

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

IN RE:)
)
CAPITAL RESOURCES DEVELOPMENT)
COMPANY,)
)
) **Permittee,**)
)
) **and**)
)
ILLINOIS DEPARTMENT OF NATURAL)
RESOURCES, OFFICE OF MINES AND)
MINERALS,)
)
) **Respondent,**)
)
) **and**)
)
ILLINOIS ATTORNEY GENERAL, *et al.*,)
)
) **Petitioners.**)

**Application No. 355
Banner Mine
Fulton County**

RECEIVED

SEP 17 2009

Dept. of Natural Resources
OFFICE OF LEGAL COUNSEL

ORDER AS TO EXCEPTIONS TIMELY FILED AND RESPONSES THERETO

This matter comes to me pursuant to Exceptions filed to my previously filed "Proposed Findings of Fact, Conclusions of Law and Order, previously issued in the above-docketed matter, together with Responses timely filed as to said written Exceptions, and in response thereto, I find as follows:

The Intervenor, Capital Resources Development Company, LLC, filed timely Exceptions to my previously issued "Proposed Findings of Fact, Conclusions of Law and Order," as did the Illinois Department of Natural Resources. In response thereto, the following parties filed written Responses to said Exceptions, to wit: Eagle Nature Foundation, the Illinois Attorney General

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Office, and the Illinois Sierra Club.

I will address the Exceptions seriatim:

Capital Resources' Exceptions:

1. On Page 50 of the Proposed Order, the Hearing Officer finds that Application No. 355 ("Application") was incomplete because it did not include information concerning property transfers and corporate changes regarding the Permittee which occurred prior to the Illinois Department of Natural Resources' ("Department") approval of the Application and issuance of Permit No. 355. The Hearing Officer states:

Until such time as the permittee's ownership and control information is properly filed and included within the permit record, including the identification of the operator and all owners and controllers of the operator, this application is indeed incomplete and cannot be approved pursuant to Section 1773.22(a). I so rule. [Proposed Order, p.50]

The documents attached hereto as Exhibits 1-4 were obtained through a Freedom of Information Act request recently submitted to the Department. *It is not clear why these documents were not a part of the administrative record for Application No. 355.*

Exhibits 1-4 contain the following documents:

- Completed Application for Surface Coal Mining and Reclamation Operations Permit Form SCM-1, for Capital Resources Development Company, LLC, dated September 11, 2007, and received by the Department on September 11, 2007. (Exhibit 1)
- Correspondence from Ernie Ashby, Permit Coordinator, Land Reclamation Division, DNR, to Capital Resources Development Company, LLC, dated September 11, 2007, advising that application submitted to Department to notify of ownership change to Capital Resources Development Company was administratively complete. (Exhibit 2)
- Correspondence from Greg Arnett, Capital Resources Development company, to Ernest Ashby, dated December 10, 2007, including a certificate for publication for public notice concerning the application for transfer of Permit No. 355. (Exhibit 3)

- Results of Review of Application to Transfer Permanent Program Permit Nos. 254 and 355 and Pending Application No. 385 Notification of Ownership Change, and related correspondence, dated January 28, 2008. (Exhibit 4)

Section 1778.13(i) provides that “[a]fter an applicant is notified that his or her application is approved, but before the permit is issued, the applicant shall, as applicable, update, correct or indicate that no change has occurred in the information previously submitted under subsections (a) through (d).” 62 Ill.Admin. Code §1778,13(i). Exhibit 1 proves that the Department was notified of the substitution of Capital Resources Development Company, LLC, for Capital Resources Development, Inc. on September 11, 2007. Exhibit 1 contains the following information required by 62 Ill.Admin. Code §1778.13(a) - (h):

- Identification of the permit applicant and operator, Capital Resources Development Company, LLC (pp. I-1 to I-3);
- Identification of Capital Resources Development Company, LLC as the entity responsible for payment of abandoned mine land reclamation fees. (p. I-4);
- Identification of North Canton, LLC, as the entity with ownership and control over Capital Resources Development Company, LLC, and information regarding the owners, officers and directors of North Canton, LLC (Att. I-6);
- Updated right-of-entry information regarding Capital Resource Development Company, LLC’s ownership of property and mineral rights in the permit area (p. I-10 and Att. I-10).

Exhibit 2 demonstrates that the Department received and reviewed the updated information regarding the identity of the applicant/operator and ownership and control of the applicant/operator, and deemed this information complete, in accordance with 35 Ill.Admin. Code §1773.22(a). Based on Exhibit 2, Capital understood that the Department would have to take final action on the revised application information. For this reason, Capital continued to submit documents to the Department under the original permittee, Capital Resources Development Company, Inc.

Capital submitted the updated Application information to the Department prior to the Department’s issuance of Permit No. 355. There is no requirement for public notice of such information under 62 Ill.Admin. Code §1778.13. However, at the direction of the Department, public notice of the change in applicant/permittee for

Permit No. 355 was published for two consecutive weeks in the Canton Daily Ledger subsequent to the Department's issuance of Permit No. 355 to Capital, as required by 62 Ill.Admin. Code §1774.17(b) (Exhibit 3). As indicated in Exhibit 4, the Department received no written comments concerning the proposed transfer of Permit No. 355 to Capital Resources Development Company, LLC. On January 28, 2008, the Department approved the transfer of Permit No. 355 to Capital Resources Development Company, LLC, pursuant to 62 Ill.Admin. Code §1774.17. Exhibit 4.

Exhibit 1-4 demonstrate that Capital provided timely notification to the Department of changes to the permittee's ownership and control information, including the identification of the operator and all owners and controllers of the operator, and that such information was received and deemed complete by the Department prior to the issuance of Permit No. 355. Moreover, these documents reveal that no public comments were received following publication of the information concerning the change in permittee. Greg Arnett testified at the hearing in this cause that the Department was notified by Capital regarding the changes in ownership of a portion of the permit area and in the identity of the permittee that occurred while the Applicant was pending before the Department. Tr. 2756-2762. *Exhibits 1-4 corroborate Mr. Arnett's testimony and respond to the Attorney General's concern that such documents were not a part of the administrative record.* AG's Brief at 28-30; AG's Reply Brief at 77-83. Capital has no knowledge as to why Exhibits 1-4 were not included in the administrative record for this proceeding.

For the reasons stated above, Capital requests that the Hearing Officer supplement the administrative record with Exhibits 1-4. Capital further requests that the Hearing Officer withdraw his ruling on page 50 of the Proposed Order, the Proposed Findings of Fact Nos. 88-92 (pp.144-145), and the proposed Conclusion of Law No. 26 (p.157), and replace these with the following findings and conclusions in his final Order.

1. The Director of the Department finds that, on September 11, 2007, the Department received information from the Company regarding the substitution of Capital Resources Development Company, LLC, for the original permit applicant, Capital Resources Development Company, Inc.
2. The Director of the Department finds that the September 11, 2007 notification by the Company also included updated information regarding Capital Resources Development Company, LLC's acquisition and ownership of certain property within the permit area, and its right to legal access to the proposed permit area.

3. The Director of the Department finds that the September 11, 2007 notification received by the Department included all information required by 62 Ill.Admin. Code §1778.13(a) - (h).
4. The Director of the Department concludes that its November 15, 2007 written finding, pursuant to Section 1773.(c)(1), that the permit application was accurate and complete and all the requirements of the Act had been complied with was correct, in light of the September 11, 2007 notification by the Company of information concerning the change in the permit application and change in ownership and right to legally access the proposed permit area. (See, Capital Resources Exceptions, #1, pp.1-6) (Emphasis added)

The Department of Natural Resources, within its Exceptions to the Proposed Order, does not make any reference to this substantive matter raised by Capital Resources. Predictably, however, the Petitioners, within their respective Responses to the filed Exceptions, *do* provide counter-arguments to the assertions made by Capital as to this matter. Indeed, the Illinois Sierra Club stated that:

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

Capital Resources Development Company (Capital) previously attempted to add documents to this proceeding regarding the requisite information mandated by 1778.13, and that belated filing was ruled as such and duly denied by Hearing Officer O'Hara. This is the second attempt by Capital to put documents into the administrative record that were not filed in a timely manner, nor found to be contained in the official record during the course of the proceedings. The official administrative record for IDNR OMM Permit No. 355 was supplied by the Illinois Department of Natural Resources (Department). As stated by Capital on page 2 of their [sic] filing of August 21st:

“...it is not clear why these documents were not a part of the administrative record for Application No. 355.”

It is respectfully submitted that it is far too late in this proceeding, and as the Hearing officer previously ruled, for Capital to add this information. Indeed, that this information was not in the administrative record supplied by the Department is a matter which the Department must address, as indicated by the Hearing Officer's Proposed Findings and

Conclusions.

The lack of completeness of the administrative record indicates something so significant on part of the Department, that Permit No. 355 was determined to be remanded to the Department. The responsibility lies with the Department to address this issue and cannot be repaired by Capital.

One could hope that the greater issue of why the administrative record for Permit 355 was not complete, and whatever Department processes lead [sic] to this error, would be considered of concern by the Department and duly researched and addressed. (See, Illinois Sierra Club Responses to Exceptions, pp.1-2)

The Illinois Attorney General also addresses this Exception within her Responses. There, the Attorney General asserts that:

[t]he Company improperly seeks to supplement the administrative record with documents attached to its Exceptions. Exhibit 1 was the subject of a Motion to Supplement Administrative Record filed by the company on July 24, 2009 and the hearing officer's order issued on July 27, 2009. The attachment of exhibit 1 to its Exceptions is an improper attempt to circumvent or seek reconsideration of the hearing officer's explicit denial of the Company's motion. The Attorney General and other Petitioners have reasonably relied upon this order. Exhibits 2, 3 and 4 are documents pertaining to the Department's review of exhibit 1. In its Exceptions, the Company states as follows: "The documents attached hereto as Exhibits 1-4 were obtained through a Freedom of Information Act request recently submitted to the Department. It is not clear why these documents were not a part of the administrative record for Application No. 355." Capital Exceptions at page 2.

First of all, each of these four exhibits is dated well prior to the commencement of the hearing on June 23, 2008 and was either generated by or sent to the Company; hence the Company already possessed such materials within its own files. *It is noteworthy that none of these documents was produced in discovery to the Attorney General despite having apparently been filed in Application No. 355.* More importantly, none of these documents was sought to be admitted by the Company at hearing. Capital Exhibit 1 is the permit application dated May 17, 2004. Capital Exhibits 2A and 2B comprise the first modifications dated November 7, 2005. Capital Exhibit 7 are [sic] the second modifications dated September 17, 2007. Therefore, the record in this contested case includes the permit application materials admitted by the Company but does not contain any of the exhibits belatedly tendered with the Exceptions.

The Company's stated intention is to "corroborate" Mr. Arnett's testimony regarding ownership and control issues. Capital Exceptions at page 4. The testimony at issue was in response to cross-examination by the Attorney General regarding properly admitted documentary evidence showing that the identity of *both* the applicant and the prospective operator had changed prior to the issuance of the permit. The Company's witness was confronted with the *lack* of documentary or factual support for the contention

that it had notified DNR and complied with the applicable regulatory obligations regarding ownership and control issues. The Attorney General's evidence shows that Capital Resources Development Company was a Delaware corporation whose [sic] registration to do business was withdrawn on September 6, 2007, while a limited liability company, Capital Resources Development Company, LLC, filed its registration on September 5, 2007. AG Exhibits 102 and 101.

The context of the inquiry into the ownership and control issues is quite relevant. Mr. Arnett submitted the response to the July 2007 modifications and the Department received it (according to the file-stamp date) on November 7, 2007. Capital Exhibit 7; TR 2749. Asked whether a responsible official of the applicant executed the required verification of the revisions to the application, Mr. Arnett testified that Thomas Korman did so and that Mr. Korman was the president of the Company. TR 2750. Mr. Korman's execution and his title as corporate officer appear in the documents. Capital Exhibit 7 and AG Exhibit 11. Mr. Korman, as the former president of a corporation whose [sic] registration to do business was withdrawn on September 6, 2007, possessed no authority as a *corporate officer* to execute the second modifications since (as a legal matter) a limited liability company is governed by members and does not have corporate officials. The Proposed Decision does not consider the validity of the applicant's verification.

This second modification response is considered by the Company to be the controlling version of the application even though DNR did not receive it until after the application was approved by the hearing officer's deadline of October 26, 2007. Yet, Part I of the final version of the application does not contain complete and accurate information as to ownership and control. This evidence is sufficient to support the hearing officer's proposed ruling that Application No. 355 "is indeed incomplete and cannot be approved." Proposed Decision at page 50.

The Attorney General addressed additional ownership and control issues through Mr. Arnett's testimony to show that the Department also failed to make mandatory inquiries. For instance, Section 1773.22 requires DNR to verify this information and, where it appears the operator and all owners and controllers of the operator identified in the application do not have any previous mining experience, "the Department shall inquire of the applicant and investigate whether any person other than those identified in the application will own or control the operations as either an operator or other owner or controller." Mr. Arnett did not receive any such inquiry. TR 2760. It is not sufficient as Mr. Arnett contended that "The Company has ne and I have the previous mining experience." TR 2759. Yet, there is no discussion of this matter in the Proposed Decision.

In light of the Company's repeated arguments regarding purported waivers by the Attorney General, it is worth noting that the Company waived its opportunity at hearing to attempt to admit any additional evidence, including the particular exhibits attached to the Exceptions. Therefore, the Attorney General objects to the first two exceptions of the Company as improperly premised upon information neither presented nor admitted at hearing, not subject to cross-examination, and therefore not contained within the contested case record. (See, Attorney General's "Response to Exceptions," pp.6-9)

I share the Company's puzzlement as to the reason the documentation and information as to transfer of ownership (and information concerning corporate changes) was not made part of the administrative record in the matter. However, that does not obviate the necessity that such information and documentation had to be properly filed and made part of the record in a manner so that the Petitioners had ample opportunity to review (and question) the information contained in such. That is, although I am not prepared to indicate that there is any legal infirmity with respect to the substantive information contained in the documents sought to be subsequently filed by the Intervenor insofar as the property transfers and corporate changes regarding the Permittee (which evidently occurred prior to the Department's approval of the Application and issuance of Permit No. 355), certainly there is no argument that the Petitioners have not had an opportunity to formally contest such information and documentation in the context of the administrative hearing. And that, of course, is the point. This matter has to be remanded to give the Petitioners an opportunity to review and contest the information and documentation concerning the property transfers and corporate changes of the Intervenor once such documentation becomes part and parcel of the official administrative record. The proper procedure to accomplish incorporation of such documentation within the official administrative record was not to file a motion subsequent to the administrative hearings in this matter and request such to be included within the record — a procedure that would not properly afford the Petitioners the appropriate opportunity to contest or question the information contained within said documentation — which is the very reason I originally denied the Intervenor's Motion. The attempt to "correct" the record by means of filing exceptions is also not an appropriate manner by which to accomplish the end of including the relevant documentation in the administrative record. It is not my duty to explicate the proper

manner in which to accomplish such completion of the administrative record, but only to rule whether the record is “correct” as it presently exists. The administrative record is not “correct” as it presently exists and, thus, these matters must be remanded to afford the Petitioners, at the very least, an opportunity to raise objections to the information contained within such transfer and corporate-changes documentation, once the Department takes the necessary steps to include such documentation and information into the official administrative record.

2. Capital next states that:

[t]he Proposed Order contains the following discussion:

I agree with the Attorney General in this regard. The Department’s affirmative assertion that there is a “specific permit condition requirement” concerning Capital “[o]btain[ing] background data, prior to [the] start of mining operations, from the point where surface water flowing from the proposed mine site would flow around the west end of the berm that lies south of Morgan Ditch, during brief period of high water or intense rainfall” is simply not accurate. Thus, I am ruling that the Department’s decision as to Application No. 355 must be denied until such time as the Department makes a specific, unequivocal ruling as to whether such a specific permit condition is warranted. I agree with the Attorney General that the Department cannot have it both ways: if the Department is rationalizing the effectiveness of its review on the hydrologic issues raised by this Application by asserting the existence of a permit condition, then such permit condition should be *specifically* imposed. Thus, this matter is remanded with the direction that the Department is directed to review this specific issue (and this *specific* permit condition, if indeed it *is* as permit condition) to determine whether, indeed, a permit condition is warranted. Proposed Order, pp.63-64.

The Hearing Officer’s remand of the above “permit condition” was prompted by the Attorney General’s contention that the Department had no ability to enforce, as a “permit condition,” the following language in Appendix C of the Department’s Findings:

Monitoring point No. 7 was established in July 2005. Due to zero flow conditions during sampling events to date, samples are not presently available. The applicant will continue to monitor this point to establish baseline seasonal water quality information. Findings, App.C, p.3; Attorney General’s Reply Brief, pp.103-104.

However, notwithstanding the Attorney General’s concerns regarding the

enforceability of this language, the record makes clear that Capital understood that the above language required it to obtain background data from monitoring point No. 7 prior to the start of mining operations. During the hearing in this matter, Greg Arnett explained, in response to questions from the Attorney General's counsel, that he had collected the necessary samples at monitoring point No. 7:

In particular, when I've been — when I have been sampling I've been focusing on point number 7 because it was required in the modifications to sample that point and I've been collecting the data. It's been very difficult to get anything down there because we've gone through an extended dry period. This year we've had plenty of rainfall, so I've been able to collect those samples. Tr.at 2525.

Exhibit 5, attached hereto, documents the background surface water sampling results collected at monitoring point No. 7, as described in Mr. Arnett's testimony. Exhibit 5, Correspondence from Greg Arnett to Scott Fowler, dated February 12, 2009.

As set forth above, it is clear that Capital understood the language in Appendix C to be a condition of the Department's approval of Permit No. 355 that required it to collect baseline water quality data at monitoring point No. 7 prior to the commencement of mining. Capital satisfied this requirement and submitted the data to the Department. Therefore, the Hearing Officer's decision for this issue to be remanded to the Department for a determination of whether a permit condition is warranted is unnecessary and would serve no purpose.

For the reasons stated above, Capital requests that the Hearing Officer supplement the administrative record with Exhibit 5. Capital further requests that the Hearing Officer withdraw his ruling on pages 63-64 of the Proposed Order that this matter be remanded for the Department to determine whether a permit condition is warranted. (See, Capital's Exceptions, pp.6-7)

The Illinois Sierra Club is the only Petitioner that directly and specifically addresses this Exception of Capital. The Illinois Sierra Club states that:

Capital again asks the Hearing Officer to supplement the administrative record with their [sic] Exhibit 5, which has background surface water sampling results for Monitoring Point #7 at the Banner Mine project. The cover letter for these samples is addressed to Scott Fowler and is dated February 12, 2009, which is well past the Department approval of this mining permit of October 26, 2007. The samples are listed as being taken from March, 2008, to September, 2008, although no data is supplied for August, 2008. No reason is given for the lack of data for August. Four of the samples appear to be taken close to the first week of the month, and two samples are dated toward to the end of the month. If the sampling was a condition of the Department's approval of Permit 355, one might ask how the basic act of collecting samples or any other actions specified by the Department receive follow-up to determine if mining permits remain "approved."

Indeed, the Hearing Officer clearly requests the Department to determine if this issue was an actual condition for the permit. This is a very good question and deserves to be explained by the Department.

One would hope that the answer from the Department regarding the Hearing Officer's remand on this issue would clarify if specific directives in permit approvals are conditions of the permit. Many questions hinge on this. If this information was not supplied by Capital, would Permit 355 have been disapproved by the Department? As the data was supplied by Capital, does the information supplied receive any evaluation or assessment by the Department in their [sic] consideration of the appropriateness of the permit approval? Since the month of August was not sampled, is the data supplied adequate or does the Department allow the Permittee to determine the completeness of the sampling, quality, etc., and appropriateness of the information and data supplied?

Herein, lies some of the concerns and lack of clarity on how the Department approves mining permits when specific information is to be obtained after the permit approval, but without apparent deadlines for completion or methods of assessment as to was [sic] the directive done or was the information supplied adequate. One wonders if there is any kind of Department follow-up that assesses issues within the permit that depend on data that was directed to be obtained after the permit was approved. It is respectfully submitted that certainly, Capital is not the appropriate voice to answer this matter.

Included as part of the source of the discussion which lead [sic] to the Hearing Officer's remand regarding the water sampling condition, or if it is not a condition of the permit approval, are the issues raised by the Attorney General that the Department based their [sic] approval of Permit 355 on hydrologic data supplied by Capital taken from the 1983 IDNR Rice Lake Land Report. The permit approval relies in great part on 24 year old data that was not collected pertaining to the specific issue at hand, and the Department claims that current data that is to be collected as part of the permit conditions validate the permit approval, but the Attorney General points out that there certainly is no effort by the Department of ensuring the enforceability of the alleged provision. (See, Illinois Sierra Club's "Response to Permittee's and Respondent's Written Exceptions to Proposed Findings of Fact, Conclusions of Law and Order," pp.2-3)

Frankly, Capital literally "hits the nail on the head" when it indicates that "Capital *understood* that the above language [pertaining to hydrologic monitoring at the permit site] required it to obtain background data from monitoring point No. 7 prior to the start of mining operations." (Emphasis added) The Hearing Officer's point in remanding this matter is that it is not clear that Capital's *understanding* is, in fact, a permit condition enforceable by the Department. The language utilized by the Department does not indicate with specificity whether such monitoring

is a permit requisite and condition, thereby creating a situation where Capital's "understanding" may be subject to change or amendment at some later date. The fact that Capital acknowledges that it "understood" the monitoring directive of the Department as a pre-requisite for issuance of the permit should make this issue relatively easy to address. The Department is only required, on remand, to indicate with specificity that which Capital now indicates is its "understanding." It's that simple.

As to supplementing the administrative record with Capital's Exhibit #5, I will not do. Again, attempting to have evidence admitted into the record (whether in the form of documentation, or in any other form) subsequent to the close of the formal administrative hearing is simply inappropriate. The prejudice to the Petitioners of not having the opportunity to object and/or cross-examine witnesses concerning the substantive information contained in such proposed Exhibit is grounds alone to reject admission of such evidence. That is not to imply that such information is not relevant to the issues raised by the Exception filed by Capital. It is simply not the proper means to bolster a party's legal stance with respect to filed Exceptions to attempt to have documents admitted as Exhibits after the close of the formal administrative hearings. Again, it is not with the Hearing Officer's purview to instruct a party as to the proper means to have such evidence considered in the context of this controversy, but presenting such by means of an attachment to the filed Exceptions is *not* the appropriate methodology.

3. Capital next Exception states, in part:

[t]he Proposed Order contains the following discussion:

However, I am not unmindful of the concerns of the residents. Although the

Department asserts that monitoring wells have been installed “in the unconsolidated material between the town and the mine,” as required by the Department’s demands within its Modification Request, there is no reason that such issue cannot be examined by the Department to assure that adequate monitoring is taking place. Mr. Norris states that, “[g]iven what is discernable from the existing site data, it is unconscionable that there are no monitoring wells between the town and the mine or within the with town in the aquifer system that is most used and most at risk.” I am remanding this application to the Department for it to determine whether this concern has been addressed. If, indeed, additional monitoring wells “between the town and mine” (or within the town) will assist in assuring that the sanctity of the residents’ source and quality of water is maintained, then so be it. I remand this matter for the Department to determine whether additional monitoring wells would better serve the purpose of warning when and if adverse impacts from mining may occur. If the Department determines that additional wells are appropriate for these purposes, then such shall be made a specific condition for issuance of the mining permit. Proposed Order, pp. 90-91.

As an initial matter, it is not clear how the Hearing Officer’s direction to remand for purposes of determining whether additional monitoring wells are necessary comports with the Proposed Conclusion of Law No. 37, which states:

The Department’s requirement of monitoring at the permit site — and the groundwater monitoring network was specifically designed to identify changes in groundwater quantity and quantity [sic] before private wells are impacted, in light of the monitoring placement along the northern boundary of the proposed mine site — is sufficient to comport with the requirements of the Act.” [sic] Proposed Order at 159. (See, Capital’s Exceptions, pp.8-9)

I note that the Department does not express any reservations whatsoever to the direction of remand as to this issue. Although Capital may be at least technically correct that the Proposed Conclusion of Law No. 37 indicates that the monitoring system established by the Company complies with the Act, I believe the remand direction is sufficiently clear to explicate for the Department what I believe is appropriate to assure protection of the town residents’ water supply.

The Attorney General, within its response to this Exception, states that:

[t]he Company argues that the hearing officer’s Proposed Decision would *unnecessarily* remand the permit application to the Department for it to determine whether additional

monitoring wells should be required in the area between the proposed strip mine and the Village of Banner. The Attorney General contends that, at this stage, no such remand for further permitting is legally authorized. The hearing officer is granted no lawful authority to issue an edict or remand or to impose his preferences through specific directives. Judicial review is expected to correct the problems created by the hearing officer's usurpation of the Department's authority and disregard of generally applicable legal requirements, including the due process and fundamental fairness mandated by the APA. In order to deal with the issues raised by this exception, the Attorney General will focus on the expert testimony and other evidence in the record to respond to the Company's argument. (See, Attorney General's "Response to Exceptions," pp.9,10)

The Attorney General then provides a multi-page argument as to the reasons the Department's initial rulings relating to water resources potentially affected by the approval of this mining permit should be reviewed.

As to the Attorney General's comments concerning my authority as a hearing officer and the power to remand, I would note that 62 Ill. Adm. Code 1847.3(k) provides, in part, that:

[i]f written exceptions are filed [as to a Proposed Order in a Mining Permit Application proceeding], the hearing officer shall within 15 days following the time for filing a response either issue his final administrative decision affirming *or modifying his proposed decision*, or shall vacate the decision and remand the proceeding for rehearing. (Emphasis added)

Thus, I believe it entirely appropriate for me to recommend a remand and then articulate the issues that I believe require re-examination and/or rehearing.

Capital asserts that:

....the record clearly shows that both Capital and the Department were mindful of the concerns of the residents during the development of the groundwater monitoring program. Moreover, the record contains no evidence that the groundwater monitoring program does not comply with the Act and regulations. Therefore, there is no basis in this record of this proceeding for the Hearing Officer's remand, and Capital requests that the Hearing Officer withdraw his ruling on pages 90-91 of the Proposed Order that his matter be remanded for the Department to determine whether additional monitoring wells are necessary. (See, Capital's "Exceptions," p.10)

I simply disagree. If I did not make myself clear in the Proposed Order, that is unfortunate. I do

not believe that there is sufficient evidence in the record to determine whether the monitoring well system presently proposed and activated adequately addresses the concerns raised by the Petitioners as to assurances of the protection of the town's water quality and quantity. I believe under such circumstances it is appropriate to remand this matter to the Department for further proceedings to determine whether this concern has been adequately addressed. Further, despite the Attorney General's expressions to the contrary, I believe it is appropriate for the Hearing Officer to direct the Department as to the specific concern that caused the remandment order to be issued, and the legal and evidentiary issues to be addressed on remandment. I will amend Conclusion 37 to reflect this concern.

4. The last Exception raised by Capital commences by citing from the previously issued Proposed Order, where I stated:

I am especially concerned that Capital originally indicated that it would obtain the services of a "specialist" to address these issues, and then simply decided not to do so. Although Capital is correct that "[t]here is no requirement in State law or the Department's regulations for the hiring of an expert or the submittal of a report," when the Applicant has affirmatively indicated its intentions to do so, and then does not, such requires an examination of the information the Company does provide (or does not provide) with a jaundiced eye. The fact that both the Department and the Company assert that site-specific information was not necessary to comply with Section 1780.16 is troublesome....It appears that information other than site-specific resource information was relied upon with respect to the Company's attempt to comply with the requirements of the Application process and the delineation of endangered or threatened species of plants or animals or their critical habitats. I believe, as asserted by the Attorney General, that more it required than general reliance on Internet information to comply with such application requisite. Therefore, I am remanding this matter to the Department with the direction that the requirements of Section 1780.16(a)(2) mandate the obtainment of site-specific resource information. The Department shall require the Company to fulfill the requirements of Section 1780.16 by obtaining such site-specific resource information. The permit application cannot be approved until such site-specific resource information pertaining to the investigation of wildlife species and habitats in the adjacent to the permit area is

completed. If, indeed, the Department asserts that site-specific resource information already supports the findings required by Section 1780.16, such information shall be identified with specificity so that a reviewer may discern compliance with Section 1780.16(a)(2). Proposed Order, pp. 109-111.

The Hearing Officer's finding with respect to compliance with Section 1780.16(a)(2) is erroneous for the following reasons. First, the Hearing Officer's statement that the Company asserts "that site-specific information was not necessary to comply with Section 1780.16" is not accurate. Capital has never contended that the requirements of Section 1780.16(a)(2) do not apply to the Application or the Banner permit area, and has complied with those requirements by furnishing all site-specific resource information sought by the Department regarding endangered and threatened species and habitats of unusually high value in and around the permit area. What Capital maintains is that there is no requirement in State law for the hiring of a wildlife expert or the submittal of a report prepared by a wildlife specialist. Capital Brief at 59. Second, the Hearing Officer's conclusion that "information other than site-specific resource information was relief upon with respect to the Company's attempt to comply with the requirements of the Application process and the delineation of endangered or threatened species of plants or animals or their critical habitats" is not supported by the record and simply ignores the volume of site-specific resource information contained in the Application addressing endangered or threatened species and habitats of unusually high value. [footnote omitted] (See, Capital's "Exceptions," pp.10-11)

Capital then purports to delineate a "non-exhaustive list of the site-specific resource information regarding endangered or threatened species and habitats of unusually high value that was assembled by Capital and included in the Application." (See, Capital's "Exceptions," pp.11-12)

As to be expected, the Department's "Exceptions" are by and large concerned with my ruling as to this particular issue (*i.e.*, whether or not site-specific resource information was required by the Department and provided by the Company as to the Application addressing endangered or threatened species of plants or animals or their critical habitats). Indeed, Exception 10 of the Department's "Exceptions" indicates that the Department "takes exception to paragraph 120 of the fact findings of the Proposed Order at page 149 [of the Proposed Order], but does not indicate with specificity (within the numbered Exception) the reason for the

Department taking “exception.” (See, Department’s “Exceptions,” #10) Likewise, the Department “takes exception to paragraph 42 of the Proposed Conclusion of Law at page 160 of the Proposed Order,” but again, the Department fails to indicate with specificity (within the numbered Exception) the reason for the Department taking such “exception.” (See, Department’s “Exceptions,” #12) The Department also indicates that it “takes exception to the Hearing Officer’s statement for remand on page 111 of the Proposed Order”...

....and subsequent statements that the “permit application cannot be approved until such site-specific resource information pertaining to the investigation of wildlife species and habitats in and adjacent to the permit area is completed....” As described in Paragraphs 18[A] through [G], the Department has detailed the various site-specific information that the Permittee provided in both the 2002 and 2004 Permit #355 Application, its modification responses, responses to public and interagency comments in the record, and evidentiary exhibits by the Permittee, all of which were reviewed and found to support the Department findings and decision to issue the Banner #355 Permit with regarding [sic] to those specific requirements of Section 1780.16. (See, Department’s “Exceptions,” #19)

The Department also “takes exception to the Hearing Officer’s statement on page 109 of the Proposed Order...:

....which concerns the alleged assertions of the Department that “site-specific information was not necessary to comply with Section 1780.16.” The Department notes that this assertion is not intended by or supported by testimony provided by Mr. William O’Leary. [See Transcripts, dated 8/28/08, 8/29/08, 10/07/08 and 10/08/08] The Department asserts that this issue, as referred to herein at Paragraphs 16 and 17, is in fact whether Section 1780.16 requires the preparation, submittal, and review of a site specific information report versus a site specific information which as been detailed herein at Paragraph 18[A] through [G]. (See, Department’s “Exceptions,” #21)

As might be expected, the Attorney General’s “Responses” addressed this issue in some detail.

The Attorney General argues as follows:

[t]he issue of the lack of site investigation highlights the information deficiency of the application. It also belies the Department’s “died on the vine” characterization of the initial February 2002 application. The protection of wildlife and its habitat was a

legitimate concern of DNR and the citizens from the outset. Mr. Malone's March 5, 2002 memo recommended a "survey of the proposed mine" to determine whether the threatened plant species of *Boltonia Decurrens* (decurrent false aster) "occurs within the proposed permit area." AG Exhibit 104/document 148; DNR Exhibit 17. Mr. O'Leary's March 26, 2002 e-mail recommended that a "completeness deficiency letter" regarding Application No. 355 should be sent to the Company to require "site specific resource information necessary to address these species and habitats including a map identifying these habitats of unusually high value and known locations of the listed species." AG Exhibit 104/document 642.

It is *first* the failure of the Department to ensure the permit applicant would follow through with the information deemed necessary for technical review. The Department possesses discretion to *require* the appropriate scope of factual information under Section 1780.16. Indeed, the result of the internal "consultation" performed by DNR during the completeness review was a determination that more investigation was necessary to the proposed permit area's proximity to Banner Marsh, Rice Lake and Slim Lake. This requirement was communicated to the Company before the Application No. 355 was deemed administratively complete on May 5, 2004. AG Exhibit 104/document 1669. The Company acknowledged its obligation in Part II(8) of the revised version of the application subsequently filed on May 17, 2004.

Not only did this application provide *only* a commitment to have a proper biological survey conducted to generate site specific resources information, but the Company disputed DNR's basis to require a more extensive investigation. Mr. O'Leary's May 28, 2004 list of "proposed modifications" included the following: "On page V-18 (#3), the applicant indicate [sic] that there are no habitats of unusually high value in the permit area, including wetlands." AG Exhibit 104/document 155. This May 17, 2004 application was also incomplete and inaccurate in its omission of Baker Hollow Creek considered by Mr. O'Leary to also contain habitats of unusually high value. Even after Application No. 355 was modified in November 2005 to include this important stream but to renege on the promise to hire a specialist, the Department still failed to *require* the factual information it deemed necessary under Section 1780.16. Even though the Proposed Decision essentially rules that the Company did not meet its burden by breaking its promise, it is also true that DNR abused its discretion by granting the permit without a proper wildlife habitat investigation to Section 1780.16(a)(2).

The Company's exception on this issue still seeks to evade its own responsibilities by arguing that other available information supports the approved protection and enhancement plans and even that other agencies, such as the Fish and Wildlife Service, found the proposed plans to meet applicable requirements. Capital Exception at page 13. Other agencies and the applicability of their regulations are not the focus of the validity of the Banner Mine permit. The question is whether DNR was adequately informed by Application No. 355 so as to determine the wildlife and habitat resources subject to the potentially adverse effects of strip mining and to mandate effective protection "to the extent possible using the best technology currently available," as required by Section 1780.16(b). (See, Attorney General's "Response to Exceptions," pp. 16-18)

The Proposed Decision is correct in finding that the permit application was insufficient in this regard.

The Attorney General's specific response to the Department's Exceptions as to this issue states:

[i]t appears that DNR's exceptions relate literally to form over substance. It asserts that the regulations require certain information and do not dictate the format "***such as a formal written report.***" DNR Exceptions at Paragraph 16; double emphasis in original. Of course, it is really the content that is important. The mining company decided that it was not necessary to hire a specialist to conduct a field survey and generate site-specific data. In contrast, some of the Petitioners did hire a professional to study the hydrology and geology of the Banner area and to review the permit application's investigation of hydrologic balance issues. Both the Company and the Department objected to the Norris report [AG Exhibit 2] because it did not contain any maps or list of citations, but neither the Company nor the Department took seriously the concerns set forth in this December 2006 document.

Wildlife and habitat on the one hand and groundwater and surface water on the other hand are subject to empirical methods of study. Species may be observed, categorized and counted; habitat such as nests and roosts may also be documented. Similarly, the respective quantities and qualities of water flows may be measured and sampled. These investigations are conducted according to the particular procedures commonly employed by biologists on the one hand and hydro-geologists on the other hand. The proper methodology helps to validate the resulting data; the proper factual information supports the findings of the assessment. In regard to the proposed Banner Mine, however, extrapolation from other information collected elsewhere instead of an actual thorough site investigation achieves neither completeness nor accuracy.

In any event, the Department's most recent argument that the Company did indeed provide some site-specific information leads it to abandon its previous argument that site-specific information was not necessary to comply with Section 1780.16. DNR Exceptions at paragraph 21. Some progress, at least, has been made. (See, Attorney General's "Responses to Exceptions," pp.19-20)

Frankly, I agree with most of this argument. Although I will reiterate that there is no legal requirement, as indicated by Capital, "in State law for the hiring of a wildlife expert or the submittal of a report prepared by a wildlife specialist," the fact that Capital indicated that it intended to do so because of the complexity and detail needed to address the environmental and wildlife issues raised by this Permit Application, indicates that considerably more than

referencing Internet articles was required to comply with the Act. I realize that there is a difference of opinion between what I believe the Act requires as to providing site-specific data and Capital's (and evidently) the Department's belief that their citations to particular evidence within their respective Exceptions as constituting what was envisioned by the drafters of the Act and the regulations when utilizing the term "site-specific resource information." Frankly, I believe that site-specific resource data requires a contemporary, parochial study of the specific area at issue, with specific focus on the wildlife present (or potentially present) at the specific site — and a study performed for the very purpose articulated by the Act (*i.e.*, a determination and assessment of such wildlife issues in light of the potential effect of granting the mining permit). Garnering stale data from various sources that address wildlife issues, peripherally, and data that was not generated and attained for the *specific* purpose of determining the *particular* issues that arise in the context of the potential effects that may arise by the granting of a mining permit, should be examined in the context of this type of application with a jaundiced eye. The potential deleterious effects of the approval of a mining permit are such that correcting the damage to a species of flower or other wildlife on the verge of extinction after mining has occurred and the damage wrought may be irremediable.

In my Proposed Order, as to this issue, I wrote:

“Section 1780.16(a)(2) was clearly applicable [to this Permit Application] and, without the necessary site-specific resource information, any protection and enhancement plan cannot be considered to be factually supported to a sufficient degree to satisfy State and federal law.” [citation omitted]

Section 1780.16(a)(2) provides that:

Site-specific resource information necessary to address the respective species or habitats *shall be required* when the permit area or adjacent area is likely to include:

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

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

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

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

[a]t page 97 of Attorney General's brief, it alleges that "actual site observations" and/or "field surveys....conducted regarding wildlife...within the general area...within the flood plain of the Illinois River" was required for submittal with the Permit Application #355 for Department review. In its brief, Sierra also raised similar allegations and concerns regarding the need for "specific site information....that constituted a qualified biological assessment related to...endangered bird and plant species that could be existing on the mine property at the time of the application." (Sierra 3&5) The Department notes that the provision of 62 Ill.Code 1780.16 for "Fish and Wildlife Plan" information state [sic] that "fish and wildlife information for the permit area and adjacent area" is required for a permit application; there is no reference of such information or methodology as being "actual site observation" or "field survey" work. The Department notes that the permit application process is an iterative and ongoing dialogue between the permit applicant and various Department review staff concerning the scope and conduct of studies to design any required protection and enhancement plans. The Attorney General is again stating an undefined general preference for "proper biological site investigation" or "site-specific resource information necessary to address the respective species or habitats" (AG 100 & 98 respectively). Both the Attorney General and Sierra state their preference, but

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

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

The Attorney General asserts that:

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

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

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

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

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

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

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

The Attorney General states that:

[t]he Company acknowledged the Department's explicit request for site-specific resource information, and the necessary habitat identification maps and protection and enhancement plans, regarding these threatened species, yet provided no such information as to the aster and the eagle. *The Company provided only generalized fish and wildlife resource information for the permit area and adjacent area,*

which was not generated from a proper biological survey of the site. The May 2004 application did not provide any site specific resources information to address the Decurrent False Astor and the Bald Eagle [at Part II(8)]. Instead, the Company stated: "The Department has requested site specific resource information, including habitat identification maps and a protection and enhancement plan, pertaining to the Decurrent False Aster and the Bald Eagle. Capital Resources Development Company will hire a specialist to compile this information. The resulting report will be completed, submitted and approved by the Department prior to the initiation of the mining operation." The Company did not hire a specialist and no such report containing the site specific resource information was done. (See, Attorney General's Brief, pp.99-100) (Emphasis added) [Note, additional emphasis has been added due to the specific issues raised by the Exceptions and Responses]

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

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

I will reiterate. I do not believe that templates that provide repetitive, admittedly "simple" information are adequate to fulfill the Act's and regulations' requirements for site-specific resource data and information. I will be frank. Templates that provide repetitive, admittedly "simple" information about the critically important issues that are the subject of Section 1780.16(a)(2) — that is, endangered or threatened species of plants or animals or their critical habitats listed by the Secretary under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.) or those species or habitats protected by the Illinois Endangered Species Protection Act (520 ILCS 10), or the habitats of unusually high value for fish and wildlife, such as important streams, wetlands, riparian areas, cliffs supporting raptors, areas offering special shelter or protection, migration routes, or reproduction and wintering areas — do not satisfy the specific, detailed requirements of 1780.16(a)(2)(A), (a)(2)(B), and (a)(2)(C).

In my Proposed Order, I went on to cite the Attorney General's Post-Hearing Brief, which stated:

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

- 1) The justification for site specific resource information was derived very early in the permit application review process through the informal consultation between the Office of Mines and Minerals and Pat Malone in the Impact Assessment Section of the Ecosystems and Environment Division of the Office of Realty and Environmental Planning. Mr. Malone's March 5, 2002 memo identified Rice Lake, Banner Marsh and Slim Lake as being adjacent to the proposed permit area and explicitly recommended a “survey of the proposed mine” to determine whether the threatened plant species of *Boltonia Decurrens* (decurrent false aster) “occurs within the proposed permit area.” AG Exhibit 104/document 148; DNR Exhibit 17. Mr. O'Leary consequently recommended in a March 26, 2002 e-mail that a “completeness deficiency letter” regarding Application No. 355 should be sent to the Company to require “site specific resource information necessary to address these species and habitats including a map identifying these habitats of unusually high value and known locations of the listed species.” AG Exhibit 104/document 642.
- 2) The Department affirmatively communicated to the Company the applicability of the Section 1780.16(b) requirements of “site specific resource information, including habitat identification maps and a protection and enhancement plan, pertaining to the Decurrent False Aster and the Bald Eagle.” Part II(8) of the May 17, 2004 permit application.
- 3) The Company acknowledged the Department's request for site specific resource information and made written commitments to “hire a specialist to compile this information” and to submit the “resulting report.” Part II(8) of the May 17, 2004 permit application.
- 4) The Company provided only generalized fish and wildlife resource information for the permit area and adjacent area. Part II(8) of the May 17, 2004 permit application.
- 5) The Company stated: “Subject to the findings of the above-mentioned

study, it is believed that there are no habitats for fish or wildlife of significantly high value within the permit area.” Part V(3)(B)(3) of the May 17, 2004 permit application.

- 6) The “report” or “study” mentioned respectively in Part II(8) and Part V(3)(B)(3) of the May 17, 2004 permit application was never performed. The “specialist” mentioned in Part II(8) of the May 17, 2004 permit application was never hired. Mr. Arnett testified that he decided “it was not necessary to hire a biologist.” TR 2453-54; 2647.
- 7) Modification Item 8 referred to the Company’s commitment in Part II(8) of the May 17, 2004 permit application that “a report is forthcoming” and explicitly directed the application to comply with Section 1780.16(b). Modification Item 14 referred to the Company’s commitment in Part V(3)(B)(3) of the May 17, 2004 permit application that “a report on habitat identification maps and protection and enhancement plans” will be submitted and explicitly directed the applicant to comply with Section 1780.16(b). Modification letter dated November 9, 2004.
- 8) The Company’s response to Modification Item 14 indicated that “site-specific potential habitat maps were considered unnecessary.” Modification responses dated November 7, 2005; TR 2647.
- 9) The protection and enhancement plans proposed in Application No. 355 were approved on October 26, 2007.
- 10) The Department possessed direct knowledge of an osprey nest at Bells Landing in Banner Marsh since at least August 2005. AG Exhibits 82, 83, 84, 85 and 86; TR 1103-05; 1138-39. Another osprey nest existed briefly in May and June 2008 in the Slim Lake Natural Area. TR 326-27; 1107-08; 1237-38; AG Exhibits 27 and 87.
- 11) A large population of decurrent false aster was discovered within the permit area in September 2008. TR 2927-28, 2931-33; AG Exhibits 121, 122, 123, 124 and 125.

Therefore, the record shows *how* the Department failed to obtain required information from the permit applicant and *why* a proper investigation ought to have been conducted.

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

* * * * *

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

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

The term “resource information” is intended to allow for the use of existing fish and wildlife information, in addition to any site-specific studies authorized under §780.16(a)(2).

* * * * *

As discussed in the preamble to the proposed rule, the authority to require site-specific studies has been retained but the restriction that a study be the only means to achieve compliance is removed. The need for site-specific studies will be determined by the regulatory authority through the consultation process required in the final rule. Site-specific studies could include aquatic sampling of streams to determine their “importance.”

The applicant is responsible for the accuracy and completeness of the submitted information and the regulatory authority is required to consult with agencies which possess the needed resources to competently evaluate the applicant’s data. 52 Fed. Reg. 47354-55.

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

Then, in my Proposed Order, I stated:

I frankly concur with the Attorney General as to this issue. I am especially concerned that Capital originally indicated that it would obtain the services of a “specialist” to address

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

It is particularly troublesome when it is asserted that even though “site-specific resource information” is not needed, such information was provided anyway. The obvious question is if sufficient site-specific information was provided, then why assert that such site-specific information was not required in the first place? The Department concedes that much of the permit applicant’s information concerning species and habitat issues was obtained on the Internet (but argues that the Attorney General also offered “a large amount of information as documented evidence obtained from various Internet website [sic] regarding protected species issues in support of *its* case in chief”). (See, Department’s Brief, p.72, citing AG’s Exhibit 106, 109 through 114, & 121)

As indicated within the Attorney General’s Brief:

....the Company contends that it collaborated with the Department and complied with Section 1780.16. In particular, it contends the Greenleaf Wetlands Report “provided very detailed information regarding plant species found in and around the permit area, and also identified the bald eagle and decurrent false aster as threatened and endangered species that were not observed within the permit area, but may be present in the vicinity of the permit are. *Greenleaf Wetlands Report* at 30.” Company’s Brief, at 57. Greenleaf’s wetland specialist did not see any bald eagles during April 24 through May 2, 2001; as to the threatened plant species, the report concluded [at page 30]: “The Banner site reconnaissance was conducted during the species non-flowering months. Due to the early season, Greenleaf Consulting, Ltd. could neither negate nor confirm the Decurrent False Aster’s presence within the proposed permit boundary.” AG Exhibit 8.

The field investigation and wetland delineation report provides site-specific data regarding soils (especially hydric soils indicating wetlands) and vegetation on te proposed site (which then comprised 738 acres). The Attorney General agrees with the Company that “detailed botanical information” was generated. Exactly 30 designated data points were utilized to identify approximately 164 acres of jurisdictional wetlands. However, the usefulness of the Greenleaf report for fish and wildlife habitat characterization and

protection/enhancement planning is quite limited. Mr. O’Leary certainly did not testify that he relied upon it to any extent for those purposes. For instance, the results of the field investigations for each of the 30 data points are set forth at pages 7 through 28, yet there is not a single mention of any observation of fish or wildlife nor is any “botanica” information discussed in the context of habitat. AG Exhibit 8 (See, Attorney General’s Reply Brief, p.158, 159)

In my Proposed Order, I concluded as follows as to this issue:

Again, I must concur with the Attorney General. It appears that information other than site-specific resource information was relied upon with respect to the Company’s attempt to comply with the requirements of the Application process and the delineation of endangered or threatened species of plants or animals or their critical habitats. I believe, as asserted by the Attorney General, that more is required than general reliance on Internet information to comply with such application requisite. Therefore, I am remanding this matter to the Department with the directions that the requirements of Section 1780.16(a)(2) mandate the obtainment of site-specific resource information. The Department shall require the Company to fulfill the requirements of Section 1780.16 by obtaining such site-specific resource information. The permit application cannot be approved until such site-specific resource information pertaining to the investigation of wildlife species and habitats in and adjacent to the permit area is completed.

Nothing within the Department’s Exceptions or Capital’s Exceptions persuades me that I should alter my original rulings as to this issue. Therefore, I will refrain from doing so.

The Department also cites several miscellaneous errors or exceptions which I am required to address. The Department notes that:

....at page 14 of the Proposed Order in the Section II portion identified as “Statutory and Regulatory Overview,” that subsection “c” of Section II concerning the issue of “Standing,” should be revised as subsection “b” of that Section. (See, Department’s “Exceptions,” #22)

At first I was confused as to the error that the Department was attempting to have me correct. I examined the statutory references for the “standing” issue and found them to be correct. Then I realized that the Department was indicated that I erred in the “heading” designation of the

Proposed Order, and that the subsection should be labeled (b) instead of “c” (inasmuch as only one other subsection — “Burden of Persuasion”— preceded it. The designation will be corrected.

The Department also notes that:

....at page 150 of the Proposed Order in the “Proposed Findings of Fact” section, that paragraphs 120 and 121 should be revised and numbered as paragraphs 121[a] and 121[b]. Both of these paragraphs address the issue of “properties listed on and eligible for listing on the National Register of Historic Places” pursuant to 62 Ill.Adm.Code 1779.12. Furthermore, the specific renumbering of paragraph 120 at page 150 of the Proposed Order will differentiate this paragraph from paragraph 120 at page 149, which concerns the issue of “sige-specific data” requirements pursuant to 62 Ill.Adm.Code 62 Ill.Adm.Code 1780.16. (See, Department’s “Exceptions,” #23)

I believe the suggestions are appropriate and the renumbering will be done in the final Order.

I reviewed all the Exceptions and all of the Responses to the Exceptions filed by the parties. I have not reiterated all of the arguments within each of these documents, since I believe those that I did not specifically cite to be duplicative of the substantive issues and arguments raised by either the Department, the Intervenor, the Attorney General, or one of the other Petitioners. Attached hereto is the modified final decision.

Dated: September 15, 2009


Hearing Officer

PROOF OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Order as to the Exceptions Timely Filed and Responses Thereto was mailed to the following addressees on the 16th day of September 2009.

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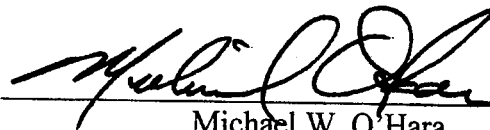
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