.

> (Jt.Ex.1, pp.344-345). It is curious that [Citizens] chose to focus upon one sentence and completely ignore the remainder of the response. More importantly, given that the above response was not even addressed by [Citizens], its assertion that " the permit application is incomplete for failing to contain scientific data that demonstrates reclamation of prime farmland soil will succeed" is flagrantly false. (**See**, Department's "Brief," pp.11,12)

The Department and Midland are correct. Citizens cannot substantiate that the permit application is "incomplete" by focussing only upon one sentence of a response and extrapolate from such that the data supporting the **sentence** (albeit perhaps incomplete) somehow permeates the entire response. Citizens does not even purport to address the remaining citations and information contained within Midland's response. Therefore, I find that Citizens failed to prove by a preponderance of the evidence that "the permit application is incomplete for failing to contain scientific data that demonstrates reclamation of prime farmland soil will succeed."

**Erosion Control and Soil Management**:

Citizens correctly states that the "Department's Regulations require that for prime farmland, a permit application include:

> [a] plan for soil reconstruction, replacement and stabilization for the purpose of establishing the technological capability of the mine operator to comply with the requirements of 62 Ill.Adm.Code 1823." (**See**, Citizens' "Brief," p.34, **citing**, 62 Ill.Adm. Code §1785.17(c)(2))

Citizens cites the opinion of Mr. Wiley Scott that the response to the inquiry concerning erosion control and soil management is either incomplete or otherwise unsatisfactory. (**See**, Citizens' "Brief," p.35) However, the Department cites page 353 of the application (Jt. Ex. #1, p.353), which contains the following question and answer:

> Question: Discuss how wind and water erosion will be minimized. Include discussions of seeding, seeding equipment to be involved and erosion control structures to be used.

Response: Erosion will be primarily controlled by vegetative measures. After the topsoil is replaced, wheat will be planted on all acreage at a rate of 1 ½ bushes per acre. A seed bed will be prepared by conventional farm equipment and wheat will be planted with a farm grain drill. The area will be seeded with a pasture mixture of 10# and alfalfa, 5# of bromegrass, and 3# of orchard grass per acre in the following early spring (probably early March).

Question: Discuss the management of these areas including crop rotations, green manuring and levels of fertility and personnel responsible for management. Discuss the fertility management.

Response: As outlined above, wheat and pasture mix will be initially planted on the reclaimed area. Wheat fertilization will be applied as per soil tests. After the initial wheat crop is harvested the area will be leveled with an Ashland land leveler pulled by a large farm tractor. The land leveler will eliminate any small depressions found in the reclaimed area. The reclaimed area will be planted to alfalfa after the land leveling process. The alfalfa crop will remove excess soil moisture. After three to six years of grass legume pasture on the area, the area will be cropped to a rotation of corn, soybeans and wheat. Fertilization of the crops planted will conform to soil tests results from the reclaimed area. (**See**, Jt.Ex. #1, p.353)

I do not find, as a matter of law, that these responses are such that Citizens' contentions that they are either incomplete or objectionable are accurate. Therefore, I find that Citizens' has failed to prove by a preponderance of the evidence that the information and responses provided by Midland in its application permit concerning erosion and soil management are such as to render the permit application "incomplete."

**"Last Mine" Map**

The Department's Regulations require:

[t]he permit application shall include maps showing:

(c) The boundaries of all areas proposed to be affected over the estimated total life of the proposed surface mining activities with a description of size, sequence, and timing of the subareas for which it is anticipated that additional permits will be sought; (**See**, 62 Ill.Adm.Code §1779.24(c))

Citizens simply reasserts the same arguments it made with respect to this section which I

addressed in my Order of March 30, 1995 (**i.e.**, Midland's permit application was incomplete for failing to include such maps). I reject such contention on the same bases as those enunciated within my March 30, 1995 Order.

V.

**Whether the Permit Application Affirmatively Demonstrates That Reclamation Can Be Accomplished By Restoring All Land Use.**

Citizens correctly state that "[t]he State Act provides:

> No permit or revised permit shall be issued unless the application affirmatively demonstrates, and the Department finds that . . . (2) the application has demonstrated that reclamation as required by this Act can be accomplished under this reclamation plan and that completion of the reclamation plan will in fact comply with every applicable performance standard of this Act..." (**See**, Citizens' "Brief," p.37, **citing**, 225 ILCS 720/2.08(b)) (Emphasis by Citizens)

Citizens cite the opinion of Mr. Wiley Scott to support that this statutory provision has not been met. Premised upon Scott's testimony, Citizens urge that Midland's permit application was "disorganized, contradictory, incomplete and inaccurate." (**See**, Citizens' "Brief," p.37) After citing several quotes from Wiley Scott from the voluminous transcript of the proceeding herein, Citizens asserts that:

> Mr. Scott's uncontradicted testimony proves that the applicant has not affirmatively demonstrated that reclamation as required by the State Act can be accomplished with all affected land being restored to their former uses. (**See**, Citizens' "Brief," p.40)

In response, Midland and Mid State:

> ...question the credibility of [Citizens'] witness...and his ability to make opinions with respect to reclamation and productivity levels of mines land. While Mr. Scott was a consultant and retired soil scientist who had worked for the SCS for many years, he personally testified that he had never conducted any research or written any papers concerning post-mining productivity or the ability to reclaim mined prime farmland. He had had no education or training in mine reclamation or reclamation technology. He had performed no field research on productivity levels of mines farmland or on the



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effectiveness of available reclamation technology. (R159; 163-65; 168-69)

Also, Mr. Scott testified concerning his lack of experience with respect to applications for surface mining permits. He said that, during his time with the SCS, he did not have any surface mining permit review responsibilities. In fact, permit no. 282 was the first and only permit application he had ever reviewed. He had never completed a mining application before and never had any kind of training on how to complete one. This was also the first time he had done an "in-depth" study of federal and state law as it related to surface mining in Illinois. (R156-59; 170-72)

Because of Mr. Scott's admitted lack of background, research and experience in the areas of surface mining permit applications, reclamation of mined land, reclamation technology and productivity levels of mined land, Midland and Mid State maintain that his testimony and opinions in this regard should be given little, if any weight and should be disregarded by this Hearing Officer in rendering his decision.

* * * * * * * * * * * *

As an initial matter, a cursory review of the mining and reclamation plans as contained in applications for permit nos. 227 and 282 and the evidence presented with respect to both of those applications reveal that those plans as well as the types of soils are essentially identical. Plans for both permits provide for the removal and replacement or stockpiling of topsoil using dozers and the windrow method; for removal, mixture and replacement of the B and C horizons via dragline; for seeding of the topsoil with vegetative cover to prevent erosion; and for use of the DMI deep tillage plow to ameliorate compaction. (Appendices E & F of permit application no. 282, inc. C326-27; C345, 347, 349; PR1555) Also, the soil types in each of the permit areas include Tama and Ipava soils. (R95; PR1599) As a result, the evidence and opinions introduced in connection with the permit no. 227 proceedings are equally applicable and relevant in the instant proceedings.

At the permit no. 227 proceedings, both IDMM and Midland and Mid State called expert witnesses who offered their conclusions and opinions on Midland's operations and reclamation plans. Unlike the expert witnesses called by [Citizens] in the instant proceedings, these experts had extensive background and training and training in the areas of prime farmland restoration and reclamation, soil analysis and reclamation technology and had conducted hands-on research in those areas. (See PR1540; 1551; 1745; 1750; 1899-1901; 1911-12, and additional statement of facts set forth, **supra**)

Each of the witnesses for IDMM and Midland and Mid State, namely Robert Dunker, Robert Darmody and Dean E. Wesley, reviewed the permit application in question and was able to arrive at an opinion based upon their professional expertise that the reclamation plan should meet productivity requirements for prime farmland or would result in good soil that would make bond release and satisfied the requirements of the law or that the reclamation plan met all of the Illinois Permanent Program requirements for the reclamation of prime farmland. (PR1555; 1614-15; 1618; 1775; 1924-25) These opinions together wholly outweigh the lone opinion offered by Wiley Scott that the permit application fails to demonstrate an ability to restore and reclaim mined land. (**See**, Midland's and Mid State's "Brief," pp.20-23)

I concur with Midland and Mid State that Mr. Wiley Scott's lone opinion does not overcome the findings of the Department contained within the permit decision pertaining to Midland's ability to restore and reclaim mined land. Because Citizens stipulated to the transcript of the hearing contained in Permit Application No. 227, the testimony of the experts contained therein (to wit: Robert Dunker, Robert Darmody and Dean E. Wesley) clearly overcome the testimony of Mr. Scott, especially and particularly in areas in which Mr. Scott is admittedly not an expert and in which Mr. Scott has little or no practical experience. Therefore, I find that Citizens failed to prove by a preponderance of the evidence that Midland failed to demonstrate that all affected lands contained in the permit area will be restored to a condition capable of supporting their former uses.

VI.

**Whether the Permit Application Affirmatively Demonstrates That Prime Farmland Can Be Restored to Equivalent or Higher Yield As Non-mined Prime Farmland in the Surrounding Area.**

The State Act requires:

> [e]xcept for operations subject to exemption..., a permit or revised permit for mining operations on prime farmland may be issued only if the Department also finds in writing that the operator has the technological capability to restore such mines area within a reasonable time, to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management and can meet the soil reconstruction standards in Section 3.07. (**See**, 225 ILCS 720.2.08(b))

Once again, Citizens relies almost exclusively upon the opinion of Mr. Wiley Scott, who expressed doubt that equivalent or higher yields would be attained on the prime farmland contained within the permit area, in derogation of 225 ILCS 720.2.08(b). Citizens states that:

> [o]f particular concern to Mr. Scott was the permit application's failure to demonstrate the impact of the reclamation plan on existing soil horizons. There are essentially two



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basic soil layers, a surface layer and a subsoil lay [sic], both of which serve important functions. Cit.Ex. 6, pp.12-13. What makes soils in Knox County high productivity soils in comparison with other areas of the state, such as Southern Illinois, is that the uppermost loess in Knox County is Peoria loess, and soils formed in Peoria loess possess a higher phosphorous, higher organic matter, content, higher content of expandable clay materials, and higher cation exchange capacity. Hrg. Trans., pp. 80-88, 94-95. In southern Knox County, Peoria loess ranges from 100 to 150 inches in thickness. Hrg. Trans., p.81; Cit.Ex 6, p.10. The permit application proposes mixing the Peoria loess with unconsolidated material beneath it.

* * * * * * * * * * * *

The State Act requires a special showing of chemical and textural suitability, as well as favorability [sic] to plant growth, in order for the B horizon to be combined with the C horizon or other strata. 225 ILCS 720/3.07(a). From a soil scientist perspective, this requirement was clearly intended to allow consolidation of B and C horizons in situations only where soils have thin or absent B horizons. (**See**, Citizens' "Brief," pp.41-43)

The Department takes strong exception to this argument. The Department states:

[t]here is absolutely no support in the record or in anything produced by [Citizens] for this statement. It was firmly established by Mr. Scott himself that mixing the B and C horizons is perfectly lawful and that he has no documentation to support his belief that mixing of horizons was intended to be limited to situations where the B horizon is thin or absent. (Tr.160, 194, 203-205) (**See**, Department's "Brief," p.15)

Midland, likewise, argued strenuously against Mr. Scott's observations and opinions concerning the propriety of the mixing of the B and C horizons. Midland argued that:

...the expert witness called by Midland and Mid State during the 227 proceedings, Dean E. Wesley, testified extensively concerning the mixture of B and C horizons. In this regard, Dean Wesley stated the soils information and resulting mix of the B/C horizons were important parts of the plan because that is the parent material upon which the final soil will develop. He said that, if the mix is proper, then a soil will develop that will eventually have the production capability of the soil that has been disturbed. (PR1915-17)

In his examination of the B/C horizon mix, Dean Wesley said he had paid particular attention to the textures and chemical properties of the material. Dr. Wesley said that the resulting textural class would be a silty clay loam. He also looked at the chemical properties of the material and opined the pH levels in question should not affect crop production in any way. He concluded that the silt loam was a good parent material through which productive soil will develop and that the chemical makeup of the material would also be capable of developing into productive soil. In the end, he summarized by

stating he was sure the combination would result in "a soil that will produce a crop that will meet the Illinois standards." (PR1914; 1917-23- 1925)

All the foregoing testimony was provided by a witness who, unlike Mr. Scott, performed analytical work, including chemical analyses and physical properties analyses, in the mining arena and dealt with the permitting processes on a regular basis. (PR1899-1901, 1911-12) (**See**, Midland's and Mid State's "Brief," pp.24-25)

Citizens, in response, call citation to Permit No. 227 and the testimony of the experts therein "scandalous." (**See**, Citizens' "Reply Brief," p.6) Citizens again asserts that "the submission of the hearing transcript from Permit Number 227 was based solely on the submission of an abstract of that testimony by Knox County," an assertion I reject **in toto**. (**See**, Citizens' "Reply Brief," p.3) If Citizens objected to the manner in which such testimony was to be utilized by either the Department or Midland, Citizens should have expressed such objection at the time the stipulation was reached in admitting the transcript into evidence. Finding no such objection expressed, I conclude that Citizens failed to prove by a preponderance of the evidence that the permit application herein fails to demonstrate that prime farmland can be reclaimed to equivalent levels of yield. On the contrary, in considering the testimony of the experts who testified in permit application No. 227, it appears that Midland clearly provided sufficient information within the application enabling experts in the reclamation process to conclude that said farmland can, indeed, be reclaimed to equivalent levels of yield.

VII.

**Whether the Department Failed to Make Written Findings In the Manner Required By Law, Thus Rendering the Permit Decision Invalid.**

Citizens urges that the Department failed to make requisite findings within the permit



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process. However, the Department responds to such arguments by persuasively arguing that:

> [Citizens] contends that the Department failed to make certain required findings, characterizing the Department's findings as nothing more than "legal conclusions which parrot the relevant statutory and regulatory language. ([Citizens'] Brief, p.54) In an attempt to support this argument [Citizens] targets five pages of the Department's 45 page Results of Review, those five pages being entitled "Summary of the Department's Findings". [Emphasis added]. As shown by the following representative example, [Citizens'] argument completely misses the mark.
>
> [Citizens] asserts that the following finding does not comply with the following statutory requirement:
>
> > 225 ILCS 720/2.08(b)(3): "No permit or revised permit shall be issued unless the application affirmatively demonstrates, and the Department finds that the assessment of the probable cumulative impact of all anticipated mining in the area on the hydrological balance specified by the Department by rule has been made by the Department and the proposed mining operation has been designed to prevent material damage to hydrological balance outside the permit area."
> >
> > Summary finding: "The Department has assessed the probable cumulative impacts of all anticipated coal mining on the hydrological balance in the cumulative impact area, in accordance with 62 Ill.Adm.Code 1780, and finds that the operations proposed under the application have been designed to prevent material damage to the hydrological balance outside the proposed permit area (See Appendix C)."
>
> (Jt.Ex. 1, p.1150). Appendix C of the Results of Review consists of eleven pages detailing the Department's assessments and findings of probable cumulative hydrologic impacts (Jt.Ex.1, pp.1172-1182). The Department invites the hearing officer to review Appendix C, along with Appendices D, E, and F in the Department's Results of Review, and is confident that the information found therein will not be deemed mere "legal conclusions."
>
> [Citizens'] focus on the Department's "Summary Findings" within the Results of Review of Permit Application No. 282 ignores the remainder of the document, which contains detailed discussions of each statutorily required finding alleged to be deficient by [Citizens]. Had [Citizens] read past the sixth page of the 45 page Results of Review, the Department submits it would be hard pressed to persist in its [sic] argument that the Department's findings are mere "conclusory recitals." (**See**, Department's "Brief," pp.15-16)

I agree that Citizens erroneously is italicizing portions of the Department's "Results of Review" in order to assert that certain findings are missing within the decisional process. I find, after careful review of the Department's decision, that all of the requisite information and findings are

present, and therefore I reject Citizens' assertion that the Department failed to make regulatory and statutorily required written findings.

VIII.

**Whether the Department Failed to Consider All Relevant Comments, Thus Rendering the Permit Decision Invalid.**

Citizens offered no arguments supporting this contention and therefore I rule that such assertion in not a basis for overturning the Department's decision.

IX.

**Whether the Department Erred in Granting a Permit to an Applicant Whose License to Transact Business in the State of Illinois Has Been Withdrawn.**

This issue was specifically addressed in my previous Order of March 30, 1995 within this docket. Citizens offers no new arguments with respect to the same. Therefore, the ruling and rationale stated within my March 30, 1995 Order is adopted and incorporated herein. Premised upon such, I reject Citizens' assertion that the Department erred in granting the permit to the applicant herein.

X.

**Whether the Department Erred in Granting a Permit Without Conducting A Violation History Search of the Applicant, ASARCO, Inc.**

This issue, too, was previously addressed by me, in my June 27, 1995 Order. Citizens offers no new arguments with respect to such issue. Therefore, the ruling and rationale stated within my June 27, 1995 Order is adopted and incorporated herein. Premised upon such, I reject



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Citizens' assertion that the Department erred in granting the permit to the applicant herein.

**The decision of the Department approving Permit Application No. 282 is hereby affirmed in toto.**

**IT IS SO ORDERED.**

Dated: April 3, 1996

Michael W. O'Hara
Hearing Officer



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The undersigned hereby certifies that a copy of the foregoing Decision was mailed to the following via certified mail at the last known address of:

Ms. Karen Jacobs
Department of Natural Resources
Office of Mines & Minerals
524 South Second Street
Springfield, Illinois 62701-1787

Mr. Scott Schmitz
Supervisor, Land Reclamation Division
Illinois Department of Natural Resources
Office of Mines & Minerals
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1 North Old Capitol Plaza
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Mr. Roger Calhoun
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Office of Surface Mining
575 North Pennsylvania Street
Suite 300
Indianapolis, Indiana 46204

Ms. Linda Laugges
Thomas, Mamer & Haughey
P.O. Box 560
Champaign, Illinois 61824-0560

by enclosing the same in an envelope addressed to them as shown above, with postage fully prepaid, and by depositing said envelope in a U.S. Post Office Mail Box in Springfield, Illinois on April 4, 1996.

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