

August 22, 2011

Mr Paul Mauer
Division of Water Resource Management
Office of Water Resources
Illinois Department of Natural Resources
One Natural Resources Way
Springfield, Illinois 62702-1271

Re: High Hazard Dam at Deer Run Mine

Dear Mr Mauer:

Several concerned citizens have recently contacted the Attorney General's Office regarding the lack of effective public notice regarding the "Coal Refuse Disposal Facility Dam No. 1" at the Deer Run Mine in Montgomery County. I have been provided copies of numerous e-mail messages, some of which you have sent to assist the public in understanding your agency's rules and processes. It is my understanding from your messages that a "public notice" document dated March 24, 2010 was somehow made available for publication but no media outlet requested a copy and no such notice was published or sent to interested persons. It is also my understanding that any approval has not yet been issued regarding the dam classification and permit, and that the mine has improperly commenced construction activity without legal authorization.

The Part 3702 rules are authorized by Sections 23 and 23a of the Rivers, Lakes and Streams Act, 615 ILCS 5/23 and 23a. It has been my experience over the years that regulatory staff such as yourself do indeed know the rules intimately. However, the rules only implement the statutory provisions and do not supercede or replace the statutory requirements, and must be interpreted consistently with the statutory provisions. The simple purpose of administrative rules is to effectuate the program established by the legislature. My purpose in writing to you is to provide unsolicited legal advice in response to legitimate concerns and I am copying your legal division in order to assist your lawyers.

Section 3702.30 addresses the applicability of the Part 3702 rules to the particular circumstances. Here, Section 3702.30(d) governs the designation by OWR of dam classification: "Before assigning or changing the dam classification for a new or existing dam, OWR shall give

notice and opportunity for hearing pursuant to Section 3702.170 to the applicant or existing dam owner and other interested persons of such action.” Section 3702.170 mandates the following: “Permit, enforcement, dam classification, existing dam spillway design variation and non-compliance hearings shall be held in accordance with the procedures established in contested cases under Article 10 of the Illinois Administrative Procedure Act.” Additionally, for all hearings thereby conducted, Section 3702.170(a) mandates that “All affected parties shall be afforded an opportunity for hearing after reasonable notice is served personally or by certified or registered mail upon the parties or their agents.” Where strict compliance with the APA contested case requirements is necessary, the agency’s failure to comply may void the resulting permit decision or order. Since you have not yet issued a final decision on the dam classification request, it is not too late to conduct a public hearing as the “interested persons” and “affected parties” have requested.

If you believe instead that the “public notice” document dated March 24, 2010 somehow complies with all applicable legal requirements and that a public hearing is not necessary despite requests for a hearing to be conducted, then I suggest that a broader view is warranted in light of the provisions of the Rivers, Lakes and Streams Act. I ask that you discuss the following statutory provisions with your agency’s lawyers:

Section 26 provides explicitly for the “rights of the people” in the administration of the Act.

Section 26a requires notice and opportunity for hearing before issuance of any order: “All orders entered by the Department of Natural Resources shall be made only upon giving reasonable notice to persons to be affected by such orders; or having any interest in the subject matter of such orders and after a hearing in relation thereto.”

Section 26b authorizes hearings: “The Department of Natural Resources may make such investigations and conduct such hearings as may be necessary to the performance of its duties under this act.”

Section 26c authorizes judicial review of final administrative decisions under the Administrative Review Law.

Section 27 mandates liberal construction of the Act: “At all times this act shall be construed in a liberal manner for the purpose of preserving to the State of Illinois and the people of the State, fully and unimpaired, the rights which the State of Illinois and the people of the State of Illinois may have in any of the public waters of the State of Illinois. . . .”

I hope that an objective assessment may be made as to whether the policies and practices of the Division of Water Resource Management comport with the public participation requirements in the Rivers, Lakes and Streams Act. The Attorney General’s Office has not taken any position on the technical merits of the permit application regarding the “Coal Refuse Disposal Facility Dam No. 1” at the Deer Run Mine. The intent of this letter is to raise the issues as to notice and

opportunity for hearing for your resolution prior to any classification designation or other permit action being finalized.

Please contact me if you have any questions or concerns. Thank you for your assistance and cooperation.

Sincerely,

Thomas Davis, Chief
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cc: Matthew J. Dunn
Mitch Cohen/IDNR Legal Counsel