

STATE OF ILLINOIS
DEPARTMENT OF NATURAL RESOURCES
OFFICE OF MINES AND MINERALS, OIL AND GAS DIVISION

JEFF HERRICK and KIM SEDGWICK,)	
)	
Petitioners,)	
)	
vs.)	Re: Freeman United Coal Mining
)	Company Industry Mine
ILLINOIS DEPARTMENT OF NATURAL)	Permit No. 357
RESOURCES, OFFICE OF MINES AND)	
MINERALS, LAND RECLAMATION,)	
)	
Respondent.)	

ORDER
FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes to me pursuant to a formal administrative hearing conducted on January 9, 2008, wherein the Petitioners, Jeff Herrick and Kim Sedgwick (hereinafter "Petitioners") request that I:

....review the decision of the Illinois Department of Natural Resources (hereinafter ["Department"]) concerning endangered species, and in particular, the Indiana Bat, and setbacks, and reverse the [Department's] decision pursuant to Section 2.11 of the Illinois Surface Coal Mining Land Conservation and Reclamation Act (hereinafter "the State Act") (225 ILCS 720/2.11(c)). (See, Petitioner's "Post-Hearing Brief," p.1)

Findings of Fact:¹

1. On February 25, 2002, Freeman United Coal Mining Company (hereinafter "Freeman") applied for a permit to surface mine coal at the Industry Mine in McDonough County, Illinois. (Record, Initial, pp. 1-1 to 1-4)
2. The Department determined that the permit area in question is 493.10 acres,

¹ Many of the facts cited herein are taken directly from the Petitioner's Post-Hearing Brief, inasmuch as many of those facts are uncontested by any of the parties to these proceedings.

which area includes 314.16 acres of forestry. (Department Findings at p.2)

3. The Indiana Bat is listed as a federal and state endangered species. (Hrg. Trans. At p.28, Malone).
4. The Indiana Bat's habitat is in forest and riparian corridors. (Hrg. Trans. At p.34, (Malone).
5. The Grindstone Creek corridor at the Industry Mine would have been prime habitat for the Indiana Bats. (Hrg. Trans. At p.53, (Malone))
6. The permit application filed by Freeman indicates that the permit area is within the "known or potential range" of the Indiana Bat. (Record, Initial, p. V-18)
7. Freeman's permit application also indicates that "[n]o observations of birds or animals or habitat for such [species] as protected by State or Federal law have been made." (Record, Initial, p. V-19)
8. Within Freeman's permit application, Freeman noted that:

[i]n July of 1986, Freeman United received the final report on the possible presence of the Indiana Bat in the Pond No. 9 Impoundment location. This study was conducted by James e. Gardner and Joyce E. Hofman of the Illinois Natural History Survey. During the study period, no Indiana Bats were captured and it was concluded that "the study site cannot be construed as significant to 1986 Indiana bat summer maternity colonies,...". Permission was, therefore, granted to construct Impoundment No. 9 as proposed in Permit #180.

In 1988 and 2000, similar studies were conducted in the Permit #305 and #341 areas. Again, no endangered species were found.

The Office of Mines and Minerals has indicated that further studies would not be necessary as long as no tree clearing would occur during the April 30th to September 1st nesting period. Freeman United agrees to these stipulations. If, however, it becomes necessary to perform tree clearing during this time frame, Freeman United will perform the necessary field

studies in accordance with U.S. Fish and Wildlife procedural recommendations to investigate for the presence of the Indiana Bat. The Office of Mines and Minerals and U.S. Fish and Wildlife will be apprised of the findings prior to the commencement of any clearing activities. (Record, Initial, p.V-20)

9. The Indiana Bat hibernates in caves during the winter months. (Hrg. Trans. At p.41, (Malone).
10. At about the time the Freeman permit application was filed with the Department, the Indiana Bat was found, inasmuch as testimony provided at the formal administrative hearing by witness William O'Leary indicated that:

I think either just before the permit was applied for or just after [specimens of the Indiana Bat were found]. The company, through a bat consultant who was doing a study at the site, did trap two Indiana bats feeding in Grindstone Creek, and also, they were able to identify a maternity roost colony in a tree adjacent to Grindstone Creek in permit area number 16, which is adjacent to proposed permit area 357. (Hrg. Trans. At pp.56-57 (O'Leary); see also Hrg. Trans. At p.31 (Malone))
11. William O'Leary is a natural resource specialist in the Land Reclamation Division of the Office of Mines and Minerals. (Hrg. Trans. At p.49)
12. William O'Leary was and is responsible for reviewing permit applications (including the permit application submitted by Freeman which is the subject of this docket) for issues concerning wildlife and wetlands, and O'Leary is responsible, amongst other duties, to address those issues in the context of reviewing permit applications filed with the Department. (Hrg. Trans. At p.53)
13. O'Leary initially recommended the following modification for the Freeman permit application as to the Indiana Bat issue:

[a]s a measure to protect the Indiana [B]at, the applicant [i.e., Freeman]

proposes to limit tree clearing to the period of September 1 to April 30. Pursuant to Section 1773.15(c)(10), 1780.16(b), and operator Memorandum 01-01, dated January 31, 2001, the applicant shall modify these dates to read September 30 to April 1. Since the date this application was deemed complete, the Department has become aware that at least one site at this mine has been documented as an Indiana [B]at feeding area and another site has been documented as a maternity roosting site. Pursuant to Section 1780.16(b) the applicant shall provide a protection and enhancement plan detailing methods to be employed to protect these habitats and detailing what methods, if any, are proposed to enhance the area for this species. (Hrg. Trans. At p.54; Ex.1 (July 8, 2002 Memorandum))

14. O'Leary's framework for the manner in which the Department was to address the confirmed presence of the Indiana Bat within the permit area was to (a) require Freeman to extend the no-cut period two (2) months — one month in the Spring, and one month in the Fall; and (b) require Freeman to provide a protection and enhancement plan. (Hrg. Trans. At p.55; Hrg. Trans. At p.57-58)
15. The Freeman permit application in this docket was filed in McDonough County, Illinois on June 14, 2002, and a notice of said permit application was published for four (4) consecutive weeks in the local newspaper subsequent to said date. (Findings at p.3)
16. A public hearing was conducted on September 12, 2002 in Macomb, Illinois. (Findings, at p.3)
17. At the September 12, 2002 public hearing conducted in Macomb, Illinois, a representative of Freeman addressed questions concerning the presence of bats at the permit area and confirmed that Indiana Bats were present at the site. (Public Hrg.Trans. At pp.35-36)

18. Pat Malone is the wetland program manager for the Illinois Department of Natural Resources; Malone is not employed by the Division of Mines and Minerals. (Hrg. Trans. At p.27)
19. Malone is responsible for reviewing permits for impacts to state-listed or federally-listed endangered or threatened species. (Hrg. Trans. At p. 28)
20. Malone has daily involvement with issues concerning the Indiana Bat in conjunction with his employment duties for the Illinois Department of Natural Resources. (Hrg. Trans. At p.29)
21. Malone reviewed the permit application and submitted his comments to the Division of Mines and Minerals, which comments were received by the Division on September 18, 2002. (Hrg. Trans. At p.34; Pl's Ex. 2)
22. Malone's comments were signed by Malone's Division chief, Stephen Davis, which was the standard practice utilized by Davis at the time. (Hrg. Trans. At pp.37 & 47)
23. Malone reviewed the permit application for impacts to the natural resources under the jurisdiction of the Illinois Endangered Species Protection Act, and made the following recommendations:

[t]he Indiana [B]at, *Myotis sodalis*, a State and Federal listed endangered species, is known to occur in the vicinity of the permit area. In order to avoid any adverse impact to this species it is recommended that clearing of woody vegetation be prohibited prior to October 31 and after March 1 when the bat is likely to be present. These dates have been coordinated with Ms. Heidi Weber of the U.S. Fish and Wildlife Service, Rock Island Office and Mr. Joe Kath, Office of Resource Conservation, Division of Resource Protection and Stewardship.

* * * * *

It has been determined [that] the Indiana [B]at maternity colony, which is located adjacent to the new permit area, will not be adversely impacted by the construction of the haul road and dead head route if work is restricted to the period between October 31 and March 1. It is also recommended that the Operator take all practicable measures to avoid any disturbance to the tree in which the Indiana [B]at maternity colony which [sic] was located along Grindstone Creek and adjacent to the new permit area. (Hrg. Trans., Pl's Ex.2)

25. The no-cut dates recommended by Malone were four (4) months more than in the original application — two (2) additional months in the Spring and Fall each — and two (2) months more than that recommended by O'Leary.
26. Malone indicated that he contacted two (2) individuals from US Fish and Wildlife Service, both of whom concurred that the dates recommended by him were the dates currently being used to protect the Indiana Bat. (Hrg. Trans. At pp.37-38)
27. The Department forwards copies of permit applications to the US Fish and Wildlife Service, and that included forwarding a copy of the Freeman permit application. (62 Ill.Adm. 1773.13(a)(3)(B))
28. In a letter dated September 16, 2002, the US Fish and Wildlife Service recommended that Freeman's permit application be denied. (Hrg. Trans. Pl's Ex.3)
29. The US Fish and Wildlife Service noted that the Indiana Bat is "known to occur in McDonough County" and further noted that the "project site [for the Freeman permit application] appears to contain [suitable summer] habitat." (Hrg. Trans. At p.71)

30. The US Fish and Wildlife Service “recommend[ed] a survey to determine whether the bat habitat is present.” (Hrg. Trans. At p.71)
31. By November, 2002, O’Leary had revised his recommended modifications in light of the public hearing and comment. (Hrg. Trans. At pp. 65-66)
32. The Office of Mines and Minerals did not adopt the recommendation of Malone as to the no-cut policy period extension, nor did the Office of Mines and Minerals require Freeman to have a survey conducted, as recommended by the US Fish and Wildlife Service. (Hrg. Trans. At p.75; Hrg. Trans. At pp.69-71 & Pl’s Ex.5)
33. On November 21, 2002, within the Department’s modification/requirement letter for the Freeman permit application, the Department indicated that it was:

...aware that the Indiana [B]at is known to occur at this mine site and uses this site for both feeding and for maternity roost activity. Pursuant to 62 Ill.Adm. Code 1780.16(a) and (b), the applicant shall provide site specific resource information necessary to address the Indiana [B]at and shall provide a protection and enhancement plan describing how, to the extent possible using the best technology currently available, the applicant will minimize disturbances and adverse impacts to the Indiana [B]at during surface coal mining and reclamation operations and how enhancement of the Indiana [B]at will be achieved where practicable. (Finding #13, November 21, 2002 letter, App. A)
34. On April 3, 2003, Freeman revised its previous modifications in light of these additional comments, including the express incorporation of the April 1 to September 30 no-cut time period. (Record, Modifications, pp.50-51)
35. On May 5, 2003, the Department granted the permit application submitted by Freeman, which permit application included a finding that the requirements of Section 1773.15(c)(1) had been met.

ORDER

The Petitioners urge that the Office of Mines and Minerals, in the context of deciding whether to issue the permit to Freeman in the context of this proceeding, “promulgated a policy conditioning all future coal mining permits to limiting timber disturbance to the time period of September 30 to April 1.” (Hrg. Trans. Pl.’s Ex.9) (See, Petitioner’s Post-Hearing Brief, p.10) Petitioners assert that this “no-cut” policy (*i.e.*, limiting timber disturbance) is applied by the Department regardless whether the Indiana Bat has been specifically identified as being present in the area or not. (Hrg. Trans. At pp.55-56) (See, Petitioner’s Post-Hearing Brief, p.10) The Petitioners argue that the Office of Mines and Minerals gives mining companies notice of this “no-cut” policy (Hrg. Trans. Pl. Ex.9), “but does not give the public notice required by law.” (See, Petitioner’s Post-Hearing Brief, p.10) Petitioners cite the definition of the word “rule” under the Administrative Procedure Act, wherein the Act states that “rule”:

...means each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy, but does not include (i) statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency, (ii) informal advisory rulings issued under Section 5-150 [5 ILCS 100/5-150], (iii) intra-agency memoranda, (iv) the prescription of standardized forms, or (v) documents prepared or filed or actions taken by the Legislative Reference Bureau under Section 5.04 of the Legislative Reference Bureau Act. (Source: P.A. 87-823; 87-1005.)

The Department, in response to the Petitioners’ assertion about “unauthorized rulemaking,” argues that the subject document to which the Petitioners allude (*i.e.*, Memorandum 01-01), was not only available to mining companies, “but also to any members of the public and

other regulatory agencies by means of the Department[’s] website pages for the Office of Mines and Minerals regulatory programs.” (See, Department’s “Response to Petitioner’s Post-Hearing Brief, p.10 of 14) The Department also notes that “[t]his information is provided online as an advisory guideline to permitted surface mine operators[] who[,]sensitive to this issue, could act to modify on-site operations, as needed, and [] avoid triggering a regulatory ‘taking’ of a threatened and endangered species.” (See, Department’s “Response to Petitioner’s Post-Hearing Brief, p. 10 of 14) The Department also notes that Memorandum 01-01 is available to the public by means of the Freedom of Information Act. (See, Department’s “Response to Petitioner’s Post-Hearing Brief, p. 10 of 14)

The Department further indicated within its Post-Hearing Brief that:

[a]s to the specific issue of the Indiana Bat and the Industry #357 permit application, this memorandum does not represent a mandatory policy of the Department concerning the Indiana bat and “no-cut” period concerning timber disturbances. This memorandum and its use constitutes an “information advisory ruling” to aid program operations on this specific issue, and also, was issued under the Department’s discretionary authority for determining the applicable criteria concerning “the best technology available,” as defined, concerning wildlife and specifically the Indiana bat. And as indicated by testimony from Mr. Bill O’Leary, the memorandum was developed as an internal management tool for the Department in conjunction with advice from other above referenced IDNR programs and the U.S. Fish and Wildlife Service to clarify misconceptions regarding “no-cut” periods and also to provide uniform and current guidelines for questions on this particular issue of the Indiana bat. [Exhibit E - Petitioner’s Exhibit 9, Transcript for hearing held on January 9, 2008.]

Furthermore, as to the specific issue of the Indiana Bat and the Industry #357 permit application, the Department notes that its review and evaluation were not conducted in sole reliance on this memorandum. The Department’s review was conducted specific to the on-site conditions at the Industry mine site. The Department’s review was not conducted in isolation. Indeed, the administrative record documents an extensive and coordinated review, as required by the Act and its regulations, which included evaluating numerous public comments as well as advisory comments from many state and federal regulatory agencies.

....even if this advisory memorandum was indeed a part of [the] Department’s review for its determination of applicable “best technology current available” criteria concerning the Indiana bat, the advisory memorandum would represent only one information piece among the totality of all public comments and technical advisory comments that the Department evaluated in reaching its final determination. The Department notes that no reference is made concerning such mandatory policy in the Findings or the 1773.15() (10) review report included in the administrative record for this matter. Indeed, the Findings and its review report discuss in detail several regulatory mandates for protecting wildlife species, site specific investigations concerning the Indiana bat, as well as the permit applicant’s commitment for enhancement and protection of the Indiana bat at the Industry mine site. (Exhibit D - 1773,15(c)(10) Review report by William O’Leary, undated circa 5/1/03.] (See, Department’s “Response to Petitioner’s Post-Hearing Brief, p. 10-12)

I find that the Department is correct in this regard, and that the Petitioners have not demonstrated that the Department engaged in unauthorized “rulemaking” that was required to comply with the strictures of the Illinois Administrative Procedures Act. (25 ILCS 135 *et seq.*) The Memorandum upon which Petitioners premise their “rulemaking” argument (*i.e.*, Memorandum 01-01) was not simply given to the mining companies (as originally asserted by the Petitioners), but was readily available to the general public by means of the Department’s website, as well as by means of the Freedom of Information Act. The Department urges that the Memorandum in question “constitutes an ‘information advisory ruling’ to aid program operations on [the] specific issue” of the no-cut period, and that the Memorandum “was issued under the Department’s discretionary authority for determining the applicable criteria concerning ‘the best technology available,’ as defined, concerning wildlife and specifically the Indiana bat.” The Petitioners’ argument — that “[t]he no-cut guidance did not simply affect Department personnel, it was cited against the mine in demanding that the no-cut period be changed to conform with the Memorandum” — does not affect the fact no reference is made concerning this alleged “mandatory policy” in the Findings ultimately made by the Department or within the

1773.15(c)(10) review report included within the administrative record. I agree with the Department that the Findings and review report did not rely exclusively upon the Memorandum, but rather were issued in conjunction with detailed discussions concerning several regulatory mandates for protecting wildlife species, site specific investigations concerning the Indiana bat, as well as the permit applicant's commitment for enhancement and protection of the Indiana bat at the Industry mine site. That is, even assuming *arguendo* that Memorandum 01-01 is not an "internal management tool of the Department's regulatory program under the Act" (and therefore not — as asserted by Petitioners — subject to the exceptions delineated within the definition of the term "rule" under the Illinois Administrative Procedures Act), I find that the Department is correct that "the review of the Industry #357 permit application was not based upon the general information provisions of Memorandum 01-01," and "that the review of and Findings for the Industry #357 permit application was in compliance with the requirements of the Act and its regulations."

The next basis the Petitioners raise in contesting the Department's permit issuance within this docket is the assertion that the public should have been given the opportunity to comment on the sighting of the Indiana bat and its maternity roost within the context of this permit application. Prior to examining the Petitioners' assertions concerning this basis of their administrative challenge, it should be noted that the Petitioners' possess the entire burden of persuasion as to the issues raised. That is, the Department's regulations at 62 Ill. Adm. Code 1847.3(g)(1)(B) state that in seeking review, the Petitioners shall have the burden of going forward to establish a *prima facie* case, with the ultimate burden of persuasion on the Petitioners

to prove by a preponderance of the evidence that the permit application fails in some manner to comply with the application requirements of the Surface Coal Mining Land Conservation and Reclamation Act, 225 ILCS 720, *et seq.* Further, the Department's regulations at 62 Ill. Adm. Code 1847.3(g)(2) provides that any party such as Petitioners who seek to reverse the Department's decision, shall have the burden of proving by the preponderance of evidence that the Department's decision is in error.

With that, the Petitioners urge that:

State mining laws require that in order to be issued a surface mining permit, "[t]o the extent possible using the best technology currently available, the operator shall minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable." (225 ILCS 720/3/18)

With respect to the current permit application, the sighting of the Indiana Bat was material and relevant to the [Department's] decision, but not subject to the opportunity for public notice and comment. While the [Department's] approach to the Indiana Bat is largely categorical in that its no-cut dates apply regardless, O'Leary testified that the protection and enhancement plan for the Indiana Bat "would be more involved at this site because we knew the bats were there." (Hrg. Trans. At pp.[sic] 58) Similarly, the [Department's] standard findings were modified in light of the sightings. (Hrg. Trans. at p.80; Pl.'s Ex.8)

However, the public was not made aware of the sightings. The permit application filed in the county did not indicate that the Indiana bat had been sighted. The permit application forwarded to federal and state agencies did not either. Thus people were surprised at the public hearing and the USFWS recommendation that a bat survey be conducted to determine whether the bat was present [sic] was ignored. While a bat survey may not have been necessary since "[w]e already knew that, in fact, they were at the mine," (Hrg. Trans. at p.71), the point is that the USFWS was not informed of this.

* * * * *

The permit applicant was not complete. It lacked accurate information on the presence of the Indiana Bat that the [Department] would learn, and use to require modifications, but the [Department] would not include anyone else. The procedures required by Section 2.04 are the provisions for notice and public review of applications, including various local bodies. (225 ILCS 5/2.04)

Petitioners are not arguing that each modification to a permit application be

subject to public hearing and comment. A permit application includes both information and proposed standards for developing and operating the mine based upon that information. Where the information changes from no endangered species found to an endangered species has been sighted, the public and government bodies should have the opportunity to review and comment. This is particularly true given the overarching standard in the State Act. The mine is required to use "the best technology currently available" to "minimize" adverse environmental impacts. (225 ILCS 720/3.18) Under these requirements, the best standard may vary from time to time and from location to location. The [Department] should, and by law is required to, use the full permit application review process to determine what the best approach is under the circumstances. (See, Petitioner's Post-Hearing Brief, pp.12-13)

The Department responded to these allegations as follows:

[t]he Department deemed the Industry #357 permit application complete for review per Section 2.04 of the Act, and its regulations, 62 Ill.Adm.Code 1777.15. This initial review for completeness is not a criteria for approval, but a regulatory criteria of receiving an administratively complete application that is appropriate for further Department review, public comment and participation. (Exhibit C - Correspondence to C. Schoonover, dated May 7, 2002 with public notice).

After submission of an "administratively complete application," as provided in 62 Ill.Adm.Code 1773.13(a), the applicant and the Department then implemented certain specific written notification and public notice requirements for the public participation in the permit process. Among these public participation requirements are comments and objections to the proposed permit application, public availability of the proposed permit application, the opportunity for a public informal conference or public hearing, as requested, hearing record and public comment period. The Correspondence file within the Administrative Record for this matter documents the Department's and the applicant's action in compliance with these public participation requirements under 62 Ill.Adm.Code 1772.15 and 1773.

The Department notes that this regulatory process also provides for an informal conference and/or a public hearing process, as provided in 62 Ill.Adm.Code 1773.1(c) 1773.14, for purposes of gathering information and public comments. AS to the Industry #357 permit application, the Petitioners requested a public hearing which was held on 9/12/03. The Petitioners did not request an informal conference which is a regulatory option under the Act and its regulations. The Department agrees that these regulatory processes are complex and lengthy; however, this permit review process does not stand alone in terms of other public information mechanisms, including public inspection of records and the state Freedom of Information Act. And, this latter statutory mechanism was apparently used by the Petitioners and other local citizens seeking information about the Industry #357 permit application. (See, Department's "Response to Petitioners' Post-Hearing Brief," pp.14-15)

The Department goes on to note within its "Response to Petitioners' Post-Hearing Brief" that:

...the "best technology currently available" concept for minimizing disturbances and adverse impact to wildlife activity is described, in part, by regulatory definition as "...techniques which are currently available anywhere, *as determined by the Department* [emphasis added], even if they are not in routine use...[and]...include, but is not limited to....*scheduling of activities* [emphasis added]..." in accordance with 62 Ill. Adm. Code 1816 fish and wildlife plan requirements.

...the Petitioners failed to note that the definition criteria for the "best available technology currently available" concept includes discretion concerning the Department's evaluation and application of "best technology currently available" concepts, such as "scheduling of activities." In this particular review process for the Industry #357 permit, the Department's determination included on-site, seasonal, and regional conditions affecting the Indiana bat, specifically regarding the allowable periods for timber disturbance, annual "no-cut" periods, and likely hibernation, maternity roosts, and summer feeding habitat. [Exhibit D - Review report by William O'Leary, undated circa 5/1/03, in O'Leary Deposition testimony, dated 8/8/0, and Administrative Record - Correspondence File - Review report regarding 1773.15 Findings.]

....the Department in fact conducted an extensive coordinated review, as required by the Act and its regulations, specifically 62 Ill. Adm. Code 1773.12, which also included the extensive public comments concerning the Indiana bat and other indigenous wildlife species and habitat issues. This review was not conducted in isolation, but rather included discussions and advisory comments from numerous state and federal agencies, such as the U.S. Department of Agriculture, U.S. Fish and Wildlife Service, Illinois EPA, as well as other [Department] program experts including Joe Kath, [Department] Endangered Species Manager for its Wildlife Resources Program, Office of Resources Conservation, Pat Malone, [Department] Natural Resources Review and Coordinator for its Office of Realty and Environmental Planning, and William O'Leary, Wildlife and Wetland Specialist for the [Department] Office of Mines and Minerals. The facts of this administrative review clearly indicated that the Department implemented the full regulatory process for its review in reaching its "best technology currently available" determination concerning the Indiana bat. Furthermore, such extensive and detailed information gathering and evaluation process serve the mutual interests of all parties to answer and address the issues, and to avoid lengthy and unnecessary administrative review proceedings.

The Department also notes that:

....[u]nder the Act and its regulations, specifically 62 Ill. Adm. Code 1773.12, the Department seeks comments from and conducts on-going discussions with many state and federal agencies as part of its coordinated inter-agency mandate. These advisory comments are discussed and evaluated by the Department. However, as indicated by the

hearing testimony of Mr. William O'Leary, such comments and opinions, as those of the U.S. Fish and Wildlife Service, do not "veto" or supercede the Department's evaluation, recommendations or its Findings. [Exhibit G - Testimony of William O'Leary, Transcript at pages 89 thru 93]

The Department states that:

....[t]he Petitioners fail to note that after the 9/12/02 public hearing when information concerning the Indiana bat was allegedly ["sprung"] upon the public, there was a 10 day public comment period, the Department received numerous letters from the public on a broad range of topics which included the Indiana bat, the great blue heron, the identity of a thistle plant species, *Cirsium pumilum* or *Cirsium hillii*, native reforestation tree species, river otters, water quality issues, as well as allegations attributed to the AVS or "Applicant Violator System," per 62 Ill. Adm. Code 1773.42. The Department also notes that the Act and its regulation do not provide for public comments concerning requested modifications to a pending permit application; however, such opportunity is available through administrative review of the Department's final decision, such as this proceeding, upon timely request. And in this administrative review proceeding, the Petitioner's have not offered any evidence or expert testimony that would contradict the Department's Findings.

Again, I have to concur with the Department's reasoning that the Petitioners have utterly failed to demonstrate that the Department erred in its Findings for approval of the Industry #357 permit application. The Petitioners have not sustained their burden of proving by a preponderance of the evidence that the permit application fails in some manner to comply with the application requirements of the Surface Coal Mining Land Conservation and Reclamation Act, 225 ILCS 720, *et seq.* Although the Petitioners urge that "[w]here the information [as to a permit] changes from no endangered species found[,] to an endangered species has been sighted, the public and government bodies should have the opportunity to review and comment," the Petitioners offer no definitive authority or case law for such general statement. Indeed, the structure of the review process is such that changes of circumstances (such as the subsequent sighting of an endangered species) may be addressed on an on-going basis, and is not a circumstance that in every instance

requires starting anew with respect to the permit application process. The Petitioners acknowledge this when they admit that they “are not arguing that each modification to a permit application be subject to public hearing and comment.” I disagree with the Petitioners that the circumstances here require a new opportunity for the public and governmental bodies to review and comment, and that failure to permit such renders the permit application incomplete.

The last basis of the Petitioners challenge to the permit application has to do with the proper setbacks. The Petitioners, within their “Post-Hearing Brief” state that:

[s]urface coal mining operations are prohibited “[w]ithin 300 feet measured horizontally, from any occupied dwelling in existence, under construction, or contracted for at the time of public notice...” (62 Ill.Admin.Code §1761.11(e)) According to the findings, “[t]here are several occupied dwellings within three hundred (300) feet of the proposed permit area.” (Findings, at p.4)

The findings justify this because the mining applicant may not conduct “surface disturbances” within the 300 foot buffer zone. This is not the appropriate standard. The State Act provides that “[n]o person shall cause or allow any surface mining operations or any surface impact of underground mining operations within 300 horizontal feet from any occupied dwelling, unless waived by the owner thereof.” (225 ILCS 720/7.01(c)) Surface mining operations include both excavations, as well as any adjacent land use incidental to such mining activities. (225 ILCS 720/1.03(a)(24) (including roads, coal preparation areas, piles, repair areas or structures) the [Department] has erroneously permitted surface mining operations within the setback zones. (See, Petitioners’ “Post-Hearing Brief,” p.14)

The Department responds to this last argument by urging that the Petitioners failed to cite the entire regulatory exceptions of Section 1761.11(e). By such failure to so cite the entire exception provision, the Petitioners imply and incorrectly assume that the 300 foot “setback zones” are absolute prohibitions to surface mining operations. Under the full and complete provisions of 1761.11(e), surface coal mining operations are permissible within the 300 feet distance under two (2) distinct and specific circumstances as follows:

- The owner....has provided a written waiver, pursuant to ...[62 Ill.Adm.Code 1761.15...] consenting to surface coal mining operations closer than 300 feet; or
- The part of the mining operation which is within 300 feet of the dwelling is a haul road or access road...”

The Department note that Petitioners also only provided a partial excerpted text from the Department’s 1761.11(e) Findings and Review of the Industry #357 permit application concerning mining activities within 300 feet of occupied dwelling. Upon review in its entirety, the 1761.11(e) Finding does in fact indicate the presence of several occupied dwellings within three hundred (300) feet of the proposed permit area. [See Petitioners’ Exhibit...at page ...]; however, the 1716.11(e) Findings on this point continue on as follows:

“...there will be no surface disturbances within 300 foot of these dwellings. Appropriate buffer zones are indicated on...[the applicant’s]...Premining Landuse Map and the Operations Map. If...[the applicant]...elects to conduct surface disturbances within the 300 foot buffer zone, the appropriate dwelling owner waiver must be obtained and submitted to the Department prior to such disturbances.”

In addition, the administrative records indicate that the applicant modified the Industry permit application to include the 1761.11(e) Finding, as requested in November 2002, that the final modified Industry permit application was resubmitted to the Department in April, 2003, and that the Department approved the modified permit application in May, 2003. [Exhibit A - Findings at pages 5 and 6, and Exhibit B Modification to Application, dated April, 2003, at pages 14 and 15.]

That is, the Department Findings of Review and approval of the Industry #357 permit application complies with 62 Ill.Adm.Code 1761.11(e) requirements for coal mining operations within 300 feet of occupied dwellings.

Despite the Department’s responses addressing the Petitioners’ setback arguments, the

Petitioner continues to argue (within its Reply to the Department's legal arguments) that:

[t]he definition of "surface mining operations" is greater than merely the area of disturbance. Contrary to the Department's assertions, *State law does not permit haul roads or access roads within 300 feet*. Nor does it allow any number of activities incidental to mining that may or may not disturb the natural land surface. (See, Petitioners' Post-Hearing Reply, p.5) (Emphasis added)

But if that were true, what interpretation does the Petitioners give to 1761.11(e)? That Section provides (as indicated by the Department) that surface coal mining operations within the 300 feet distance is permissible when "[t]he part of the mining operation which is within 300 feet of the dwelling is a haul road or access road..." Thus, I again reject the Petitioners arguments as to this assertion, and I specifically find that the Department's approval of the permit application is not in derogation of the applicable regulations.

I would be remiss if I did not address, in passing, the Intervenor's assertions that the Petitioners' Petition "should be dismissed (i) for their failure to establish a prima facia case and (ii) for their failure to establish, by a preponderance of the proof, that the Final Decision of the Department of Natural Resources [] to issue Permit No. 357 was in error." (See, Intervenor's "Post-Hearing Brief," p.1)

The Intervenor, noting that neither of the Petitioners own property encompassed by Permit No. 357 — and also noting that neither of the Petitioners gave "any indication that the surface coal mining and reclamation operations on Permit No. 357 [would] have or will in any manner adversely affect the Petition Herrick's property" — submitted "that these Petitioners have no more standing to challenge the Department's decision on Permit No. 357 than did the Citizens for the Preservation of Knox County in *Citizens for the Preservation of Knox County*,

Inc. v. Illinois Department of Mines and Minerals, 149 Ill.App.3d 261, 500 N.E.2d 75 (3rd Dist. 1986); or the Preservation Council in *Landmarks Preservation Council v. Chicago*, 125 Ill.2d 164, 531 N.E.2d 9 1988); or the Sierra Club in *Sierra Club v. Morton* (1972), 405 U.S. 727, 92 S.Ct. 1361.” (See, Intervenor’s “Post-Hearing Brief,” p.4

As the Intervenor’s legal counsel may or may not know, I was the Hearing Officer who wrote the underlying Order and Decision in the *Citizens for the Preservation of Knox County, Inc. v. Illinois Department of Mines and Minerals* case, so I am very familiar with the extremely limited factual basis upon which that particular case was decided. Although I *did* rule in *Citizens* that the Petitioners there lacked standing, it was in that case where the Petitioners’ legal counsel elicited the testimony from Petitioners that they were not really interested in the outcome of that case, but were litigating the issues in hopes of affecting rulings in prospective controversies. Premised upon that testimony, and the lack of any other connection to the litigation upon which to base standing, I ruled against the Petitioners as to the standing issue. However, I emphasized in the ruling that the circumstances were highly unusual, and that in most cases, the issue of standing would normally be a relatively facile issue to decide (and would normally be ruled in favor of the individual(s) seeking standing).

Such is the case here. I agree with the Petitioners that *Citizens* antedates the issuance of the Illinois Supreme Court decision in *Greer v. Illinois Housing Development Authority*, 122 Ill.2d 462 1988), where the Supreme Court expansive construed the concept of standing (an interpretative construction with which I agree, as specifically indicated within my decision in *Citizens*). I also agree with the Petitioners that “it was the [Intervenor’s] burden to plead and prove lack of standing,” in light of the fact that challenging the standing of a litigant is an

affirmative defense. (See, Petitioners' "Post-Hearing Reply," p.3, citing *Greer and People v. \$1,124,905 U.S. Currency*, 177 Ill.2d 314 (1997)) The Surface Coal Mining Land Conservation and Reclamation Act (225 ILCS 720/1 *et seq.*) states that its provisions are intended, in part, to protect "the health, safety and general welfare of the people, the natural beauty and aesthetic values, and enhancement of the environment in the affect areas of the State [and] to prevent erosion, stream pollution, water, air and land pollution and other injurious effects to persons, property, welidlife [sic] and natural resources...." (See, Petitioners' "Post-Hearing Reply Brief," p.5)

Petitioners accurately argue that "[t]hey are located in the area of the mine and reside on property downstream from the mine." (See, Petitioners' "Post-Hearing Reply Brief," p.5) As urged by the Petitioners, "the Department's permission to mine has the potential to adversely affect their environmental and aesthetical interests and that relief from these threats is available if the Hearing Officer reverses the Department's decision." (See, Petitioners' "Post-Hearing Reply Brief," p.5) I agree that "Petitioners reside in the area of the mine and the stated purpose of the statute is to concern itself with 'the affect areas of the state,' including environmental and aesthetic values that are not confined to the borders of the permitting facility." (See, Petitioners' "Post-Hearing Reply Brief," p.6)

Conclusions of Law:

1. I find that the Petitioners have not demonstrated that the Department engaged in unauthorized "rulemaking" so as to have had to comply with the strictures of the Illinois Administrative Procedures Act is such regard. (25 ILCS 135 *et seq.*)


2. The Department's Findings and review report did not rely exclusively upon Memorandum 01-01, but rather were issued in conjunction with detailed discussions concerning several regulatory mandates for protecting wildlife species, site specific investigations concerning the Indiana bat, as well as the permit applicant's commitment for enhancement and protection of the Indiana bat at the Industry mine site.
3. The Department's regulations at 62 Ill.Adm.Code 1847.3(g)(1)(B) state that in seeking review, the Petitioners shall have the burden of going forward to establish a prima facie case, with the ultimate burden of persuasion on the Petitioners to prove by a preponderance of the evidence that the permit application fails in some manner to comply with the application requirements of the Surface Coal Mining Land Conservation and Reclamation Act, 225 ILCS 720, *et seq.*
4. The Department's regulations at 62 Ill.Adm.Code 1847.3(g)(2) provides that any party such as Petitioners who seek to reverse the Department's decision, shall have the burden of proving by the preponderance of evidence that the Department's decision is in error.
5. The Department properly deemed the Industry #357 permit application complete for review per Section 2.04 of the Act, and its regulations, 62 Ill.Adm.Code 1777.15.
6. The Department Findings of Review and approval of the Industry #357 permit application complies with 62 Ill.Adm.Code 1761.11(e) requirements for coal mining operations within 300 feet of occupied dwellings.
7. The Petitioners have not sustained their burden of proving by a preponderance of the evidence that the permit application fails in some manner to comply with the application requirements of the Surface Coal Mining Land Conservation and Reclamation Act, 225

ILCS 720, *et seq.*

I therefore find that Petitioners have standing to pursue this hearing. However, I further find that Petitioners have failed to satisfy the statutory evidentiary burden to overturn the Department's granting of the permit application, and therefore the Department's prior permit application approval herein is hereby affirmed *in toto*.

IT IS SO ORDERED.

Dated: May 7, 2008



Michael W. O'Hara
Hearing Officer

PROOF OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Order Findings of Fact and Conclusions of Law was faxed and sent by first class mail to the following addressees on the 8th of May, 2008.

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A handwritten signature in black ink, appearing to read "Michael W. O'Hara", is written over a horizontal line.

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