BEFORE THE ILLINOIS DEPARTMENT OF MINES AND MINERALS

In Re The Matter Of	)
	)
PERMANENT PROGRAM PERMIT	)
APPLICATION #132, MIDLAND	)
COAL COMPANY, RAPATEE MINE,	)
SM-1 APPLICATION	)

ORDER AND DECISION

Appearances.

William F. Morris, on behalf of the Petitioners, Citizens for the Preservation of Knox County, Inc.

Robert Creamer & Reed Roesler, on behalf of Midland Coal Company.

John Henriksen & Dan Hopson, on behalf of the Illinois Department of Mines & Minerals.

History.

Midland Coal Company (hereinafter "Midland") filed an application for a Coal Surface Disturbance Permit (Application #132, Midland Coal Company, Rapatee Mine, SM-1 Application) on February 14, 1984. The Illinois Department of Mines & Minerals (hereinafter "Department") deemed the application incomplete on February 27, 1984. Midland submitted additional information to the Department by letter dated February 29, 1984, and after review of the supplemental material, the Department deemed the application complete on March 16, 1984.

The Department received comments on the application from the Illinois Department of Agriculture, the Illinois Department of Conservation, the Illinois Department of Transportation, the Illinois Environmental Protection Agency and the U.S.D.A. Soil Conservation Service.

No requests for an informal hearing were received by the Department.

A public hearing was requested by both the Knox County and Fulton County Boards. The Knox County request was received by the Department on April 19, 1984, and the Fulton County request was received on April 30, 1984. Public hearings were held by the Department on June 13th, 1984 at the Fulton County Courthouse and on June 13th, 1984 at the Knox County Courthouse. The Petitioners, Citizens for the Preservation of Knox County, Inc. (hereinafter "Petitioners"), appeared and presented evidence at the public hearing in Knox County.

Subsequent to these public hearings, by letter dated September 20, 1984, the Department requested Midland to make thirty eight (38) modifications to Midland's application. On October 25, 1984, Midland submitted an additional 55 pages of material covering the requested 38 modifications.

On December 14, 1984, the Department issued its Results of Review of Permanent Program Permit Application #132, and approved, as modified, the application for the Coal Surface Disturbance Permit SM-1.

The Permit Application covers a little over 660 acres of land, of which more than 500 acres has been previously mined by another operation in the early 1950's and not reclaimed. The unmined acres includes an 11 acre tract classified as prime farmland under applicable regulations.

On January 11, 1985, the Petitioners filed a Request for Hearing with the Department pursuant to Section 1787.11 of the Department's Rules and Regulations. A hearing on the Request for Review was held on February 1, 1985, wherein certain procedural matters were addressed. Subsequent

evidentiary hearings, after the parties pursued discovery, were held on May 21, 22 and 23rd, 1985.

Petitioners seeks to have Permit #132 set aside.

Midland Coal and the Department seek an order upholding the Results of Review previously issued by the Department.

Facts.

The Department was the only party to this proceeding to provide a synopsis in its Post-Hearing Brief of the applicable facts. Therefore, I have borrowed extensively from that synopsis in the following recitation. Additional facts are cited throughout the Decision when deemed required.

The permit area herein consists of three (3) major soil types: Lenzburg, Hickory and Lawson.

Lenzburg soil is a prime farmland soil as defined by the United States Soil Conservation Service (S.C.S.) It is the product, in this instance, of previous surface mining conducted in the 1950's by Midland's predecessor. At the time the area was mined, there was no legal obligation to reclaim the land. However, Midland's predecessor in interest graded some of the area to a two to five percent slope. In other areas, Midland's predecessor left the land with slopes of twenty to seventy percent. This steep slope area comprises sixty-five percent of the proposed mining area. (Tr. of May 23, pp. 13,14) Thirty years after mining, a few inches of organic material have formed within this area. (Tr. of May 23, p. 17) The Lenzburg soil

area is currently being used for pasture. (See the Pre-Mining Land Use Map, Admin. Record, p. 649)

Midland's mining and reclamation plan for the Lenzburg soil indicates that Midland will selectively handle the pre-existing shovel spoil. Then the rock overburden will be removed. After Midland extracts the coal, Midland will reverse the process by placing the rock overburden in the void left from removing the coal and then replace the pre-existing shovel spoil on the rock overburden. Ninety percent of the Lenzburg soil will be reclaimed to pasture and wildlife land use with a slope of two to ten percent. The final cut lakes and sediment ponds will be steeper than that which existed prior to mining. (Tr. of May 23, pp.15, 16)(See the Post-Mining Land Use Map, Admin. Record, p.485)

The Hickory soils are thin layers of soil over glacial till and are not prime farmland soils. The topography of the Hickory soil type is hilly. On top of the hills are a few flat acres. (Tr. of May 23, p.21) The land is being used for three purposes: forest, pasture, and a haul road. (Tr. of May 23, p.23) (See Pre-Mining Land Use Map, Admin. Record, p. 649) According to Midland's mining and reclamation plan, a three acre cropland area is found in the Permit area and Midland plans to separate the topsoil from the other overburden in the area and reclaim it to cropland. (Tr. of May 23, p.22) For the rest of the Hickory soil, Midland plans to selectively handle, with a dragline, the unconsolidated overburden so that the soil is placed upon the consolidated rock overburden. Some of the soil material will be used in reclaiming another part of the permit area to the standards found in Section 1825 of the Department's

regulations. (Tr. of May 23, pp. 22,24) Midland will reclaim the land to pasture and wildlife habitat uses. (Tr. of May 23, pp. 23-25) (See Post-Mining Land Use Map, Admin. Record, p. 485)

At the hearings conducted in this matter, evidence was presented that a three acre parcel of land was identified as possible prime farmland. (Tr. of May 22, pp. 113-116) The parcel is not identified as such within the map utilized by Midland, a map purportedly prepared in accordance with the Department's rules, the rules of the Office of Surface Mining, and by the Soil Conservation Service.

Lawson soil is an alluvial, prime farmland soil. It has an "A" horizon of thirty inches. Because it is an alluvial soil, the soil lacks a "B" horizon. It has a thick "C" horizon. (Tr. of May 23, pp. 26-27) Because some of the land has been used as cropland, Midland is required to reclaim the land to the prime farmland standards set forth in Part 1823 of the Department's regulations. Some of the Lawson soil has not been historically used for cropland. Therefore Midland is required to reclaim this land to the high capability standards of Part 1825 of the Department's regulations. (Results of Review, p. 5; Admin. Record, p. 550)

Midland's mining and reclamation plan indicates that scrapers will remove and store separately the "A" horizon. Then, the dragline will selectively handle the "C" horizon and the remainder of the overburden. After the replaced "C" horizon is graded with dozers, scrapers will then lay down the topsoil in long strips called windrows. All rubber-tired traffic, one of the chief sources of compaction, will only travel on top of the windrows. Eventually, tracked tractors will spread out the windrows.

Then, in order to prepare for the planting of crops, the land will be placed in pasture for several years. (Tr. of May 23, pp. 35-37) (Results of Review, Appendix "F", Admin. Record, pp. 556-557)

At the Hearings conducted in this matter, Petitioners presented the testimony of three witnesses: Mr. Phillip Christy, Mr. Russell Boulding, and Mr. Leo Hennenfent. Mr. Christy, Director of Reclamation for Midland, testified as an adverse witness. Mr. Boulding testified as an expert witness in the field of reclamation. Mr. Hennenfent testified as to the activities of the Petitioners' association.

The Department presented the testimony of two witnesses: Mr. Dean Spindler and Mr. Allen Oertel. Mr. Spindler testified as the Department's expert on the reclamation of prime farmland. Mr. Oertel testified in the capacity of an expert in hydrology.

Midland presented the testimony of Dr. Dean Wesley. Dr. Wesley is a professor of agriculture at Western Illinois University and one of the owners of Key Agricultual Laboratories.

Issues.

The issues presented by this Adminitrative review are:

1. Do Petitioners lack standing to seek administrative review of the Department's Results of Review herein?

2. Does the Permit allow the use of top soil substitutes which are not equal to or more suitable for sustaining revegetation than the available top soil and which is not the best available to support

revegetation, contrary to the provisions of Section 1816.22(e) of the Department's regulations? (Petitioners' Specification of Error #1)

3. Does the Permit allow restoration of lands to a condition which is not capable of supporting the uses which they were capable of supporting prior to mining, contrary to the provisions of Section 1816.133(a) of the Department's regulations? (Petitioners' Specification of Error #2)

4. Does the Permit improperly grant a "negative determination" to 131.1 acres of prime farm land, contrary to the provisions of Section 1779.27(b) of the Department's regulations? (Petitioners' Specification of Error #3)

5. Does the Permit allow a post-mining soil mix which has physical and chemical characteristics that are less favorable than the native C horizon, contrary to the provisions of Section 1785.17(b)(4) of the Department's regulations? (Petitioners' Specification of Error #4)

6. Did Midland fail to demonstrate that the proposed method of reclamation will achieve within a reasonable period of time equivalent or higher levels of yield on reclaimed prime agricultural land, contrary to the provisions of Section 1785.17(b)(6) of the Department's regulations? (Petitioners' Specification of Error #5)

7. Did Midland fail to demonstrate that it has the technological capability to restore the prime farm land, within a reasonable period of time, to equivalent or higher levels of yield as non-mined prime farm land in the surrounding area under equivalent levels of management, and are the findings of the Department that Midland has such capability in error and

contrary to the provisions of Section 1785.17(d)(3) of the Department's regulations? (Petitioners' Specification of Error #5)

8. Does the approved reclamation plan comply with the three following performance standards required by Section 1823 of the Department's regulations:

a) Whether Section 1823.12(a)(2) relative to the handling of sub-soil materials is violated because the approved alternate sub-soil material is not suitable;
b) Whether Section 1823.14(c) relative to excessive compaction is violated because no definitive plan for avoiding excessive compaction is set forth;
c) Whether Section 1823.15(b)(2)(iii) relative to post-mining crop production is violated because the physical and chemical chracteristics of the post-mined soil under the approved plan are unlikely to achieve the required performance standard. (Petitioners' Specification of Error #7)

9. Did the Department fail to require restoration of 70.6 acres of Lenzburg soil to be reclaimed in accordance with the standards set forth in Section 1825.11 of the Department's regulations? (Petitioners' Specification of Error #8)

10. Does the Application fail to adequately identify alternate sources of water supply for affected wells in violation of Section 1779.17 of the Department's regulations? (Petitioners' Specification of Error #9)

11. Does the Permit allow mining operations to be conducted on lands outside the Permit area, contrary to the provisions of Section 1700.11(b) of the Department's regulations and Section 2.01 of Ill. Rev Stat. 1983, ch. 96½, Sec. 7902.01? (Petitioners' Specification of Error #10)

12. Does the Permit allow mining operations to be conducted on lands outside of the Permit area, contrary to the provisions of Section 1816.81 (a) and (b) of the Department's regulations and Section 2.01 of Ill. Rev.

Stat. 1983, ch. 96½, Sec. 7902.01? (Petitioners' Specification of Error #11)

13. Does the Permit improperly allow mining within 300 feet of occupied dwellings in violation of Section 1786.19(d)(5) of the Department's regulations? (Petitioners' Specification of Error #12)

14. Does the Permit make an improper finding of "valid existing rights," contrary to the definition thereof in Section 1701.5 of the Department's regulations? (Petitioners' Specification of Errors #13)

15. Did the Department improperly declare Midland's application to be a "complete Application" on March 16, 1984, contrary to the provisions of Section 1771.23(a) and Section 1771.11(a) of the Department's regulations? (Petitioners' Specification of Error #14)

16. Did Midland improperly reserve to itself the "right to amend [the] Application or any Permit issued to [the] Application as appropriate to conform to any future changes in the applicable statutes, regulations or administrative rules?"

FINDINGS AND CONCLUSIONS

I.
STANDING

At the onset of this administrative review proceeding, Midland moved to dismiss the Petitioners' Request for Hearing for the reason that the Request failed to allege that the Petitioners (or any of its members) were persons "with an interest which is or may be adversely affected" by the issuance of the Permit approved by the Department's Results of Review.

Midland cites Section 1787.11 of the Department's regulation governing administrative review of permit applications, which states, in part, that:

> [w]ithin 3[0] days after the applicant or permittee is notified of the final decision of the Department concerning the application for a permit, revision or renewal thereof, permit, application for transfer, sale, or assignment of rights, or concerning an application for coal exploration under 1776.14, the applicant, permittee or any person with an interest which is or may be adversely affected may request a hearing with this Section. (Emphasis added)

Midland urges in its Post-hearing Brief that the case law it cites "demonstrate[s] that the Petitioner has failed to meet the minimum requirements for associational standing," and that therefore the petition for review filed by the Citizens for the Preservation of Knox County, Inc. must be dismissed.

Petitioners, on the other hand, assert in their Post-hearing Brief the belief that I had already definitively resolved the issue of standing at the beginning of the administrative review proceeding. This is clearly false. As is clear from the transcript of the February 1, 1985 hearing, the question of standing was initially resolved in favor of the Petitioners because the Petitioners properly alleged "an interest which is or may be

adversely affected." (Tr. of Feb. 1, pg. 11) At the time of this initial hearing, I indicated the belief that Section 1787.11 was to be broadly construed specifically because the regulatory language requires only a showing that a person has an interest which "may be adversely affected." (Tr. of Feb. 1, pg. 12) I ruled in favor of the Petitioners as to the issue of standing because, as of that time, no evidence had been presented and I concurred with the assertion of Petitioners' counsel that Petitioners had properly alleged standing. (Tr. of Feb. 1, pg. 11) Equally clear, however, was my preserving of the resolution of the ultimate issue of standing until all the evidence had been presented by the parties. (Tr. of Feb. 1, pg. 13) In fact, I specifically indicated on the record that Midland could "raise the issue again after the evidence and testimony is taken with respect to the issue of standing and whether, in fact, any adverse affect [sic] has been shown..." (Tr. of Feb. 1, pg 13)

Midland properly chose to raise the issue of standing again after all the testimony and evidence had been presented. (Tr. of May 22, pp 207, 208) I am thus obliged to address the standing issue.

The United States Supreme Court, in Sierra Club v. Morton, 405 U.S. 727 (1972), set forth a broad test for deciding the issue of standing of associations. Therein, the Supreme Court construed the federal Administrative Procedure Act. The Court ruled that an entity seeking judicial review of federal agency action must be "adversely affected" or "aggrieved" (deemed the "injury in fact" test by the Court) before that entity will be deemed to have standing. The Court stated that:

> [a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in

> our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured. (405 U.S. at pp. 734, 735)

The Court went on to state that:

> . . . broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.
>
> Some courts have indicated a willingness to take this latter step by conferring standing upon organizations that have demonstrated "an organizational interest in the problem" of environmental or consumer protection. Environmental Defense Fund v. Hardin, 138 U.S. App. D.C. 391, 395, 428 F.2d 1093, 1097. It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review. See, e.g., NAACP v. Button, 371 U.S. 415, 428. But a mere "interest in a problem," no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or aggrieved" within the meaning of the APA. The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's depradation. But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.
>
> The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. (405 U.S. at pp. 738, 739, 740)

The Court held that Seirra Club lacked standing.

All of the cases cited by Petitioners in their Post-hearing Brief concerning the issue of standing are in accord with the basic premises

outlined in Sierra v. Morton (supra). In fact, all of the cases cited by Petitioners on the issue of standing post-date Sierra v. Morton and most of the courts deciding the cited cases specifically name Sierra v. Morton in reaching their holdings on the standing issue.

Midland argues in its Post-hearing Brief that:

> [n]one of the Petitioners' members stand to be economically or physically harmed by the mining activity which is the subject of the Departments Results of Review. None of the members are adjacent or even nearby land owners. None has shown a threat of economic loss. Their only claim is a general one which they assert as citizens of the county in which mining is to take place. And the concern expressed for the impact of that mining on unidentified small towns, the unsubstantiated threat to present and aspiring farmers, and the bare assertion that the [Knox] County's tax base will suffer does not lend any more specificity to the Petitioner's general claim (R. 198 & 199, 5/22/85).

I am strongly inclined to agree with Midland, especially in light of the testimony given by Mr. Leo Hennenfent. Mr. Hennenfent, a witness called by the Petitioners, was the sole witness who presented testimony concerning the standing issue as it relates to the Citizens for the Preservation of Knox County, Inc., in conjunction with this permit application. Mr. Hennenfent, under oath, gave the following testimony:

Atty. Creamer: Q. And isn't it true that you [Mr. Hennenfent] and others in your group have stated in the past that your real concern is not with this particular permit or even the 11 acres of Lawson soil, but with the adjacent land?

Hennenfent: A. That is correct.

Atty. Creamer: Q. And the next potential permit?

Hennenfent: A. That is correct, sir.
(Tr. of May 22, p. 203)

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

I do wish to indicate that my inclination is to construe the regulatory basis for standing as broadly as possible. But such basis for standing cannot be stretched to include those seeking review for the sole purpose of testing the regulatory "waters." To do so would be to invite the very problems which the concept of standing was created to prevent.

Despite my holding that Petitioners lack standing to seek administrative review in this particular instance, I feel it is proper to address some of the issues raised by the Petitioners.

Petitioners' Post-hearing Brief commences with a short overview of the legislative history of Section 510(d)(1) [30 U.S.C. Section 1260(d)(1)],the "Prime Farmland Amendment" to the Surface Mining Control and Reclamation Act of 1977. Petitioners state the purpose of the overview is in order that a person may "fully comprehend and appreciate the intent of Congress relative to prime farmland reclamation." (Petitioner's Brief, p.7) Petitioners conclude that:

> [t]here can be no doubt that Congress intended that the strictest of standards be enforced in cases of strip mining prime farmland, and any prime farmland reclamation plan must be reviewed in light of this clear congressional mandate. (Petitioners' Brief, p.13)

Generally, I agree with these introductory statements.

Petitioners' primary contentions as to the adequacy of Midland's proposed permit are directed, generally, at Midland's Restoration Plan for the eleven (11) acre tract classified as prime farmland. Petitioners presented, as their only evidence as to these contentions, the expert opinion testimony of Russell Boulding. Despite Midland's and the Department's questioning of Boulding's expertise in their respective Post-hearing Briefs, I found Mr. Boulding's background and credentials to be exemplary and, thus, his testimony persuasive--- but only as to matters in his area of expertise.

For instance, Petitioners state that:

> Mr. Boulding identified his "Prime Farmland Restoration Checklist" found at pp. 13-17 of Petitioner's Exhibit 2, as being

> the method by which he reviewed Midland's Prime Farmland Restoration Plan. He further identified his "checklist" as being the only systematic methodology ever developed by anyone for the review of prime farmland restoration plans. [Tr. of May 21, pp. 102, 103] This assertion by Mr. Boulding was never challenged nor was the credibility of his method ever questioned. A review of the "checklist" shows it to be a relatively simple, straight forward and very reasonable system for reviewing a reclamation plan. It encompasses all of the requirements of the Statute and Regulations as well as the clear intent of Congress. (Petitioners' Brief, p.15)

However, Petitioners fail to emphasize that enforcing the systematic review methodology utilized by Boulding in his "Prime Farmland Restoration' Checklist" would, in effect, place a ban on prime farmland mining. (Tr. of May 22, p. 178) Congress specifically rejected such a ban in passing the "Prime Farmland Amendment." That is, Petitioners seek to have me enforce the technical guide of one expert so as to accomplish de facto what Congress rejected de jure. This I decline to do.

No state evaluates the adequacy of prime farmland restoration in accordance with Boulding's "Prime Farmland Restoration Checklist." (Tr. of May 22, pp. 175, 185) Nor does the United States Office of Surface Mining evaluate prime farmland restoration plans pursuant to Boulding's guidelines. Of the ninety two (92) restoration plans examined by Boulding to formulate his "technical guide," none would have passed in applying Boulding's criteria, although some of the plans were better than others. (Tr. of May 22, p. 177) Boulding expressed the opinion that Congress passed a "Prime Farmland Amendment" which was "in a sense. . . ahead of what the state of the art [of reclamation] was." (Tr. of May 22, p. 178) Boulding would only allow mining on prime farmland on "an experimental basis" and would require a whole bunch of stipulations on a very carefully designed

research program for testing different types of handling methods, different types of deep subsoiling techniques, equipment for reducing compaction, taking careful measurements to see if the actual physical and chemical properties of the post-mined soil, what they are in comparison to the pre-mining soil to see whether the predicted values actually have occurred and to do careful crop yield tests to try to relate actual yields to what is happening, the physical and chemical properties of the post-mining soil." (Tr. of May 22, p. 183) As correctly pointed out by Midland in its Post-hearing Brief, "Boulding would require the same type of research program that was rejected by Congress, and by the Illinois Legislature through the provisions of the Illinois Act . . . " (Midland's Brief, p. 8)

Further, none of the parties to this proceeding have pointed out the fact that this particular permit application would not have even been under the purview of the moratorium amendment offered by Secretary of the Interior, Cecil Andrus, in 1977 (a moratorium provision subsequently omitted from the final "Prime Farmland Amendment" passed by Congress). That is, Andrus' amendment would have imposed a five (5) year mining moratorium "unless the applicant demonstrates that prime farmland does not comprise more than 10% of the surface area to be disturbed pursuant to the applicant's mining plan." Petitioners are thus asserting that I should impose a more restrictive moratorium on mining of prime farmland, by enforcing Boulding's "technical guide" criteria, than the moratorium proposed by Andrus and rejected by Congress.

It is difficult to see the manner in which Boulding's criteria reflect "the clear intent of Congress." (Petitioner's Brief, p. 15) Therefore, I

am disinclined to follow Boulding's "technical guide" as if such guide has the force of a governmental agency's regulations. The fact that Boulding formulated the guide in conformity with what he discerned Congress' intention was in passing the "Prime Farmland Amendment" does not contribute to the applicability of such criteria. The issues in administrative reviews of this sort are whether the proposed permit complies with the Department's regulations and whether the Department has correctly examined the permit in light of these regulations. As perspicaciously pointed out by Illinois Senator Percy during the floor debate of the "Prime Farmland Amendment":

> [t]he mining companies argue very persuasively . . . that they do have the technology and know-how to do exactly what our amendment provides . . . I believe we are not imposing any undue burden on them to require that they simply demonstrate to the state permit-granting authority that they can and will restore the land. (Congressional Record-Senate, May 20, 1977, page 15713).

If Petitioners seek to challenge the adequacy of the Department's regulations, their challenge should have been raised at the time of the Department's rulemaking (or, thereafter, directed toward the legislature). I am not about to scrap the Department's regulations and replace them with the criteria proposed by one expert in the field. To do so would undermine the legislative and regulatory process.

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

Petitioners first contend that the Permit allows the use of top soil substitutes which are not equal to or more suitable for sustaining

revegetation than the available top soil and which is not the best available to support revegetation, contrary to the provisions of Section 1816.22(e) of the Department's regulations.

Section 1816.22(e) states, in part, that:

> [s]elected overburden materials may be substituted for or used as a supplement to, top soil, if the Department determines that the resulting soil medium is equal to or more suitable for sustaining revegetation than is the available top soil and the substitute material is the best available to support revegetation.

Petitioners argue that Mr. Boulding "identified three (3) locations within the permit area as having soils which possess chemical and physical characteristics which make them more favorable for use as topsoil." (Petitioners' Brief, pp. 31, 32) Petitioners acknowledge that the Department's soil expert testified that "there were topographical problems" at one of the sites in question "which would make access difficult" and "the thinness of the soil" at another of the sites makes it "non-economical to try and save it." (Petitioners' Brief, p. 32)

Petitioners urge that Section 1816.22(e) of the Department's regulations permits "the use of alternative top soil only if it can be shown that the proposed alternative is "equal to or more suitable for sustaining revegetation than is the available top soil and the substitute material is the best available to support revegetation." (Petitioner's Brief, p. 33) The Department urges that Section 1816.22(e) only requires "topsoil substitute to be equal to the original." (Department's Brief, p. 8)

I agree with the Petitioners that Section 1816.22(e) requires a two (2) prong test to determine whether a particular substitute material may be

used for topsoil: (1) if the Department determines that the resulting soil medium is equal to or more suitable for revegetation than is the available topsoil, and (2) the substitute material is the best available to support revegetation.

Petitioners urge that the economic impracticality of the substitutes they identified should have no bearing on the issue of the availability of the substitute material. Petitioners argue that:

> [g]iven the size and capacity of the equipment used in strip mining, it is difficult to imagine that any topographical problems at site 3 would be insurmountable. Midland could well get to it if they wanted to or if the Department required it. Furthermore, it has never been suggested that compliance with S.M.C.R.A. would be an inexpensive proposition for the coal industry . . . The expense and/or difficulty of saving the better grade soils . . . to be respread as topsoil, is not a factor to be considered. (Petitioner's Brief, p. 32)

I disagree. First, Petitioners' contentions concerning the size and capacity of equipment used in strip mining are vague and speculative. Likewise, Petitioner's statements that Midland could "get" to the soil if it wanted to is unsupported speculation. I believe Section 1816.22(e) contemplates consideration of economic factors as well as topographical factors when the Department makes the determination of whether the substitute material is the best available to support revegetation. I therefore find no error as to the proposed Permit premised upon Section 1816.22(e) of the Department's regulations.

Petitioners next contend that the Permit allows the restoration of lands to a condition which is not capable of supporting the uses which they were capable of supporting prior to mining, contrary to the provisions of Section 1816.133(a) of the Department's regulations.

Section 1816.133(a) states:

> [a]ll affected lands shall be restored in a timely manner to a condition capable of supporting--
> (1) The uses which they were capable of supporting prior to any mining, or
> (2) Higher or better uses of which there is a reasonable likelihood of restoration: Provided that, no plan of restoration shall be approved unless use of the area as proposed does not (i) present any actual or probable hazard to public health or safety, or (ii) pose any actual threat of diminution or pollution, and (iii) that the proposed land use following restoration is not found to be impracticable or unreasonable by the Department or determined by the Department to be inconsistent with land use policies and plans which are applicable, or to involve unreasonable delay in implementation. No restoration plan shall be approved if the proposed land use following reclamation is violative of other applicable law.

Petitioners' only reference to this contention of error in their Post-hearing Brief is on page 14 and then, the contention is simply restated. The Department, in its Post-hearing Brief, states that "the Petitioner[s] [contend], in issue number two of its Response to the Specification of Errors, that the Lenzburg soil will be unable to support pasture and the Hickory soil will be unable to support wildlife and pasture, both actions contrary to Section 1816.133(a) of the Department's regulations." (Petitioner's Brief, p. 9) Quite frankly, I see no reference to "wildlife", "pasture", "Hickory soil" or "Lenzburg soil" in Petitioners' issue number two of the Response to the Specification of Errors. Nor can I discern with any certainty just what Petitioners are asserting by this second contention. Petitioners fail to provide a straightforward argument in their Post-hearing Brief as to this contention. In fact, the analysis and argument which follow the Petitioners' recitation of this contention in their Post-hearing Brief appear to be directed toward arguments concerning the Lawson prime farmland and regulations other than

Section 1816.133(a). (e.g. Sections 1785.17(b)(6), 1785.17(d)(3)) The methodology utilized by the Petitioners in presenting their arguments within their Post-hearing Brief makes it exceedingly difficult to review the Petitioners' contentions seriatim. I do not believe it is my function to sort out from the evidence that material which purportedly supports Petitioners' Specification of Errors. As indicated to Petitioners on several occasions, the burden of proof as to their Specification of Errors is upon them, pursuant to Section 1787.11(5) of the Department's regulations.

If in fact, Petitioners are asserting that the Lenzburg soil will be unable to support pasture and the Hickory soil will be unable to support wildlife and pasture, I find no reference to such arguments in their Post-hearing Briefs. In fact, the only reference to Lenzburg soil in the Petitioners' Brief is on page 5, in Specification of Error number 8 (a Specification of Error which was subsequently withdrawn by Petitioners). I find no reference at all to Hickory soils in Petitioners' Post-hearing Brief. I find no reference at all to "wildlife" in Petitioners' Post-hearing Brief. The only reference to "pasture" in Petitioners' Brief is on page 17 and then, only in reference to criticism concerning the Department's determinations as to Lawson prime farmland.

I find no error in the Permit premised upon Section 1816.133(a) of the Department's regulations.

Petitioners withdrew Specification of Error number three premised upon Section 1779.27(b).

Petitioners next contend that the Permit allows a post-mining soil mix which has physical and chemical characteristics that are less favorable than the native C horizon, contrary to the provisions of Section 1785.17(b)(4) of the Department's regulations.

Section 1785.17(b)(4) states that a restoration plan encompassing prime farmland shall include:

> [i]f applicable, documentation, such as agricultural school studies or other scientific data from comparable areas, that supports the use of other suitable material, instead of the A, B, or C soil horizon, to obtain on the restored area equivalent or higher levels of yield as non-mined prime farmlands in the surrounding area under equivalent levels of management.

Petitioners cite three (3) of the studies contained in the Permit record dealing with the soil mix issue and conclude that "[t]he limited data that are relevant indicate that the 15 foot C mix should not have been approved as alternative subsoil material for the Lawson soil . . ." (Petitioner's Brief, p. 25) Petitioners state that in the Snarski paper:

> [t]he data . . .(which represent laboratory mixes, not mixes that actually occurred from mining) indicate that the B horizon mixes of the Sable soil have more favorable chemical characteristics than any of the B/C mixes which have more favorable textural characteristics (16.8 to 23.7% clay versus 29.7 to 32.5% clay). (Petitioner's Brief, p. 22)

Petitioners concede that "the physical and chemical data on the upper C horizon and the 15 foot mixture for the Lawson soil in the Prime Farmland Restoration Plan for Permit #132 show some similarities to the relationship identified in the sable soil, in that, the upper C horizon has somewhat more favorable chemical characteristics than the 15 foot mix." (Petitioners' Brief, p. 22) However, Petitioners assert that the 15 foot mix's texture is significantly less favorable than the actual upper C

horizon and "[c]onsequently, [the Snarski] paper cannot be used to justify the mix approved by [the Department] or as evidence supporting Midland's technological capability." (Petitioners' Brief, p. 22) Petitioners also cite the McSweeny and Grandt 1981 papers and assert that they support "the need to use the more texturally favorable upper C horizon rather than 15 meter mix that was approved by the Department." (Petitioners' Brief, p. 23) However, Petitioners' expert testified that:

> [l]ooking at the chemical characteristics [of the 15 foot mix and the natural upper C horizon], you know, I look at those numbers and say there is not a really big difference between the chemical characteristics, these chemical characteristics between the two soils. If I were to make a judgment, I would say that the upper C is slightly more favorable. (Tr. of May 22, p. 77)

Boulding went on to testify that the "cation exchange capacity" made the chemical characteristics of the upper C horizon more favorable than the proposed mix. (Tr. of May 22, p. 78) Boulding also indicated that the upper C horizon has more favorable physical characteristics in "terms of texture, water capacity and soil structure." (Tr. of May 22, pp. 83, 84) Strangely, Petitioners' Post-hearing Brief fails to address these issues or simply glosses over them. In fact, Petitioners' Brief fails to point out any of the testimony of Russell Boulding except for his statements concerning compaction (Petitioners' Brief, p. 25) and his identification of some "Clinton" soil in the permit area. (Petitioners' Brief, p. 38) As I indicated earlier in this opinion, the burden of proof is on the Petitioners and I do not believe it is the function of the Hearing Examiner to marshall all of the facts from the record in support of Petitioners' contentions of error.

The Department did specifically address the Petitioners' contention of error in its Post-hearing Brief. The Department, noting that Russell Boulding had testified that the chemical characteristics of the two (2) soils "will be substantially the same," went on to state:

> . . .the pH [of the soil] will change only slightly. [Tr. of May 22, p. 75] The phosphorous readily available to the plants will produce a change that is statistically insignificant. [Tr. of May 22, p. 76] The phosphorous in the soil that it is unavailable [sic] for plants will increase. [Tr. of May 22, p. 76] However, since that phosphorous is unavailable, the change is irrelevant. As to potassium, a change will occur; however, Russell Boulding is unsure as to whether that change will affect yields. [Tr. of May 22, p. 77] As to calcium and magnesium, these elements will increase. The elements are plant nutrients. [Tr. of May 22, pp. 77, 78] (Department's Brief, p. 12)

The Department concedes the cation exchange capacity will change, but argues that "the figure used to measure cation exchange capacity is very inexact." (Departments' Brief, p. 12) The Department's expert on reclamation of prime farmland, Mr. Dean Spindler, testified that the change in cation exchange capacity will have little effect on yields. The Department also agrees with the Petitioners that the texture of the soil will change from a silt loam to a loam, but argues that "yields will be unaffected by the projected change in soil texture . . ." (Department's Brief, p. 12) The Department supports this argument by indicating that the projected post-mining soil texture will not reduce the water holding capacity of the soil. The Department also notes, as does Midland, that the post-mining soil will have a higher elevation than it did in its pre-mining state. Petitioners' expert admits that he failed to consider the effect of that elevation. (Tr. of May 22, p. 193)

Based upon these arguments, and the fact that the experts differ in their opinions as to the effect of the mix on prospective yields, and in light of the paucity of argument presented by Petitioners as to this issue, I cannot find error premised upon Section 1785.17(b)(4).

Petitioners next urge that Midland failed to demonstrate that the proposed method of reclamation will achieve within a reasonable period of time equivalent or higher levels of yield on reclaimed prime agricultural land, contrary to the provisions of Section 1785.17(b)(6) of the regulations.

Section 1785.17(b)(6) states:

> [Each permit plan containing prime farmland shall contain] [a]vailable agricultural school studies or other scientific data for areas with comparable soils, climate, and management (including water management) that demonstrates that the proposed method of reclamation will achieve, within a reasonable time, equivalent or higher levels of yield after mining as existed before mining.

In conjunction with this assertion of error, Petitioners also urge that Midland has not demonstrated that it has the technological capability to restore prime farmland and that the Department's findings that Midland has such capability are in error, in contravention of Section 1785.17(d)(3).

Section 1785.17(d)(3) states the Department may grant a permit for mining and reclamation of prime farmland if it finds that:

> [t]he applicant has the technological capability to restore the prime farmland, within a reasonable time, to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management. . .

Petitioners support these contentions of error by first attacking the relevancy of the research papers submitted by Midland in support of the

proposed Permit. Petitioners contend that the Department did "not compare or contrast the soil types in question to the said types in the data considered." Petitioners contend that the Department did "not compare and contrast the mining methods in question to the mining methods referenced in the data considered." Petitioners contend that the Department did "not compare and contrast the reclamation methods proposed to those reported in the data considered." The Petitioners contend that the Department did "not require any specific reference area against which productivity will be measured." (Petitioner's Brief, p. 15) After reviewing the data base provided by Midland and criticizing its relevance, the Petitioners assert that "none of the information provided by Midland or reviewed by the Department in Appendix E of the Results of Review (AR 526-531) document supports a finding that Midland has the technological capability to restore prime farm soils in the Rapatee #132 Permit area." (Petitioners Brief, pp. 24, 25) This is the opinion of Petitioner's expert, Russell Boulding. But as already pointed out, Mr. Boulding holds the opinion that no technology exists today which would guarantee full restoration of mined prime farmlands. Mr. Boulding further indicated that he did not believe that any soil scientist as knowledgeable as he could remain silent "on the adequacy of the Prime Farmland Restoration Plan" for Permit #132. (Tr. of May 22, p. 155) That opinion was undermined by the affidavits of Alten Grandt and Ivan Jansen, noted experts in the field of soil science. Both these experts indicated they had examined Midland's Permit application and Petitioners' Specification of Errors and concluded that the Permit meets the specifications required by the Department's regulations. (Midland's

Exhibits 2 & 3) Boulding maintained that the method of reclamation proposed by Midland is not at the leading edge of developed technology, but is "certainly better than average." (Tr. of May 22, p. 66) Dean Spindler, the Department's soil expert, specifically and unequivocally disagreed with Boulding on this point. (Tr. of May 23, p. 85) Spindler believes the technology exists today to return prime farmland back to as good or better capacity as that farmland was prior to mining, in direct contrast to Boulding's opinion. (Tr. of May 23, p. 86) Midland also presented the testimony of a noted soil expert, Dean Wesley, and he too testified that based upon his examination of the Permit application and the Department's regulations, Midland demonstrated the capability to bring about the production of the prime farmland to its pre-mined capabilities. (Tr. of May 23, p. 110)

Weighing the testimony of experts who disagree is always a difficult proposition. One expert, Mr. Boulding, holds opinions which significantly differ from four (4) other experts (i.e. Dean Spindler, Dean Wesley, Alton Grandt and Ivan Jansen). I cannot state with certainty that Petitioners' expert is correct and the other experts are wrong. Mr. Boulding asserted that if these other experts used the same guidelines as he did with his "Technical Guide", they would reach the same conclusions as he did. (Tr. of May 22, p. 155) But as I have previously indicated, that Technical Guide does not have the force of law but is only the opinion of Mr. Boulding as to what he believed the intention of Congress was in passing the "Prime Farmland Amendment."

On the basis of these facts and opinions, I cannot see that Petitioners have sustained their burden of proof in contending that the Department has failed to comply with either Section 1785.17(b)(6) or 1785.17(d)(3).

In this regard, I think it important to comment on the Petitioners' Post-hearing Brief's statement that:

> [i]t is now eight years since the coal industry convinced Congress that it had the "know-how" [to reclaim prime farmland]; and yet the industry collectively (and Midland Coal Company in this case specifically) has yet to generate a single shred of yield data showing that the most highly productive prime soils have been restored to 100% productivity for crops normally grown on such soils, on any kind of a sustained basis. What has the coal industry been doing with all of its alleged "technology" and "know-how" over the past eight years. One is tempted to paraphrase a popular hamburger commercial and ask, "Where's the corn?" (Petitioners' Brief, p. 14)

As far as I know, this Permit is one of the first issued under the Illinois permanent regulatory schema. It certainly has not been eight (8) years since the enactment of the Illinois permanent program. At this early date, it cannot be expected of prospective permittees to demonstrate 100% productivity by yield data which necessarily must be generated over at least a decade. I believe it reasonable for the Department, in this instance, to extrapolate from the available data and rationally predict whether a permittee has the capability of restoring prime farmland to the same or better productive capacity. I see no error in this.

However, I concur with the Petitioners with respect to the issue of what constitutes a "reasonable time." Dean Spindler testified that he believed "a reasonable time" for Midland to restore the mined area to equivalent or higher levels of yield to be twenty years. (Tr. of May 23,

p. 79) The Department made the requisite finding based, partly, upon Mr. Spindler's opinion. Dean Wesley, Midland's expert, also testified that it would probably take Midland twenty (20) years to reclaim the land to the required condition. (Tr. of May 23, p. 117) Petitioners correctly note that Midland's reclamation plan calls for the required productivity to be reached within a five (5) to ten (10) year period. (See Appendix E to Midland's Application)

I believe the Department should have stated with specificity what it considers to be "a reasonable time" with respect to the productivity requirement stated in Section 1785.17(d). Such specificity would obviate any subsequent contention by Midland that "a reasonable time" means something other than what the Department deems required under the regulations. Such specificity seems essential for enforcement of the regulations. However, the fact that Midland's projection for obtaining the required productivity appears unrealistically optimistic (in light of the experts' opinion) does not require setting aside of the Permit. That is, even if I had ruled differently on the issue of standing, I do not believe the Department's omission is such as to mandate setting aside of the entire Permit.

Which brings me to the issue of compaction.

Petitioners assert that:

> [a]ll of the expert witnesses agree that soil compaction can and often does occur during the reclamation process, and they further agree that compaction can occur to an extent that it can adversely affect the post-mining productivity of the soil. (Boulding [Tr. of May 21, pp. 141-146; Tr. of May 22, pp. 62, 63]; Wesley [Tr. of May 23, pp. 127-128]; Its [sic] further admitted by Christy [Tr. of May 21, p. 65], Wesley [Tr. of May 23, p. 129] and Spindler (deposition) (66-67) that the prime

> farmland restoration plan does not contain any projection as to what degree of compaction will or may occur, given the proposed mining and reclamation methods. (Petitioners' Brief, p. 25)

Petitioners argue that "[t]he law simply does not allow for the approval of a finding of technological capability when the data submitted in support thereof does not account for a factor (in this case soil compaction) which everyone admits could adversely affect productivity." (Petitioners' Brief, p. 26) Petitioners urge that the approved reclamation plan is lacking because no definitive plan for avoiding excessive compaction is provided in the permit. Petitioners urge that such omission is a violation of Section 1823.14(c).

Section 1823.14(c) states that surface coal mining and reclamation operations on prime farmland shall be conducted so as to:

> [r]eplace the soil horizons or other suitable soil material in a manner that avoids excessive compaction.

The Department argues that compaction will be avoided or eliminated by (1) limiting topsoil removal replacement and grading to periods when the soil is relatively dry; (2) the method of mining to be utilized by Midland; (3) limited use of scraper traffic by utilizing the dragline to selectively handle and replace the "C" horizon; and (4) by requiring Midland to use deep tillage equipment or other state of the art technology should compaction become a problem. (Department's Brief, p. 16)

Petitioners did not demonstrate that "excessive" compaction will occur or is likely to occur. Petitioners, rather, urge that the regulations require something other than what Midland has proposed in its Reclamation Plan, but Petitioners fail to state just what it is they believe is required. When Mr. Boulding was questioned as to any alternative

methodology available to avoid excessive compaction, he indicated that he would only allow mining on prime farmland on an experimental basis. (Tr. of May 22, pp. 182, 183) Boulding then indicated that a bucket wheeling excavator might also create a fritted soil structure, but he subsequently admitted that such equipment would not be suitable on Lenzburg soil (the type soil making up most of the Permit area). (Tr. of May 22, p. 184) (Tr. of May 23, p. 145)

Boulding conceded that the federal government has failed to set specific standards for compaction of reclaimed soils. (Tr. of May 22, p. 179) Boulding also admits that any imposition of specific requirements for compaction would result in the Department enforcing more stringent rules than the federal government. (Tr. of May 22, pp. 179, 180) Thus, Petitioners seek to have me impose unpromulgated standards, the imposition of which would violate Section 1.02(c) of the Illinois Surface Coal Mining Land Conservation and Reclamation Act (Ill.Rev.Stat., 1983, Ch. 96½, Sec. 7901.02(c), which states:

> [i]t is also the purpose of this Act to establish requirements that are no more stringent than those required to meet the Federal Surface Mining Control and Reclamation Act of 1977.

Thus, I again can see no violation of the Department's regulations on this issue.

I do wish to indicate, after hearing the testimony of Mr. Boulding and after perusing his informative study, "The Lost Harvest: A Study of the Surface Mining Act's Failure to Reclaim Prime Farmland in the Midwest", that I share his concern about the federal government's (and the Department's) omission of compaction standards under their respective

surface mining regulations. But I cannot act legislatively to fill in regulatory hiatuses, no matter what my personal preferences or opinions are. This matter appears to be, again, one better left to the rulemaking process, not administrative review.

Petitioners next major point of contention is the alleged failure of Midland's application to adequately identify alternate sources of water supply for affected wells in violation of Section 1779.17 of the Department's regulation.

Section 1779.17 states:

> [t]he application shall identify the extent to which the proposed surface mining activities may proximately result in contamination, diminution, or interruption of an underground or surface source of water within the proposed permit or adjacent areas for domestic, agricultural, industrial, or other legitimate use. If contamination, diminution, or interruption may result, then the description shall identify the alternative sources of water supply that could be developed to replace the existing sources.

Petitioners admit that Midland did a "credible job" identifying the surrounding sources of water. However, Petitioners argue that Midland's plan does not present "any definitive plan for the development of alternative water supplies" should contamination, diminution or interruption occur. (Petitioners' Brief, p.33)

I do not believe the Permit is lacking in this regard. The regulations only require that alternative sources of water supply be identified. This Midland has done. I see no violation of Section 1779.17.

Petitioners also assert that the Permit makes an improper finding of "valid existing rights," contrary to the definition of Section 1701.5 of the Department's regulations. Petitioners argue that because Midland plans to mine within 300 feet of several occupied dwellings, Midland must fall within a regulatory exception. Petitioners urge that Midland does not come under the perview of the "valid existing right" exception provided in Section 1761.11 (the exception the Department premises its finding that Midland may mine within the 300 foot distance from occupied structures). "Valid existing rights" is defined in Section 1701.5 of the Department's regulations. That Section is prefaced by the language: "Valid existing rights means, but are not limited to, the existence of the following facts or circumstances..." (Emphasis added) Thus, Petitioners assertion that the definitional language should be construed restrictively belies the specific regulatory language. Petitioners chose not to present evidence at the May Hearings as to this contention. After careful review of the Petitioners' legal argument contained in their Brief, I am unable to see error within the Permit premised upon Section 1701.5.

As to Petitioners' argument that the Department erred in finding the Midland's Permit application "complete" pursuant to Sections 1771.23(a) and 1771.11(a) of the Department's regulations, I find this contention equally without merit. At the heart of Petitioners' argument is the fact that the Department required thirty eight (38) additional modifications to the application. Petitioners assert that "[i]f the application was so deficient that it needed 38 modifications, Midland should be required to go

back to square one and start all over again, this time with a full and complete application." (Petitioners' Brief, p.37) I find this argument unpersuasive. The demand of the Department in requiring the 38 modifications is persuasive evidence of the diligence and detailed analysis of the Department's review of the Permit application, not of any error. I find Petitioners' contention that Midland should start from "square one" an impractical one in that such punitive measures would serve no useful purpose and clearly result in duplicitous application material being filed by Midland. I see no error in the Department's "completeness" finding.

Petitioners' last contention is that the Department failed to require a prime farmland restoration plan for three acres of Permit area identified by Russell Boulding as "Clinton" soil. While not disputing that the "Clinton" soil may be present on the Permit site, the Department argues that its reliance upon soils maps which meet Department regulations precludes the Department from requiring Midland to submit a reclamation plan for this three acre site.

I find persuasive the Department's citation of the comments contained in 44 Federal Register pp.15085-15085, wherein the Office of Surface Mining addresses the issue of site-specific soil surveys in the context of 30 C.F.R. Sec. 785.17(c), and stated:

> [s]everal commentators proposed that information gained from a soil survey developed in accordance with procedures set forth in U.S.D.A. Handbook 436 (Soil Taxonomy) and 18 (Soil Survey Manual), should be adequate to describe the soils within the permit area and that site-specific soil information is not necessary. OSM agrees that this soil survey information is sufficient and will be adequate for the purposes of the permit application. Accordingly, these publications

have been incorporated by reference into the final regulations, and OSM allows for other representative descriptions to be used, if available and approved by the regulatory authority....One commentator suggested the soil map units for prime farmland soils should be prepared by a certified soil scientist or agronomist in order to provide a uniform standard of excellence, since only qualified individuals are certified. While this may be correct, OSM believes that the requirement of Paragraph (b)(1) of the final regulation for surveys to be prepared according to the standards of the NCSS, and in accordance with the procedures set forth in U.S.D.A. Handbooks 436 (Soil Taxonomy) and 18 (Soil Survey Manual), will accomplish the same goals of uniformity and high standards...(44 Fe. Reg. 15085-15086 (1979)) (Emphasis added)

Section 1785.17(b)(1) of the Illinois regulations substantially mirrors its federal counterpart, 30 C.F.R. Sec. 785.17(c).

The Department argues that:

[w]hen the Office of Surface Mining promulgated the final rules, it adopted the U.S.D.A.'s medium intensity standards for preparing soil maps and rejected the site specific soil surveying and mapping requirements. By adopting the U.S.D.A. standards, the Office of Surface Mining implicitly provided an exemption for such inclusions.

Requiring stricter standards, as the Petitioner wants, mandates some independent authority. This authority does not exists. One source, the regulations of the Office of Surface Mining, limits the Department to the soil survey manual. Another source, the state statute, is silent. Because Section 1.02(c) of the Surface Coal Mining Land Conservation and Reclamation Act states the Department's regulations may only be as strict as the federal regulations, the standards in the Soil Survey Manual are the only ones which the Department can use. (Ill. Rev. Stat. ch. 96½, para. 7901.02(c) (1983)). (Department's Brief, p.25)

The Department urges that I should defer to the Department's reasonable construction of the regulation it is empowered to enforce. The Petitioners, on the other hand, offer no alternative methodology to identify prime farmland except by implicitly asserting that site-specific soil surveys are mandated by the Department's regulations. I find the Department's analysis of the applicable regulations persuasive, especially

in light of the interpretations given to the identical language on the federal level. Thus I find no error.

Petitioners withdrew paragraphs 3, 8, and 12 of their Specification of Errors. Petitioners presented no argument with respect to paragraphs 10, 11 and 15 of their Specification of Errors. I thus see no error of the Permit application premised upon these contentions.

I decline to award Petitioners costs, expenses and attorneys fees under Section 8.07 of the Surface Coal Mining Land Conservation and Reclamation Act and Section 1843.22 of the Department's regulations.

IT IS HEREBY ORDERED that the issuance of Permit #132 is affirmed. Petitioners lack standing to challenge the Results of Review in this proceeding.

Dated: 8/12/85

Michael O'Hara
Hearing Examiner