

Signed and Mailed 11-9-11

STATE OF MISSOURI
DEPARTMENT OF NATURAL RESOURCES

Jeremiah W. (Jay) Nixon, Governor • Sara Parker Pauley, Director

www.dnr.mo.gov

November 7, 2011

Mr. Jack McManus
Chief, Agricultural and Environment Division
Office of the Attorney General
P.O. Box 899
Jefferson City, MO 65102-0899

RE: Saxony Lutheran High School, Inc. v. Missouri Department of Natural Resources
Case No. 11CG-CC00272

Dear Mr. McManus:

The Department of Natural Resources ("Department") received the enclosed summons and petition on November 3, 2011. The Petition seeks judicial review of the decision made by the Land Reclamation Commission on September 22, 2011.

The Department is requesting representation from the Attorney General's office in this matter. Please let me know which Assistant Attorney General will be assigned to this matter.

Sincerely,

DEPARTMENT OF NATURAL RESOURCES



Harry D. Bozqian
General Counsel

HB:crk

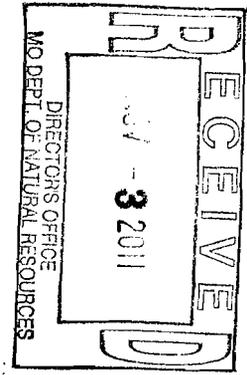
Enclosures

C: David Lamb



IN THE 32ND JUDICIAL CIRCUIT COURT, CAPE GIRARDEAU COUNTY, MISSOURI

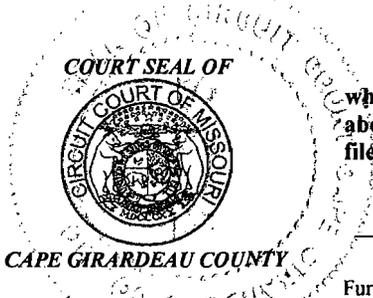
Judge or Division: WILLIAM L SYLER	Case Number: 11CG-CC00272
Plaintiff/Petitioner: SAXONY LUTHERAN HIGH SCHOOL INC	Plaintiff's/Petitioner's Attorney/Address STEPHEN G JEFFERY 20 S CENTRAL AVE SUITE 306 CLAYTON, MO 63105
Defendant/Respondent: MISSOURI DEPARTMENT OF NATURAL RESOURCES	Court Address: COMMON PLEAS COURTHOUSE 44 N LORIMIER CAPE GIRARDEAU, MO 63701
Nature of Suit: CC Chptr 536 State Agcy Rvw	



(Date File Stamp)

Summons in Civil Case

The State of Missouri to: MO LAND RECLAMATION COMMISSION
Alias:
1101 RIVERSIDE DR
JEFFERSON CITY, MO 65102



You are summoned to appear before this court and to file your pleading to the petition, a copy of which is attached, and to serve a copy of your pleading upon the attorney for Plaintiff/Petitioner at the above address all within 30 days after receiving this summons, exclusive of the day of service. If you fail to file your pleading, judgment by default may be taken against you for the relief demanded in the petition.

October 25, 2011
Date

Courtney DeBono
Deputy Clerk

Further Information:

Sheriff's or Server's Return

Note to serving officer: Summons should be returned to the court within thirty days after the date of issue.

I certify that I have served the above summons by: (check one)

delivering a copy of the summons and a copy of the petition to the Defendant/Respondent.

leaving a copy of the summons and a copy of the petition at the dwelling place or usual abode of the Defendant/Respondent with _____ a person of the Defendant's/Respondent's family over the age of 15 years.

(for service on a corporation) delivering a copy of the summons and a copy of the petition to _____ (name) _____ (title).

other _____

Served at _____ (address)
in _____ (County/City of St. Louis), MO, on _____ (date) at _____ (time).

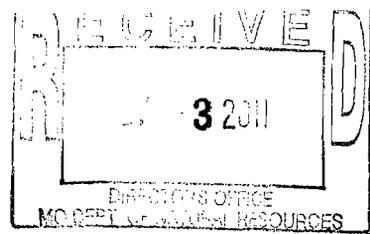
Printed Name of Sheriff or Server

Signature of Sheriff or Server

Must be sworn before a notary public if not served by an authorized officer:
Subscribed and sworn to before me on _____ (date).
My commission expires: _____ Date _____ Notary Public _____

Sheriff's Fees	
Summons	\$ _____
Non Est	\$ _____
Sheriff's Deputy Salary	
Supplemental Surcharge	\$ 10.00
Mileage	\$ _____ (_____ miles @ \$ _____ per mile)
Total	\$ _____

A copy of the summons and a copy of the petition must be served on each Defendant/Respondent. For methods of service on all classes of suits, see Supreme Court Rule 54.



CIRCUIT COURT OF
CAPE GIRARDEAU COUNTY, MISSOURI

SAXONY LUTHERAN HIGH SCHOOL, INC. ,)
Registered Agent: Thomas A. Ludwig)
2004 Saxony Drive)
Jackson, MO 63755)
Petitioner)

v)

Case No. _____

MISSOURI DEPARTMENT OF)
NATURAL RESOURCES and)
MISSOURI LAND RECLAMATION)
COMMISSION,)
Serve: Sara Parker Pauley, Director)
Missouri Department of Natural Resources)
1101 Riverside Drive)
Jefferson City, MO 65102)
Respondents)

PETITION FOR JUDICIAL REVIEW
AND
DECLARATORY JUDGMENT

COMES NOW Petitioner, by and through counsel, and for its Petition for Judicial
Review and Declaratory Judgment does state:

Summary of the Case

In October 2010, the Missouri Land Reclamation Commission (“Commission”) received
a permit application for a highwall limestone quarry to be located just south of Fruitland,
Missouri. The applicant was Strack Excavating, LLC (“Strack), which proposed a 99-acre Mine
Plan. Saxony Lutheran High School, Inc. (“Saxony”), is located immediately south of the
proposed Strack quarry. Strack’s proposed “mine plan boundary” is 55’ from Saxony’s northern
property line.

On January 27, 2011, the Commission held a public hearing to afford Saxony the

F I L E D
OCT 21 2011

PATTI WIBBENMEYER
CIRCUIT CLERK

opportunity to present good faith evidence of how its health, safety and livelihood would be unduly impaired by the issuance of a mining permit to Strack. Saxony administrators, along with Saxony students, parents and other concerned parties, testified they believed air pollution and dust emissions from the proposed quarry would have adverse health effects on themselves, their children, and those affected persons who have pre-existing health problems including allergies, asthma, sinusitis, and sinus infections, and they also testified they had concerns about traffic safety along U.S. Highway and County Road 601. In addition, a Medical Doctor, who is a board-certified pathologist, testified that air pollution and dust emissions from limestone quarries cause health problems for susceptible populations, including children, the elderly and those with pre-existing health problems. Further, a Missouri registered geologist testified regarding the environmental problems associated with limestone quarries such as air pollution and dust emissions from quarries and related operations.

On February 7, 2011, the Commission decided that Saxony had presented good faith evidence regarding the Strack application and ordered an evidentiary hearing to be conducted. The evidentiary hearing was conducted in July 2011 in Jefferson City. On July 12, 2011, the day after the Governor signed House Bill 89 into law, Saxony rested its case. House Bill 89, *inter alia*, enacted § 444.771, RSMo., which prohibits the Commission and the DNR from issuing permits under chapters 444, 643 and 644 to any person who proposes to locate a mining operation with a “mine plan boundary” that is closer than 1,000 feet to an accredited school.

On September 22, 2011, the Commission entered an Order finding against Petitioner and adopting the Recommendation submitted by the Hearing Officer. The Hearing Officer’s recommendation included a provision that Strack’s permit application be approved provided that the mine plan boundary was moved north to comply with the new 1,000’ requirement in §

444.771. However, because Strack never revised its pending permit application to shift the mine plan boundary, the Commission approved a permit application that facially did not comply with § 444.771. Moreover, the “new” mine plan boundary and “new” acreage in the Strack permit was never published in accordance with 10 CSR 40-10.020(H).

This action under § 527.010 *et seq.*, and 536.100 *et seq.*, RSMo., seeks judicial review of the decision made by the Commission on September 22, 2011.

Parties

1. Saxony Lutheran High School, Inc. (“Saxony”) is Missouri not-for-profit corporation in good standing which operates an accredited, private Lutheran high school, located at 2004 Saxony Lane, along County Road 601 in Jackson, Missouri. Saxony has an enrollment of 187 students for the 2010-2011 school year. Saxony has a net worth of less than \$7 million and has less than 500 employees.

2. The Missouri Department of Natural Resources (“DNR”) is a state agency created by Article IV, § 47 of the Missouri Constitution and supervises the Missouri Land Reclamation Commission pursuant to § 640.010(6), RSMo.

3. The Missouri Land Reclamation Commission (“Commission”) is a state agency created by § 444.520, RSMo., and is domiciled within the DNR.

Jurisdiction and Venue

4. This Court has subject matter jurisdiction pursuant to § 527.010, § 536.100-140, RSMo., and Supreme Court Rule 100.01.

5. Venue is appropriate in this Court under § 536.110.3, RSMo because: (a) the real property where the Strack quarry is to be located is in Cape Girardeau County, Missouri, and (b) Saxony’s address and principal place of business is located in Cape Girardeau County, Missouri.

Statement of Facts

6. On October 19, 2010, Strack submitted an open pit limestone quarry mining application for a proposed 99 acre limestone quarry east of Highway 61 and along County Road 601.

7. The site maps attached to the Strack permit application show the “mine plan boundary” will be within 55' of the southern property line of the Strack property.

8. The Commission conducted a 45-day public comment period on the Strack permit application and received over 2,500 letters and comments opposing the proposed quarry.

9. The Commission sent a letter asking Strack to conduct a public meeting in accordance with § 444.773.3, RSMo., regarding its permit application to allow the public the opportunity to ask questions and make comments. However, Strack refused to conduct any public meeting.

10. The Commission scheduled a public hearing on the Strack quarry on its January 2011 agenda.

11. On January 27, 2011, the Commission conducted a public hearing pursuant to § 444.773, RSMo to afford parties the opportunity to show they have “standing” to request the Commission to conduct a full evidentiary hearing on whether the Strack permit should be issued.

12. “Standing” is defined in § 444.773, RSMo., such that persons opposed to the proposed permit must “present good faith evidence that their health, safety or livelihood would be unduly impaired by the issuance of the mining permit.”

13. During the public hearing on January 27, 2011, Saxony presented witness testimony showing:

(a) many students attending Saxony, other students, parents and guests participate in outside events at Saxony and believe they will suffer from adverse health effects from the air and

dust emissions from the Strack and Heartland quarry operations; and

(b) Dr. Paul Horn, M.D., a Board-certified pathologist, testified that he has personally conducted hundreds of autopsies in the Cape Girardeau area, many of which were on persons who formerly worked in the many limestone quarries in the area. He also testified the dust in the air emissions from a limestone quarry can enter into a person's lungs and cause adverse health effects, particularly in susceptible populations such as children under 18, elderly people, and persons already suffering from chronic obstructive pulmonary disease, asthma, sinusitis, sinus infections and other medical problems.

14. During the public hearing on January 27, 2011, Saxony presented the testimony of Daniel Price, a registered geologist in Missouri, who is employed by ENVIRON International. Mr. Price testified that limestone quarries generate significant amounts of dust and air emissions from the mine pit, haul roads, conveyors, rock crushing and all the other related equipment.

15. On February 7, 2011, the Commission by a vote of 4 to 2 with one abstention decided that Saxony had presented good faith evidence that the proposed Strack quarry would unduly impair their health and livelihood and ordered an evidentiary hearing.

16. The evidentiary hearing was conducted in Jefferson City on July 5, 6, 7 and 12, 2011 in Jefferson City.

17. On July 11, 2011, the Governor signed House Bill 89 into law.

18. House Bill 89, *inter alia*, enacted § 444.771, RSMo, which states:

Notwithstanding any other provision of law to the contrary, the commission and the department shall not issue any permits under this chapter or under chapters 643 or 644 to any person whose mine plan boundary is within one thousand feet of any real property where an accredited school has been located for at least five

years prior to such application for permits made under these provisions, except that the provisions of this section shall not apply to any request for an expansion to an existing mine or to any underground mining operation.

19. On July 12, 2011, Saxony rested its case.

20. On September 22, 2011, the Commission entered a Final Order which decided the appeal against Saxony. A copy of the Final Order is attached hereto and incorporated herein as Exhibit 1.

21. The Final Order, which adopted the Hearing Officer's recommended Order, Findings of Fact, and Conclusions of Law (attached hereto and incorporated herein as Exhibit 2), states, in part,

Hearing Officer, W. B. Tichenor issued his Recommended Order on August 24, 2011, that: the Application for Expansion of Permit #0832 be approved, with the mine plan boundary (exclusive of underground mining) to be located one thousand feet from the Strack-Saxony property line, in compliance with and as required by section 444.731 RSMo.

22. Saxony has exhausted its administrative remedies and has a right to judicial review of the Commission's September 22, 2011 Final Order in this Court under § 527.010 *et seq.*, and § 536.100 *et seq.*, RSMo.

COUNT I

23. Saxony realleges and incorporates by reference the allegations in paragraphs 1 through 22.

24. The Final Order imposed a special condition for the approval of Strack's permit application, to-wit: "the Application for Expansion of Permit #0832 be approved, with the mine

plan boundary (exclusive of underground mining) to be located one thousand feet from the Strack-Saxony property line, in compliance with and as required by section 444.731 RSMo (emphasis added).

25. The Land Reclamation Act, §§ 444.760 - 444.789, RSMo does not confer statutory authority on the Commission to impose any special conditions in the approval of Strack's permit application.

26. In the Missouri Solid Waste Management Law, the General Assembly conferred statutory authority on the DNR to impose special conditions in the approval of a permit application: "When the review reveals that the facility or area does conform with the provisions of sections 260.200 to 260.345 and the rules and regulations adopted pursuant to sections 260.200 to 260.345, the department shall approve the application and shall issue a permit for the construction of each solid waste processing facility or solid waste disposal area as set forth in the application and with any permit terms and conditions which the department deems appropriate... (emphasis added)." See § 260.225.5(7), RSMo.

27. In the Missouri Hazardous Waste Management Law, the General Assembly conferred statutory authority on the Hazardous Waste Management Commission to impose special conditions in the approval of a permit application: "If the department determines the application conforms to the provisions of any federal hazardous waste management act and sections 260.350 to 260.430 and the standards, rules and regulations adopted pursuant to sections 260.350 to 260.430, it shall issue the hazardous waste transporter license with such terms and conditions as it deems necessary to protect the health of humans and the environment...(emphasis added)." See § 260.395.2, RSMo.

28. In the Missouri Clean Air Law, the General Assembly conferred statutory authority

on the Air Conservation Commission to impose special conditions in the approval of a permit application: “Every source required to obtain a construction permit shall make application therefor to the department and shall submit therewith such plans and specifications as prescribed by rule. The director shall promptly investigate each application and if he determines that the source meets and will meet the requirements of sections 643.010 to 643.190 and the rules promulgated pursuant thereto, he shall issue a construction permit with such conditions as he deems necessary to ensure that the source will meet the requirements of sections 643.010 to 643.190 and the rules (emphasis added).” See § 643.075.2, RSMo.

29. In the Missouri Clean Water Law, the General Assembly conferred statutory authority on the Clean Water Commission to impose special conditions in the approval of a permit application: “... If the director determines that the source meets or will meet the requirements of sections 644.006 to 644.141 and the regulations promulgated pursuant thereto, the director shall issue a permit with such conditions as he or she deems necessary to ensure that the source will meet the requirements of sections 644.006 to 644.141 and any federal water pollution control act as it applies to sources in this state...(emphasis added).” See § 644.051.3, RSMo.

30. As compared to the statutes cited in ¶¶ 26, 27, 28 and 29, *infra*, the General Assembly did not enact any statutory language in the Land Reclamation Act which authorizes the Commission to impose any “terms” or “conditions” that it “considers necessary” or “appropriate” in connection with the issuance of a permit.

31. Because the Commission lacks statutory authority to unilaterally impose a special condition in the Final Order approving Strack’s permit, the Commission’s action in approving the Strack permit application is unlawful, arbitrary, capricious, unreasonable and not

substantially justified.

32. In filings with the Hearing Officer on July 13, 20 and 22, 2011, Saxony expressly advised the Hearing Officer and the Commission that it lacked statutory authority to unilaterally impose a special condition in the any approval of the Strack permit application.

Wherefore, Saxony prays the Court:

A. Declare that the Land Reclamation Act does not confer statutory authority on the Commission to impose a special condition in the approval of a permit application;

B. Find that, contrary to what is cited in the Final Order, there is no Missouri statute § 444.731, RSMo that serves as the basis for any purported special condition.

C. Declare that the Commission's Final Order is unlawful, arbitrary, capricious, unreasonable, and is not substantially justified;

D. Reverse and vacate the Commission's issuance of the mining permit to Strack;

E. Remand this matter to the DNR and to the Commission with direction to deny the permit application because the 55' mine plan boundary in the Strack permit application does not comply with § 444.771, RSMo.;

F. Award Petitioners their reasonable attorneys' fees and costs in this matter; and

G. Award such further relief the Court deems just and appropriate.

COUNT II

33. Saxony realleges and incorporates by reference the allegations in paragraphs 1 through 32.

34. The Commission's rule - 10 CSR 40-10.020(A).5 - requires Strack to provide as part of its permit application the estimated number of acres of the land to be affected by its operations.

35. Under 10 CSR 40-10.020(H), once the permit application is considered complete, a legal notice providing Notice of Intent to Operate a Surface Mine is published for four consecutive weeks in a newspaper in the county where the proposed operation is to be located.

36. The Notice of Intent publication requirement in 10 CSR 40-10.020(H) complies with the procedural Due Process requirements to fairly apprise potentially affected parties of the pending government action regarding a permit application, in particular the location of the mine plan boundary and the acreage affected.

37. The Notice of Intent originally published by Strack identified a specific mine plan boundary and a specific number of affected acreage.

38. Strack has never submitted any modification to its permit application, site maps, or any other documents that comprise its permit application which move the mine plan boundary from what Strack originally proposed.

39. The Commission's unilateral action in the Final Order imposing the special condition serves to move Strack's mine plan boundary from what Strack originally proposed.

40. The "new" mine plan boundary and the resulting "new" amount of acres that will be affected by the Strack quarry have not been the subject of any Notice of Intent published in any newspaper as required by 10 CSR 40-10.020(H).

41. Because the requirements in 10 CSR 40-10.020(H) were not followed, the Commission's unilateral action in the Final Order violates procedural Due Process in Article I, § 10 of the Missouri Constitution in that potentially affected members of the public have not been made aware of the "new" mine plan and "new" acreage.

Wherefore, Saxony prays the Court:

A. Declare that the Commission's unilateral action in the Final Order imposing the

special condition serves to move Strack's mine plan boundary;

B. Declare that 10 CSR 40-10.020(H) requires the publication of a Notice of Intent to provide notice to the general public of the size and location of a proposed quarry;

C. Declare that the Commission failed to comply with its own rule - 10 CSR 40-10.020(H) - by failing to publish a Notice of Intent of the change in Strack's mine plan boundary and the resulting effect on the amount of Strack's acreage;

D. Declare that the Commission's Final Order is unlawful, arbitrary, capricious, unreasonable, and is not substantially justified;

E. Reverse and vacate the Commission's issuance of the mining permit to Strack;

F. Remand this matter to the DNR and to the Commission with direction to deny the permit application because of the failure to comply with 10 CSR 40-10.020(H);

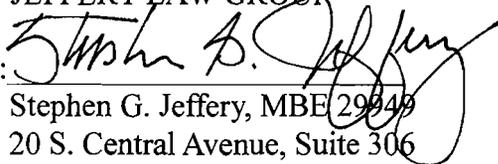
G. Award Petitioners their reasonable attorneys' fees and costs in this matter; and

H. Award such further relief the Court deems just and appropriate.

Respectfully submitted,

JEFFERY LAW GROUP

By:


Stephen G. Jeffery, MBE ~~29049~~

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ATTORNEYS FOR PETITIONER

**MISSOURI DEPARTMENT OF NATURAL RESOURCES
LAND RECLAMATION COMMISSION**

In the Matter of:)	
)	
STRACK EXCAVATING LLC.)	Proceeding Under
Permit # 0832 Expansion)	The Land Reclamation Act,
Strack Quarry # 2)	Sections 444.760 – 444.789, RSMo.
Cape Girardeau County, Missouri,)	
)	
SAXONY LUTHERAN HIGH SCHOOL,)	
<i>Petitioner,</i>)	
)	
v.)	
)	
DEPT. OF NATURAL RESOURCES,)	
MIKE LARSEN,)	
Staff Director,)	
Land Reclamation Program,)	
Division of Environmental Quality,)	
<i>Respondent,</i>)	
)	
STRACK EXCAVATING LLC.,)	
<i>Applicant,</i>)	

FINAL ORDER

Upon due notice given to all parties, the Formal Public Hearing was held in the Matter on July 5, 6, 7, & 12, in the 8th Floor Conference Room, Broadway Office Building, Jefferson City, Missouri.

Petitioners appeared by Counsel, Stephen G. Jeffery and Bruce A. Morrison, JEFFERY LAW GROUP, Clayton, MO 63105.

Respondent appeared by Counsel, Laura Bailey Brown and Timothy P. Duggan, Assistant Attorney Generals.

Applicant appeared by Counsel, Brian E. McGovern and Robert A. Miller, McCARTHY, LEONARD, KAEMMERER, Chesterfield, MO

A written transcript of each hearing was prepared.

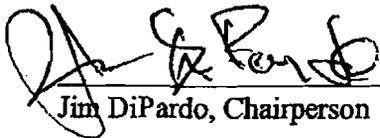
Hearing Officer, W. B. Tichenor issued his Recommended Order on August 24, 2011, that: the Application for Expansion of Permit # 0832 be approved, with the mine plan boundary (*exclusive of underground mining*) to be located one thousand feet from

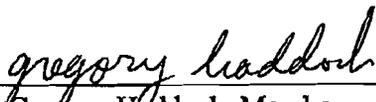
the Strack – Saxony property line, in compliance with and as required by section 444.731 RSMo.

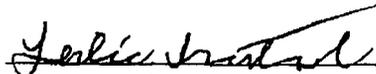
IT IS HEREBY ORDERED THAT:

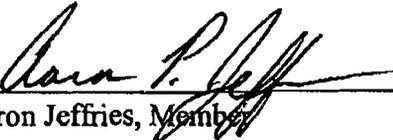
- 1) The hearing officer's Recommended Order is adopted and approved in full.
- 2) The Findings of Fact, Conclusions of Law and Decision made by the hearing officer are hereby fully incorporated by reference herein.
- 3) The captioned administrative appeal is decided against Petitioner and in favor of the Respondent and Applicant.
- 4) The Secretary of the Commission is to provide copies of this Final Order to the parties.

Entered this 22 day of September, 2011.


Jim DiPardo, Chairperson


Dr. Gregory Haddock, Member


Dr. Leslie Gertsch, Member


Aaron Jeffries, Member


Joe Gillman, Member


John Madras, Member

Vacant, Member

Copies to be sent immediately by the Land Reclamation Commission to:

Stephen G. Jeffery and Bruce A. Morrison, JEFFERY LAW GROUP, 231 S. Bemiston Ave., Suite 800, Clayton, MO 63105, Attorney for Petitioner.

Laura Bailey Brown and Timothy P. Duggan, Assistant Attorney Generals, P. O. Box 899, Jefferson City, MO 65102-0899, Attorney for Respondent.

Brian E. McGovern and Robert A. Miller, McCARTHY, LEONARD, KAEMMERER, L.C. 400 South Woods Mill Rd., Ste 250, Chesterfield, MO 63107, Attorney for Applicant.

W. B. Tichenor, Hearing Officer, 3710 Shadow Glen Ct., Columbia, MO 65203-4844

**MISSOURI DEPARTMENT OF NATURAL RESOURCES
LAND RECLAMATION COMMISSION**

In the Matter of:)	
)	
STRACK EXCAVATING LLC.)	Proceeding Under
Permit # 0832 Expansion)	The Land Reclamation Act,
Strack Quarry # 2)	Sections 444.760 – 444.789, RSMo.
Cape Girardeau County, Missouri,)	
)	
SAXONY LUTHERAN HIGH SCHOOL,)	
<i>Petitioner,</i>)	
)	
v.)	
)	
DEPT. OF NATURAL RESOURCES,)	
MIKE LARSEN,)	
Staff Director,)	
Land Reclamation Program,)	
Division of Environmental Quality,)	
<i>Respondent,</i>)	
)	
STRACK EXCAVATING LLC.,)	
<i>Applicant,</i>)	

RECOMMENDED ORDER

HOLDING

Petitioner failed to establish by competent and substantial scientific evidence that:

(1) Petitioner’s health would be unduly impaired by impacts from the expansion of Permit No. 0832 for the operation of the Strack Quarry # 2, Cape Girardeau County, Missouri, by Applicant; or

(2) Petitioner’s livelihood would be unduly impaired by impacts from the expansion of Permit No. 0832 for the operation of the Strack Quarry # 2, Cape Girardeau County, Missouri, by Applicant.

The Application for Expansion of Permit # 0832 for the operation of the Strack Quarry # 2 is approved with the mine plan boundary (*exclusive of underground mining*) to be located one thousand feet from the Strack – Saxony property line, as required by section 444.731 RSMo.¹



Counsels:

Petitioner appeared by Counsel, Stephen G. Jeffery and Bruce A. Morrison, Jeffery Law Group, Clayton, Missouri

Respondent appeared by Counsel, Laura Bailey Brown and Timothy P. Duggan, Assistant Attorneys General, Jefferson City, Missouri

Applicant appeared by Counsel, Brian E. McGovern and Robert A. Miller, McCarthy, Leonard & Kaemmerer, LC, Chesterfield, Missouri.

Hearing Officer:

Case Heard and Recommended Order prepared by W. B. Tichenor, Hearing Officer.

Identification of Parties & Commission

The parties are identified throughout the Recommended Order as follows:

Saxony Lutheran High School	Petitioner or Saxony
Mike Larsen	Respondent or Larsen
Strack Excavating LLC	Applicant or Strack
Missouri Land Reclamation Commission	LRC or Commission.

ISSUES

The Commission takes this appeal to determine:

(a) whether there is competent and substantial scientific evidence on the record, that Petitioner's health will be unduly impaired by impacts from the operation of the Strack Quarry # 2, Cape Girardeau County, Missouri, on land adjoining Petitioner's property; *10 CSR 40-10.08(3)(D)*; or

(b) whether there is competent and substantial scientific evidence on the record, that Petitioner's livelihood will be unduly impaired by impacts from the operation of the Strack Quarry # 2, Cape Girardeau County, Missouri, on land adjoining Petitioner's property. *10 CSR 40-10.08(3)(D)*

In the absence of the required evidence to establish one of these propositions the Application for Expansion of Permit #0832 is to be approved, with the mine plan boundary (*exclusive of underground mining*) to be located one thousand feet from the Strack – Saxony property line, as required by section 444.731 RSMo.

SUMMARY OF EVIDENCE

Petitioner's Evidence Testimony

The following witnesses testified on behalf of Petitioner:

1. Mike Larsen: Staff Director – Land Reclamation Program – Missouri Department of Natural Resources.² Mr. Larsen testified as to the process and procedure on handling the Strack application and his recommendation for its approval by the Commission.
2. James Maevers: Chairman of the Executive Board – Saxony Lutheran High School Corporation.³ Mr. Maevers testified as to general background information on Saxony, the Executive Board, Board of Regents, their operations and activities.
3. Larry Clear: Teacher and Coach – Saxony Lutheran High School.⁴ Mr. Clear testified as to his teaching and coaching duties at Saxony. He also provided testimony as to other outdoor activities and the location of the athletic facilities at Saxony.
4. Rhonda Wessel: Director of Development – Saxony Lutheran High School.⁵ Ms. Wessle testified as to her duties as Director of Development and fund raising activities on behalf of Saxony.
5. Cynthia Gage: Member Board of Regents and Executive Board – Saxony Lutheran High School.⁶ Ms. Gage testified as to the marketing efforts for recruiting students at Saxony.
6. Judith Fuchs: Counselor – Saxony Lutheran High School.⁷ Ms. Fuch testified as to her counseling duties at Saxony. She also testified as to her responsibilities and the activities she directs as Counselor in recruiting new students to Saxony.
7. Wendell Mueller: Treasurer – Executive Board Saxony Lutheran High School.⁸ Mr. Mueller testified as to his duties as Treasurer for Saxony. He also provided testimony relating to explaining Exhibit N and income and expense information contained therein.
8. Kendall Hale: New Source Review Unit Chief – Air Pollution Control Program – Missouri Department of Natural Resources.⁹ Mr. Hale gave testimony relative to the process for issuance of the New Source Review Permit (*Exhibit H*) and explanation of the permit.
9. Benjamin Dordoni: Junior – Saxony Lutheran High School.¹⁰ Mr. Dordoni testified concerning his activities at Saxony and his upper respiratory allergies.

10. Kristy Winter: Junior – Saxony Lutheran High School.¹¹ Miss Winter gave testimony relative to the activities in which she is involved at Saxony and her upper respiratory allergies.

11. Leonard Fiedler: Retired – Development Consultant – Lutheran Church Missouri Synod.¹² The testimony of Mr. Fiedler was given under a pending Motion to Strike the Witness. Said Motion was, subsequent to the testimony, granted. Therefore, the proffered testimony of the witness was not received into the record. *See*, **PETITIONER FAILED TO ESTABLISH UNDUE IMPACT ON THE LIVELIHOOD OF PETITIONER**, *infra*.

12. A. J. Garms: Junior – Saxony Lutheran High School.¹³ Mr. Garms testified as to the activities he takes part in at Saxony and his medical condition – vocal cord dysfunction and respiratory distress syndrome, which leads to asthma.

13. Dr. Craig Ernstmeier: Administrator Principal – Saxony Lutheran High School.¹⁴ Dr. Ernstmeier gave testimony concerning the operation of and activities at Saxony. He also provided testimony relative to the various facilities located on the Saxony property.

Exhibits

The following exhibits were received into evidence on behalf of Petitioner.

EXHIBIT	DESCRIPTION
PET – B	Strack’s Permit Application for Industrial Mineral Mines
PET – C	Letter dtd 1/13/11 – Larsen to Petitioners, with copy of Directors Recommendation
PET – H	Strack – Permit to Construct dtd 12/27/10
PET – J	10 CSR 10-6.010 – <i>Official Notice Taken</i>
PET – K	10 CSR 10-6.020 – <i>Official Notice Taken</i>
PET – L	10 CSR 10-6.060 – <i>Official Notice Taken</i>
PET – M	Dispersion Modeling – Strack Quarry # 2 – dtd 1/26/11 – Shell Engineering
PET – N	2000 – 2011 – Saxony Tuition, Income & Expense History/Projections

Respondent’s Evidence Testimony

No witnesses testified on behalf of Respondent. Mr. Larsen and Mr. Hale had been listed as witnesses for the Respondent in prehearing filings. However, they were only cross-examined by Counsel for Respondent, Ms. Brown.

Exhibits

The following exhibits were received into evidence on behalf of Respondent.

EXHIBIT	DESCRIPTION
RES – 1	Strack's Permit Application for Industrial Mineral Mines
RES – 2	Notice Application Complete, dtd 11/22/10
RES – 3	Publisher's Affidavit and Mailing Receipts
RES – 4	Staff Director's Recommendation to the Land Commission

Applicant's Evidence **Testimony**

Mr. Larson testified on behalf of Applicant at the conclusion of his cross-examination.¹⁵

Exhibits

The following exhibits were received into evidence on behalf of Applicant.

EXHIBIT	DESCRIPTION
APP – 4	Memo, dtd 1/1/11 – Hearing Request Permit Expansion Strack Quarry # 2
APP – 12 ¹⁶	Aerial Photo of Saxony and Strack properties

PROCEDURAL HISTORY

The procedural history of the Matter is as follows:

1. November 4, 2010: Applicant's Permit Application for Industrial Mineral Mines received by Missouri Land Reclamation Commission.
- ~~2. November 22, 2010: Notice of Complete Application sent to Applicant.~~
3. January 11, 2011: Publisher's Affidavit and Mailing Notices filed with Commission and Director's Recommendation to the Commission.
4. January 27, 2011: Director's Recommendation presented to the Commission.
5. February 7, 2011: Commission determined Saxony Lutheran High School had standing for a public hearing on the issue of whether Saxony's health and livelihood would be unduly impaired by the issuance of the permit for expansion of Permit # 0832 for Strack Quarry # 2 in Cape Girardeau County, Missouri.
6. March 11, 2011: Order Upon Assignment of Matter to Hearing Officer issued.

7. March 15, 2011: Assistant Attorneys General Laura Bailey Brown and Timothy P. Duggan file Entry of Appearance on behalf of Respondent.
8. April 4, 2011: Applicant files Motion for Protective Order.
9. April 11, 2011: Order to Show Cause on Motion for Protective Order issued.
10. April 29, 2011: Petitioner files Petition.
11. May 10, 2011: Petitioner files Motion to Modify Schedule.
12. May 12, 2011: Order in Response to Motion to Modify Schedule issued.
13. May 13, 2011: Applicant files Request for Telephone Conference to Establish a Hearing Date. Order Granting Request for Telephone Conference issued.
14. May 23, 2011: Order Setting Dates for Hearing issued.
15. May 24, 2011: Order for Submission of Witness and Exhibit Lists issued.
16. May 25, 2011: Applicant files Answer to Petition. Applicant files Motion to Dismiss or Strike Claims.
17. May 28, 2011: Order to Show Cause on Motion to Dismiss or Strike Claims issued.
18. May 31, 2011: Respondent files Answer to Petition and Amended Answer to Petition.
19. June 15, 2011: Petitioner files Suggestions in Opposition to Motion to Dismiss or Strike Claims.
20. June 17, 2011: Applicant files Motion for Order Regarding Disclosure and Depositions of Expert Witnesses.
21. June 18, 2011: Order Ruling on Motion to Dismiss or Strike Claims issued.
22. June 20, 2011: Petitioner files Expert Disclosure. Applicant files Expert Witness Disclosure and Supplemental Expert Witness Disclosure.
23. June 22, 2011: Petitioner files Motion with Consent of All Parties to Modify Disclosure Schedule. Bruce A. Morrison files Entry of Appearance as co-counsel for Petitioner.
24. June 29, 2011: Respondent files Witness and Exhibit Lists.
25. June 30, 2011: Petitioner files Witness and Exhibit Lists. Applicant files Witness and Exhibit Lists.

26. July 3, 2011: Applicant files Motion to Strike Petitioner's Designated Expert Witness Dr. Jennifer Lowery, Motion to Strike Petitioner's Designated Expert Witness Peter Defu, and Motion to Strike Petitioner's Designated Expert Witness Leonard Fiedler.
27. July 3, 2011: Petitioner files Motion for Reasonable Time to Respond to Applicant's Motions to Strike Petitioner's Three Experts.
28. July 5, 6 & 7, 2011: Formal Public Hearing held.
29. July 11, 2011: Applicant files Motion to Exclude Revised Opinions and Additional Documents from Designated Expert Witness Dr. Jennifer Lowery.
30. July 11, 2011: Petitioner files Request for Hearing Officer to Take Official Notice of House Bill 89 and Motion for Accelerated Determination.
31. July 12, 2011. Formal Public Hearing held. Petitioner rested its case.¹⁷ Applicant moved for Directed Verdict at the close of Petitioner's Case.¹⁸
32. July 12, 2011: Petitioner files Suggestions in Oppositions to Motions to Strike Petitioner's Designated Expert Witnesses. Applicant files Reply to Petitioner's Response to Motion to Strike Petitioner's Designated Expert Witness Leonard Fiedler.
33. July 12, 2011: Order taking Pending Matters Under Advisement issued.¹⁹ Order Denying Motion for Accelerated Determination issued.
34. July 13, 2011: Petitioner files Motion for Reconsideration of Order Denying Motion for Accelerated Determination.
35. July 17, 2011: Order Granting Motion to Strike Petitioner's Designated Expert Leonard Fiedler issued.
36. July 18, 2011: Order Granting Motion for Directed Verdict issued.
37. July 19, 2011: Applicant files Reply to Motion for Reconsideration of Order Denying Motion for Accelerated Determination. Applicant files Memorandum Regarding Hearing Officer's Proposed Condition regarding Revision of Mine Plan Boundary.
38. July 20, 2011: Petitioner files Response to Strack's Reply to Petitioner's Motion for Reconsideration. Order Taking Motion for Reconsideration Under Advisement issued.
39. July 22, 2011: Applicant files Motion for Recommendation of Issuance of Permit Pursuant to Revised Mine Plan Boundary. Petitioner files Reply to Motion for Recommendation of Issuance of Permit Pursuant to Revised Mine Plan Boundary.

FINDINGS OF FACT

Testimony of Petitioner's Witnesses

1. Mike Larsen: Mr. Larsen's testimony provided no competent and substantial scientific evidence to establish any undue impact upon the health or livelihood of Saxony Lutheran High School by the issuance of the expansion of Permit # 0832 for the operation of Strack Quarry # 2 in Cape Girardeau County, Missouri.

2. James Maevers: Mr. Maevers' testimony²⁰ provided no competent and substantial scientific evidence to establish any undue impact upon the health or livelihood of Saxony Lutheran High School by the issuance of the expansion of Permit # 0832 for the operation of Strack Quarry # 2 in Cape Girardeau County, Missouri.

The testimony of Mr. Maevers established the following facts:

- a. Saxony is not aware of any data that would suggest the level of emissions from the Strack Quarry # 2 would create any type of health risk for any of the students, faculty or guests at Saxony.²¹
- b. Saxony has not been told nor is aware that any outdoor events that it conducts will in any way be terminated or will not take place as a result of the existence of the Strack Quarry # 2.²²
- c. Saxony has not been notified that it will be prohibited from conducting any event as a result of the existence of the Strack Quarry # 2 and no event has been canceled as a result of the future existence of the Strack Quarry # 2.²³
- d. Saxony is not aware of any data that would suggest that the value of its property would decline as a result of the existence of the Strack Quarry # 2 and no appraisal has been done for that purpose.²⁴
- e. Saxony does not have any factual basis for any concern that enrollment may suffer if the Strack Quarry # 2 is permitted to operate.²⁵
- f. Saxony is not aware of any students who have left the school directly or indirectly as a result of the proposed operation of the Strack Quarry # 2.²⁶
- g. Saxony has not been told by any parents that if the Strack Quarry # 2 is permitted to operate that any students will be withdrawn from the school.²⁷

- h. Saxony has not done any type of analysis or investigation regarding what impact to enrollment, if any, would occur if the Strack Quarry # 2 is permitted to operate.²⁸
- i. Saxony's projected enrollment for the 2011 – 2012 school year is consistent with its feeder program from Lutheran elementary schools and Saxony has no basis that the projected slight reduction in enrollment is a result of the proposal for the operation of the Strack Quarry # 2.²⁹
- j. Saxony is not aware of any data or analysis to reflect a decrease in fundraising should the Strack Quarry # 2 be permitted to operate.³⁰
- k. Since the issue of the Strack Quarry # 2 has begun, none of the 26 Lutheran congregations which are members of the association which provides financial support to Saxony have withdrawn from the association or their support from Saxony.³¹
- l. Saxony has no data that would suggest that particulate emissions at any level would occur from the Strack Quarry # 2 and travel on to the Saxony property.³²

3. Larry Clear: Mr. Clear's testimony provided no competent and substantial scientific evidence to establish any undue impact upon the health or livelihood of Saxony Lutheran High School by the issuance of the expansion of Permit # 0832 for the operation of Strack Quarry # 2 in Cape Girardeau County, Missouri.

4. Rhonda Wessel: Ms. Wessel's testimony provided no competent and substantial scientific evidence to establish any undue impact upon the health or livelihood of Saxony Lutheran High School by the issuance of the expansion of Permit # 0832 for the operation of Strack Quarry # 2 in Cape Girardeau County, Missouri.

5. Cynthia Gage: Ms. Gage's testimony provided no competent and substantial scientific evidence to establish any undue impact upon the health or livelihood of Saxony Lutheran High School by the issuance of the expansion of Permit # 0832 for the operation of Strack Quarry # 2 in Cape Girardeau County, Missouri.

6. Judith Fuchs: Ms. Fuchs' testimony provided no competent and substantial scientific evidence to establish any undue impact upon the health or livelihood of Saxony

Lutheran High School by the issuance of the expansion of Permit # 0832 for the operation of Strack Quarry # 2 in Cape Girardeau County, Missouri.

7. Wendell Mueller: Mr. Mueller's testimony provided no competent and substantial scientific evidence to establish any undue impact upon the health or livelihood of Saxony Lutheran High School by the issuance of the expansion of Permit # 0832 for the operation of Strack Quarry # 2 in Cape Girardeau County, Missouri.

8. Kendall Hale: Mr. Hale's testimony provided no competent and substantial scientific evidence to establish any undue impact upon the health or livelihood of Saxony Lutheran High School by the issuance of the expansion of Permit # 0832 for the operation of Strack Quarry # 2 in Cape Girardeau County, Missouri.

9. Benjamin Dordoni: Mr. Dordoni's testimony provided no competent and substantial scientific evidence to establish any undue impact upon the health or livelihood of Saxony Lutheran High School by the issuance of the expansion of Permit # 0832 for the operation of Strack Quarry # 2 in Cape Girardeau County, Missouri.

10. Kristy Winter: Miss Winter's testimony provided no competent and substantial scientific evidence to establish any undue impact upon the health or livelihood of Saxony Lutheran High School by the issuance of the expansion of Permit # 0832 for the operation of Strack Quarry # 2 in Cape Girardeau County, Missouri.

11. Leonard Fiedler: Mr. Fiedler's testimony, had it been received into evidence, would have provided no competent and substantial scientific evidence to establish any undue impact upon the health or livelihood of Saxony Lutheran High School by the issuance of the expansion of Permit # 0832 for the operation of Strack Quarry # 2 in Cape Girardeau County, Missouri.

12. A. J. Garms: Mr. Garms' testimony provided no competent and substantial scientific evidence to establish any undue impact upon the health or livelihood of Saxony Lutheran High School by the issuance of the expansion of Permit # 0832 for the operation of Strack Quarry # 2 in Cape Girardeau County, Missouri.

13. Dr. Craig Ernstmeyer: Dr. Ernstmeyer's testimony provided no competent and substantial scientific evidence to establish any undue impact upon the health or livelihood of Saxony Lutheran High School by the issuance of the expansion of Permit # 0832 for the operation of Strack Quarry # 2 in Cape Girardeau County, Missouri.

Other Findings

14. Description of Strack Property.³³ The Strack property is in the general shape of the number seven (7), with the top arm (*northern portion*) of the property running in an east-west direction. The leg (*southern portion*) of the property runs in a north-south direction. The southern boundary of the property is the northern boundary of the Saxony property. The property contains 76 acres.

15. Location of Strack Quarry # 2 Bonded Area.³⁴ The bonded area under the Permit Application consists of 20 acres located in the Northeast corner of the property. The bonded area is in excess of 1,680 feet north of the Strack – Saxony property line and more than 2,600 feet north of the Saxony building. The starting point for the quarry pit on the bonded area is in excess of 1,680 feet north of the Strack – Saxony property line and more than 2,600 feet north of the Saxony building.

16. Location of Strack Quarry # 2 Plant.³⁵ The Shot Rock Load-In, Pit Haul Road, Primary Crusher, Secondary Crusher, Product Pile Load-In, Product Pile Load-Out, Product Storage and Product Haul Road are all located in the top (*east-west*) arm of the property. The plant is located in excess of 1,680 feet north of the Strack – Saxony property line and more than 2,600 feet north of the Saxony building.

17. PET Exhibit H. Potential emissions of all pollutants are conditioned below *de minimis* levels.³⁶ Under the conditions of the Permit to Construct issued to Applicant for the operation of Strack Quarry # 2, Applicant shall not cause an exceedance of the National Ambient Air Quality Standard (NAAQS) for particulate matter less than ten microns in aerodynamic diameter (PM₁₀) of 150.0 ug/m³ 24 hour average in ambient air.³⁷ The maximum modeled value for the Strack facility was 111 ug/m³ of PM₁₀ or 39 ug/m³ of PM₁₀ below the conditions of the Permit to Construct.³⁸

18. PET Exhibit M. No expert testimony was provided by Petitioner relative to the Dispersion Modeling performed by Shell Engineering.³⁹ None of Petitioner's witnesses provided any testimony relative to any of the information in Exhibit M. None of Petitioner's witnesses gave any testimony that made any correlation between the information in Exhibit M and potential undue impairment to health or livelihood at Saxony.

19. Health Impacts from Emissions. Petitioner provided no scientific evidence that the level of emissions set by Exhibit H or established by Exhibit M generated at a location in

excess of 1,680 feet from the Saxony property and in excess of 2,600 feet from the Saxony building would result in any undue impairment to the health of staff, faculty, students or visitors at Saxony Lutheran High School.

20. PET Exhibit N. The exhibit provides the historical data for enrollment, income and expenses for the school years 2000-2001 through 2009-2010 and the projections for school years 2010-2011⁴⁰ and 2011-12. None of the information provides any basis for making a projection or arriving at a conclusion as to potential impact upon enrollment or income if the Strack Quarry # 2 is permitted to operate on the property adjoining the Saxony property. None of the witnesses who testified as to Exhibit N provided any analysis or explanation of the exhibit that arrived at a conclusion of undue impact upon enrollment or income.⁴¹ None of Petitioner's witnesses gave any testimony that made any correlation between the information in Exhibit N and the existence of Strack Quarry # 2 on property adjoining the Saxony property to establish any undue impairment to livelihood at Saxony.

14. Livelihood Impact. Petitioner presented no scientific evidence upon which a conclusion could be reached that the operation of the Strack Quarry # 2 on property adjoining the Saxony property would unduly impact the livelihood of Saxony. See, PETITIONER FAILED TO ESTABLISH UNDUE IMPACT ON THE LIVELIHOOD OF PETITIONER, *infra*.

CONCLUSIONS OF LAW

and DECISION

JURISDICTION

The hearing in this matter is authorized by § 444.773.3 RSMo, which provides in relevant part: "...If the public meeting does not resolve the concerns expressed by the public, any person whose health, safety or livelihood will be unduly impaired by the issuance of such permit may make a written request to the land reclamation commission for a formal public hearing. The land reclamation commission may grant a public hearing to formally resolve concerns of the public. Any public hearing before the commission shall address one or more of the factors set forth in this section."⁴²

The Hearing Officer was duly appointed by the Land Reclamation Commission of the Department of Natural Resources to conduct a hearing and recommend to the Commission a decision.⁴³ The Hearing Officer and the Commission have jurisdiction over this appeal.

HEARING PROCEDURE

Section 444.789 provides that the hearing held in this matter is a contested case, that the parties may conduct discovery, make oral arguments, introduce testimony and evidence, and cross-examine witnesses. The statute authorizes a member of the Missouri Bar to be appointed to hold the hearing and make recommendations, with the final decision reserved to the Commission. The Hearing Procedure mandated by statute and regulation was followed in this case.⁴⁴

NATURE OF THE CASE

The case presents two questions to be answered. If either question is shown by the evidence to be answered in the affirmative, the Commission may deny the permit. If neither question is shown by the evidence to be answered in the affirmative the Applicant is entitled to have the Application approved, subject to section 444.731 RSMo.

The first question to be addressed is whether the Petitioner presented competent and substantial scientific evidence on the record, that Petitioner's health would be unduly impaired by impacts from quarrying at Strack Quarry # 2 on land adjoining the land of Saxony.

The second question is whether the Petitioner presented competent and substantial scientific evidence on the record that that Petitioner's livelihood would be unduly impaired by impacts from quarrying at Strack Quarry # 2 on land adjoining the land of Saxony.

Unless Petitioner is able to carry its burden of proof on one of these two issues, the expansion of Permit #0832 is to be approved, subject to section 444.731 RSMo.⁴⁵

PETITIONER'S BURDEN OF PROOF

General Burden of Proof

The burden of proof as it relates to the issues raised and the relief sought by Petitioner is on the Petitioner.⁴⁶ The general principle is that the burden of proof rests on the party bringing

the action, the Petitioner in the present case. In general, the party seeking to establish a claim bears the burden of proof to establish the entitlement to the claim.⁴⁷

Petitioner was required therefore, to present competent and substantial evidence to support its claims for relief in opposition to Strack's Application for Expansion of Permit # 0832.⁴⁸ Competent evidence is evidence that is admissible, that is relevant to an issue in a given proceeding.⁴⁹ Substantial evidence is evidence that a reasonable mind would accept as adequate to support a conclusion; evidence beyond a scintilla.⁵⁰ Substantial evidence is evidence that if true has probative force upon the issues and from which the trier of facts can reasonably decide a case.⁵¹

Scientific Burden of Proof

Petitioner also had a specific burden of proof established by statute and Commission regulation. Not only must Petitioner's evidence on the two claims asserted meet the standard of competent and substantial, but that evidence must be scientific evidence.⁵² The term "scientific evidence" is not defined in §§ 444.773, 444.765, 10 CSR 40-10.080 or 10 CSR 40-10.100.

Therefore, the following terms are defined for purposes of this Order.

Scientific – of or dealing with science, based on, or using, the principles and methods of science, done according to methods gained by training and experience.⁵³

Science – original knowledge, systematized knowledge derived from observation, study and experimentation.⁵⁴

Scientific knowledge – Knowledge that is grounded on scientific methods that have been supported by adequate validation. Four primary factors are used to determine whether evidence amounts to scientific knowledge: (1) whether it has been tested; (2) whether it has been subject to peer review and publication; (3) the known or potential rate of error; and (4) the degree of acceptance within the scientific community.⁵⁵ This is the test applied under the *Daubert* standard.⁵⁶ The Supreme Court has also held that similar scrutiny must be applied to nonscientific expert testimony.⁵⁷ The evidentiary test to be applied under § 490.065 RSMo guides the admission of expert testimony in contested administrative proceedings and the test is similar to that set forth in *Daubert*.⁵⁸

Scientific evidence – testimony or opinion evidence that draws on technical or specialized knowledge and relies on scientific method for its evidentiary value.⁵⁹ Scientific evidence encompasses opinions of an expert based upon facts or data of a type reasonably relied

upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reliable. Scientific evidence may also include the facts or data underlying recognized studies and the resulting conclusions from such studies.⁶⁰

Health and Livelihood Issues

By statute and regulation, Petitioners have a specific burden of proof related to establishing an impact on health, or livelihood. Section 444.773.4 RSMo establishes a standard of “competent and substantial scientific evidence, ... that an interested party’s health, . . . or livelihood will be unduly impaired by the issuance of the permit.” This statutory standard is further delineated in 10 CSR 40-10.080.⁶¹ It is the foregoing standards which must now be applied to Petitioner’s evidence to ascertain if the burden of proof was satisfied in this case.

PETITIONER FAILED TO ESTABLISH UNDUE IMPACT ON THE HEALTH OF PETITIONER

In the Order issued June 19, 2011, the Hearing Officer ruled on Applicant’s Motion to Dismiss the claim as to undue impairment to the health of Petitioner as follows:

“The Commission granted standing for a formal hearing on the ground of undue impairment to the health of the Petitioner. Health in its common and ordinary usage relates to the physical and mental well being of a human being. The Petitioner being a corporate entity, and not a natural person, has no physical or mental well being that can be impaired in the judgment of the Hearing Officer. There is no showing that Petitioner has members whose health would be unduly impaired by the issuance of the permit that is the subject of this matter.

“Therefore, the Hearing Officer must conclude that the Commission’s understanding of the claim of undue impairment of health must have related to natural persons. The natural persons most immediately connected to Saxony Lutheran High School are those persons who are the students, faculty, staff and guests of the high school. The Hearing Officer has found no basis upon which he has authority to substitute his opinion or judgment on this issue for that of the Commission and deny standing on a ground granted by the Commission. Accordingly, Applicant’s Motion to dismiss or strike claims asserted on behalf of students, faculty, staff and guests of Petitioner is denied.”

The testimony presented by Witnesses Dordoni, Winter and Garms was received by the Hearing Officer as representative of the testimony that would have been given by any other

students with a respiratory condition. Their testimony was also considered to be applicable to other persons, be they staff, faculty or visitors to Saxony, who would have any similar conditions. These three witnesses were the only “impairment of health” witnesses at the hearing.

The information provided by these individuals did not constitute scientific evidence or data to establish that the operation of the Strack Quarry # 2 a distance of more than a quarter of a mile from the Saxony property⁶² and nearly a half mile north of the high school building⁶³ would unduly impair the health of the students or other persons, being on the Saxony property, who might have similar conditions. Petitioner provided no expert witness to testify as to any study or analysis that had been performed establishing that any particulate emissions at any level would occur from the Strack Quarry # 2 and travel on to the Saxony property. No testimony was presented demonstrating the existence of any data that would suggest the level of emissions from the Strack Quarry # 2 would create any type of health risk for any of the students, faculty or guests at Saxony. Applicant’s Dispersion Modeling report provides no substantiation for Petitioner’s claim of undue impact on health, since no testimony was provided to draw any connection between the health conditions of the Saxony witnesses and the Modeling data.

Summary

The students’ testimony as to their allergies establishes no scientific foundation from which it can be concluded that the operation of the Quarry will in any fashion unduly impair their health or the health of other persons on the Saxony property. Accordingly, Petitioner failed to meet its burden of proof on this issue. There was no undue impairment of health established that would warrant the Commission denying the issuance of the expansion of permit # 0832 for the operation of the Strack Quarry # 2.

PETITIONER FAILED TO ESTABLISH UNDUE IMPACT ON THE LIVELIHOOD OF PETITIONER

Testimony Under Motion to Strike Witness – Leonard Fiedler

The only witness tendered to address the claim of an undue impact on the livelihood of Saxony was Leonard Fiedler. Applicant filed its Motion to Strike Mr. Fiedler as an expert witness after the deposition of the witness had been taken. Due to the hearing schedule, it became necessary to take the testimony of Mr. Fiedler before the Hearing Officer was able to rule on the Applicant’s Motion. Accordingly, on July 7th, Mr. Fiedler was permitted to testify

under the pending Motion to Strike. The effect of that was that although the witness could testify, if the Hearing Officer granted the Motion to Strike the testimony would be stricken and not be a part of the record.⁶⁴

Ruling on Motion to Strike Witness - Fiedler

On July 17, 2011, the Hearing Officer issued his Order Granting the Motion to Strike Leonard Fiedler as an expert witness. Said Order is hereby incorporated by reference, as part of this Recommended order, as if set out in full herein. Mr. Fiedler was stricken as an expert witness for Petitioner on the issue of a claimed undue impact on the livelihood of Saxony. Accordingly, there was no other evidence in the record to address this issue.

Fiedler Testimony under Rule 73.01A

During the process of Mr. Fiedler's direct testimony, Counsel for Petitioner requested that the Hearing Officer exercise his discretion and allow Petitioner to take and record the Fiedler testimony under Supreme Court Rule 73.01A (*Rule 73*).⁶⁵ The Hearing Officer extended leeway and granted Petitioner's request and permitted a record of the remaining testimony of Mr. Fiedler to be made under Rule 73.⁶⁶ The testimony under Rule 73 was also given under the pending Motion to Strike Mr. Fiedler as an expert witness. Therefore, the Rule 73 testimony while allowing Petitioner to make a "record" of that testimony would not become a part of the evidentiary record if the witness were stricken as an expert witness.

Analysis of Rule 73 Testimony

Had the witness not been stricken, his testimony would have failed to provide competent and substantial scientific evidence that the operation of the Strack Quarry would unduly impair the livelihood of Saxony. In the direct examination under Rule 73,⁶⁷ Mr. Fiedler stated his opinion that "... having the Strack limestone quarry immediately adjacent to Saxony High School will have an undue impact on the future livelihood of Saxony High School"⁶⁸ However, this opinion was not based upon any scientific analysis, study or data, but rested simply upon Exhibit N and Mr. Fiedler's fund raising and school administrator experience.⁶⁹

Under cross-examination, Mr. Fiedler admitted the following:⁷⁰

- a. he was unaware of any contributors to Saxony who had indicated they would withdraw their contributions if the Strack Quarry were allowed to operate.
- b. he was unaware of any specific facts, data or information that would reflect that third source income would decrease as a result of the quarry being allowed to operate.

- c. he had no facts or data to suggest that fundraising would decrease as a result of the existence of the quarry.
- d. he had done no analysis regarding what, if any fundraising effects will occur at Saxony because of the quarry.
- e. he was not able to quantify the claimed impact of fundraising at Saxony if the quarry is permitted to begin operations.
- f. he was not able to testify that past student enrollment had in any way been affected by the proposed quarry.
- g. he was not aware of any parents who have advised Saxony that they will not send their child to the high school if the quarry is allowed to operate.
- h. he had no factual data to reflect that the existence of the quarry will result in a decrease in enrollment.
- i. he had not done any investigation or analysis to quantify any potential enrollment changes at Saxony should the quarry go into operation.

The foregoing testimony of Mr. Fiedler established that his opinion as to any potential impact of the Strack Quarry on the livelihood of Saxony was not based upon any factual data or scientific analysis that would go to establish a potential impact on either donations or enrollment at Saxony. When, as in this instance, the Hearing Officer, as trier of fact determines that the methodology used by the tendered expert is not reasonably reliable, then the testimony does not meet the statutory standard of § 490.065 and is inadmissible.⁷¹

There was no “methodology” employed by Mr. Fiedler to arrive at his opinion. No explanation was provided either in the Fiedler deposition cited to in Counsel for Applicant’s Motion to Strike or in the testimony under Rule 73 as to how the data of Saxony’s past enrollment and income history supports a conclusion of future “undue impairment” of either donations to or enrollment at the school. There was no analysis supplied which the Hearing Officer could review to see the consistency and logic of the process used to arrive at the Fiedler conclusion. It was not established that Mr. Fiedler had utilized a methodology recognized by experts who would conduct an analysis of how an external factor might impact a not for profit educational institution.

Where the basis for a test as to the reliability of testimony is not supported by a statement of facts on which it is based, or the basis of the fact does not appear to be sufficient, the testimony is to be rejected.⁷² Without explanatory testimony to establish how, without any of the information cited above in items a through i, Mr. Fiedler could have possibly arrived at his opinion, the testimony does not qualify as competent and substantial scientific evidence and is not admissible as an expert opinion under § 490.065.

The Hearing Officer finds a further problem with the opinion tendered by Mr. Fiedler. The Fiedler opinion was presented as the sole fact of undue impairment to livelihood. The opinion is contradicted by the witnesses own testimony, as detailed above.⁷³ A single witness's unexplained contradictory evidence relied on to prove a fact does not constitute substantial evidence.⁷⁴ No reasonable inference can be drawn from Exhibit N that either Saxony's income or enrollment will be unduly impaired if the Strack Quarry # 2 is permitted to operate. Under these circumstances, the fact of undue impairment of livelihood could not be established.

This leaves the Hearing Officer with nothing more than the personal belief or feeling of Mr. Fielder that the operation of the quarry would have some impact on donations and enrollment. The personal belief, feeling, understanding or thought of a witness about a matter does not constitute substantial evidence justifying or permitting a finding to that effect.⁷⁵ In other words, as concerns the standard of competent and substantial scientific evidence, the Fiedler opinion is based upon what can only be characterized as speculation, conjecture or surmise. Such evidence does not meet the standard of being substantial,⁷⁶ let alone scientific.

Summary

The Fiedler opinion (*had it been admissible*), having not been based upon scientific analysis and data, establishes no scientific foundation from which it can be concluded that the operation of the Quarry will in any fashion unduly impair the livelihood of Saxony. Accordingly, Petitioner failed to meet its burden of proof on this issue. There was no undue impairment of livelihood established that would warrant the Commission denying the issuance of the expansion of permit # 0832 for the operation of the Strack Quarry # 2.

Conclusion – Health and Livelihood Issues

The issues presented upon the assignment of the Matter to the Hearing Officer addressed the two claims of undue impairment to the health or livelihood of the Petitioner. It was therefore, the responsibility of the Hearing Officer, based upon the evidentiary record, to make the necessary findings of facts and conclusions of law as to those two issues. Applicant's Motion for Directed Verdict was previously granted as to the issues presented on the basis that the Petitioner failed to present competent and substantial scientific evidence that the health or livelihood of Petitioner will be unduly impaired by the issuance of the permit to Applicant.

The foregoing addresses in detail the evidence proffered and the basis for Petitioner's failure to meet the required standard of proof as to the claims of undue impairment to the health

or livelihood of the Petitioner. Based upon the findings and conclusions, there exists no basis under the statutes and regulations as they existed when the Matter was submitted to the Hearing Officer upon which the Commission may deny the application as recommended by the Respondent.

Enactment of SS # 2 for SCS for HCS for HB 89

It is now necessary to turn to the fact that on July 11, 2011, the Governor signed into law SS # 2, for SCS for HCS for House Bill 89 (*House Bill 89 or HB 89*). House Bill 89 contained the following provision, which became law upon the Governor signing the legislation:

“444.771. Notwithstanding any other provision of law to the contrary, the commission and department shall not issue any permits under this chapter or under chapters 643 or 644 to any person whose mine plan boundary is within one thousand feet of any real property when an accredited school has been located for at least five years prior to such application for permits made under these provisions, except that the provisions of this section shall not apply to any request for an expansion to an existing mine or to any underground mining operation.”

The effect of the signing into law of HB 89 is that it is required that for the subject application to be approved there must exist a buffer of one thousand feet between the northern boundary of the Saxony property and the southern mine plan boundary.

Pending Motions Resulting From Signing of HB 89

As a result of the Governor signing HB 89 into law, Petitioner filed its Motion for Accelerated Determination which was denied by Order issued July 12, 2011. The following Motions and Responses were filed which are pending.

1. Petitioner's Motion for Reconsideration of Order Denying Motion for Accelerated Determination
2. Applicant's Reply to Motion for Reconsideration
3. Applicant's Memorandum Regarding Proposed Condition Regarding Revision of Mine Plan Boundary
4. Petitioner's Response to Reply to Motion for Reconsideration.
5. Applicant's Motion for Recommendation of Issuance of Permit Pursuant to Revised Mine Plan Boundary

6. Petitioner's Reply to Motion for Recommendation of Issuance of Permit Pursuant to Revised Mine Plan Boundary

Motion for Reconsideration

The Motion for Reconsideration is denied on the grounds of mootness. The Hearing Officer on July 12, 2011 at the Hearing took official notice of the signing into law of HB 89.⁷⁷ Therefore, that portion of the Motion for Accelerated Determination requesting official notice of the signing into law of HB 89 was so granted. The other Request for Relief in the Motion for Accelerated Determination was that the Hearing Officer cease taking any additional evidence on the record other than as may be necessary relating to the request for Official Notice as contained herein and other matters relating to § 444.771 RSMo. That Request for Relief has been rendered moot, given that after Petitioner rested its case on July 12th the Hearing Officer ceased taking any additional evidence and adjourned the hearing. Accordingly, the Motion for Reconsideration of the Motion for Accelerated Determination has become moot.

Motion for Recommendation of Issuance of Permit Pursuant to Revised Mine Plan Boundary

Applicant by its Memorandum Regarding Revision of Mine Plan Boundary expressed its willingness to have the mine plan boundary (exclusive of any underground mining) to be modified so that the boundary is not located within 1,000 of Saxony Lutheran High School's real property. The argument which Petitioner presented in its Reply followed the argument set out in its Motion for Reconsideration. That is Petitioner asserts that the Commission does not have the statutory authority to impose a special condition in a mining permit that moves a mine plan boundary. Hence, under the position advanced by Petitioner, the Hearing Officer cannot issue a Recommended Order that would make such a special condition applicable in this instance. Petitioner's argument is not well taken.

Application of the Statutory Standard

It is not the Commission that is imposing a special condition in this Matter. The legislature has established a standard relative to the issuance of a permit for a mine plan boundary that is in proximity to the property on which an accredited school has been located for at least five years prior to the application for the permit. The standard is that the mine plan boundary (exclusive of any underground mining) is not to be located within 1,000 feet of such

school's real property. The present situation is not a case of the Commission electing to apply a special condition to the issuance of Applicant's permit. The case is simply that the Commission is to apply the existing law – the standard the legislature has established – in approving the Application for Expansion of Permit # 0832.

Petitioner meets the standards of being an accredited school on the property which adjoins Applicant's property on the South and having been located on that property for five years prior to the date Applicant filed its application that is the subject of this Matter. The one thousand foot mine plan boundary standard set by § 444.771 was, of course, not in place on November 4, 2010 when the Permit Application⁷⁸ was received by the Land Reclamation Commission. Nor was that standard the law when the Commission granted standing to Petitioner for a Formal Public Hearing, nor when the Matter was assigned to the Hearing Officer, nor when the Hearing was conducted on July 5, 6 or 7.

When HB 89 was signed into law, the Strack Application had already been deemed complete and compliant with the law that existed at the time it was filed. The Application was compliant with the law as it existed when approval was recommended by Respondent on January 11, 2011.⁷⁹ Applicant's Permit to Construct⁸⁰ and water permit⁸¹ had previously been issued. The law now requires that the mine plan boundary not be within one thousand feet of the Saxony property. If the land on which Applicant was seeking to operate the proposed quarry was so small that the statutory standard could not be applied, then that fact would dictate that the application could not be approved. That is not the case in this instance. The Strack property is of sufficient size that the legislative intent to create a buffer of one thousand feet between a mine plan boundary and the property of a school such as Saxony can be accomplished.

Petitioner Arguments Against Application of 1,000 Foot Standard

Petitioner raised various assertions as to why the 1,000 foot standard should not be imposed and the application denied.⁸² The arguments were on the following points: (1) 55 acre lake outside mine plan boundary; (2) Strack Plant out of compliance with 200 foot buffer required by air construction permit; and (3) required changes by applying the 1,000 foot standard not a part of the initial public notice. The points raised are not well taken.

55 Acre Lake

The proposed lake of 55 acres cannot be accommodated within the southern boundary of the mine plan being moved a thousand feet north of the Saxony property. The fact that a smaller

lake may ultimately result does not alter the provisions as to the plans for the reclamation of the topography, grading, topsoil replacement and revegetation. The use of the reclaimed land, under the thousand foot buffer requirement of the statute, will be altered as to the acres devoted to wildlife and that set aside for a water impoundment, with more being devoted to wildlife habitat and less to the lake.

The important factor for the Commission is the reclamation of the land used for the quarrying operation, not the division of reclaimed land between a water impoundment and a wildlife area. A reduction in the size of the lake does not alter the factors providing an appropriate reclamation of the land. The only substantive change required by the thousand foot barrier is a reduction to the amount of the land that can be quarried. Such a modification as to the size of the quarry, brought about by the legislative enactment of the buffer zone, does not constitute a significant alteration to the land reclamation plan of the application. The change mandated by the legislative enactment can be accommodated in this instance and the integrity of the land reclamation plan as originally proposed remains intact.

Location of Plant

Petitioner's argument on this point is that "If the mine plan boundary is moved north by 1,000 feet, then the location of the "Plant" as shown by Strack in its air construction permit application, may well not comply with the 200' buffer zone required in Strack's air construction permit." The argument misconstrues the facts on this point. The location of the Strack Plant as given in PET Exhibit M will not be impacted by compliance with the statutory thousand foot buffer. The Strack Plant is to be located over 1,600 feet from the Saxony property line. See, FINDINGS OF FACT 14, 15 & 16, *supra*. That fact doesn't change with the mine plan boundary being moved north of the Saxony property line a thousand feet. The 200' air construction permit buffer is from the nearest property boundary, not from the mine plan boundary. In any event the Plant is more than 200 feet from the southern mine plan boundary that is required to accommodate the statutory thousand foot buffer. The application of the statutory mine plan buffer to the Strack Quarry does not in any manner impact the air construction permit previously issued. There is nothing unclear or unexplained relative to the location of the Strack Plant as it applies to the air construction permit. Petitioner's argument is not well taken.

Public Notice

Petitioner's final argument is that the application of the buffer of one thousand feet established by HB 89 requires significant changes that were not part of the initial public notice. The facts do not support Petitioner's argument.

Section 444.772.10 RSMo sets forth what was required to be contained in the public notice in this Matter. The statute states in relevant part:

“The notices shall include the name and address of the operator, a legal description consisting of county, section, township and range, the number of acres involved, a statement that the operator plans to mine a specified mineral during a specified time, and the address of the commission. The notices shall also contain a statement that any person with a direct, personal interest in one or more of the factors the commission may consider in issuing a permit may request a public meeting, a public hearing or file written comments to the director no later than fifteen days following the final public notice publication date.”

The only item in the required notice that would have been changed, if the thousand foot buffer requirement had been in place when Applicant filed its application, would have been that the acreage of the mine plan would have been reduced from 76 to approximately 53 acres, more or less.⁸³ The reduction of the acreage to be mined is not a significant or even material change in the public notice. The import and intent of the notice is to permit interested person to request a public meeting, a public hearing or to file written comments to the director. Nothing in a change in the mining acreage would have in any manner compromised or restricted the rights of interested persons under the notice. It is illogical to suggest that persons who did not challenge the original mine plan of 76 acres, would have petitioned for a hearing for a mine plan of only 53 acres and buffered from Saxony by one thousand feet. Furthermore, there is no reasonable basis to conclude that persons who were denied standing as to the original application would have been granted standing if the statutory buffer had been in place and been a part of the original application.

Conclusion – Enactment of HB 89 Issue

There is no prejudice to Petitioner or any other person or entity in the approval of the Strack application with the buffer of one thousand feet in compliance with and as required by section 444.731 RSMo. The imposition of the thousand foot buffer is completely the result of a substantive change in the law that occurred after the application was file, after the Director's

recommendation was made, after the Matter was submitted to the Hearing Officer and after the Formal Public Hearing was commenced. The resulting reduction required by the statutory buffer in the proposed mine plan is not due to any error or omission on the part of either Applicant or Respondent. It is totally and simply the result of the legislative enactment. The enactment of HB 89 provides no basis upon which the Strack application can be denied, given that Petitioner failed to establish any undue impact on health or livelihood. The enactment of HB 89 only requires that the buffer of one thousand feet be applied to this mining plan.

ORDER

IT IS RECOMMENDED by the undersigned, a hearing officer duly appointed by the Land Reclamation Commission of the Missouri Department of Natural Resources, that the Application for Expansion of Permit # 0832 be approved, with the mine plan boundary (*exclusive of underground mining*) to be located one thousand feet from the Strack – Saxony property line, in compliance with and as required by section 444.731 RSMo.

Any Finding of Fact that is a Conclusion of Law or Decision shall be so deemed. Any Decision that is a Finding of Fact or Conclusion of Law shall be so deemed.

SO ORDERED August 24, 2011.

MISSOURI DEPARTMENT OF NATURAL RESOURCES

/s/ W. B. Tichenor

W. B. Tichenor

Hearing Officer

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¹ Enacted by SS # 2 for SCS for HCS for HB 89, 96th General Assembly, 2011, with an emergency clause. Signed into law on July 11, 2011

² Vol. I – TR. 34:25 – 229:13

³ Vol. II – TR. 248.8 – 300:14

⁴ Vol. II – T. 301:10 – 314:4

⁵ Vol. II – TR. 315:22 – 331:20

⁶ Vol. II – TR. 332:15 – 340:22

⁷ Vol. II – TR. 344:12 – 354:17

⁸ Vol. II – TR. 357:1 – 370:18

⁹ Vol. II – TR. 371:1 – 471:5; Vol. III – TR. 478:15 – 523:13

¹⁰ Vol. III – TR. 525:7 – 533:16

¹¹ Vol. III – TR. 534:6 – 545:7

¹² Vol. III – TR. 546:8 – 637:5

¹³ Vol. IV – TR. 668:20 – 678:18

¹⁴ Vol. IV – TR. 679:14 – 691:5

¹⁵ Vol. I – TR. 229:14 – 231:11

¹⁶ Exhibit 12 was used extensively in both direct and cross-examination of witnesses. Vol. II – TR. 255:14 – 258:1; 274:14 – 275:9; 275:22 – 276:7; 281:12 – 282:8; 286:5 – 287:4; 296:11-15; 298:16 – 299:13; 304:10 – 306:5; 308:7-13; 308:20 – 309:2; 309:22 – 311:4; 313:4-12; Vol. III – TR. 487:11 – 489:17; Vol. IV – TR. 670:13 – 671:19; 676:12 – 678:11; 682:10 – 684:22; 686:14-22; 687:20 – 690:9

It was not moved for admission prior to Petitioner resting its case. By Order issued July 28, 2011, the Hearing Officer gave the parties opportunity to object to Exhibit 12 being received into the record. Counsel for each party via email response on July 28th confirmed no objection to Exhibit 12.

¹⁷ Vol. IV – TR. 696:12 – 20

¹⁸ Vol. IV – TR. 697:22 – 704:13

¹⁹ Pending Matters: Request to take Official Notice of House Bill 89, Motion for Accelerate Determination, Motion to Strike Designated Expert Witness Leonard Fiedler and Motion for Directed Verdict.

²⁰ Mr. Maevers testified as the corporate representative for Saxony.

²¹ Vol. II – TR. 284:25 – 285: 13

²² Vol. II – TR. 285:19 – 23

²³ Vol. II – TR. 285:24 – 286:4

²⁴ Vol. II – TR. 287:10 – 288:1

²⁵ Vol. II – TR. 288:2 – 10

²⁶ Vol. II – TR. 288:11 – 14.

²⁷ Vol. II – TR. 288:15 – 20

²⁸ Vol. II – TR. 288:21 – 289:6

²⁹ Vol. II – TR. 289:7 – 292:13

³⁰ Vol. II – TR. 292:14 – 20

³¹ Vol. II – TR. 273:15 – 274:13

³² Vol. II – TR. 280:7 – 18

³³ APP Exhibit 12; PET Exhibit B/RES Exhibit 1 - Site Information, Location Map, Detail Map # 1, Aerial Photograph Maps

³⁴ Id.

³⁵ PET Exhibit M – Figure 1 – Strack facility layout

³⁶ PET Exhibit L – 10 CSR 10-6.060 (5)

³⁷ PET Exhibit J – 10 CSR 10-6.020 (2) 20 – Ambient air – all space outside of buildings, stacks or exterior ducts

³⁸ PET M – Project Overview

³⁹ PET Exhibit M was received into evidence during the testimony of Mr. Larsen (*Vol. 1 – TR. 175:11 – 180: 1*) and was referenced during the testimony of Mr. Hale (Vol. II – TR. 484:9 – 488:14; 489:18 – 490:21; 494:6 – 14.

⁴⁰ The document was prepared before the close of the 2010-2011 school year.

⁴¹ James Maevers: Vol. II – TR. 258:2 – 263:4; 273:8 – 274:13; 289:2 – 16; 290:16 – 291:20;
Rhonda Wessel: Vol. II – TR. 321:23 – 324:6; 330:3 – 8; Wendell Mueller: Vol. II – TR. 359:16 – 368:12; 369:3 – 22; 370:6 – 18.

⁴² *See also*, 10 CSR 40-10.080(1) (F).

⁴³ §444.789.3 RSMo; 10 CSR 40-10.080(5) (C) (3).

⁴⁴ 10 CSR 40-10.080(5)

⁴⁵ §444.773.4 RSMo; 10 CSR 40-10.080(3) (B) & (D).

⁴⁶ SS No. 2 for SCS for HCS for House Bill No. 89 (*H.B. 89*) was signed into law by the Governor on July 11, 2011. H.B. 89 repealed and reenacted §444.773. The only change made to this section of law was in subsection 4. The bill amended the first and second sentences of subsection 4, as follows (*language in bold print is new language added, language with brackets [] around it is existing language that is stricken from the statute*):

“4. In any **public hearing** [held pursuant to this section the burden of proof shall be on the applicant for a permit.], if the commission finds, based on competent and substantial scientific evidence on the record, that an interested party’s health, safety or livelihood will be unduly impaired by the issuance of the permit, the commission may deny such permit.”

The effect of the enactment was that there is no burden of proof on the applicant in a formal public hearing.

⁴⁷ 20 MoPrac. §10:73, p. 409.

⁴⁸ Mo. Const. Art. V, § 18; 20 MoPrac. §10:60, p. 367 *et seq.*

⁴⁹ Black's Law Dictionary, Seventh Edition (1999) – *admissible evidence, relevant evidence*; *City of Kansas City v. New York-Kansas Bldg*, 96 S.W.3d 846, 861 (Mo. App. 2001); *State v. Kidd*, 990 S.W.2d 175, 180 (Mo.App. 1999).

⁵⁰ Black's Law Dictionary, Seventh Edition (1999) – *substantial evidence*.

⁵¹ *George v. McLuckie*, 227 S.W.3d 503 (Mo.App.W.D. 2007); *Brown v. Bailey*, 210 S.W.3d 397, (Mo.App.E.D. 2006); *Preston v. Director of Revenue*, 202 S.W.3d 608 (Mo. 2006).

⁵² §444.773.4 RSMo; 10 CSR 40-10.080 (3) (B) & (D)

⁵³ Webster's New World Dictionary, Second College Edition – *scientific*

⁵⁴ *Id.* – *science*

⁵⁵ Black's Law Dictionary, Seventh Edition – *scientific knowledge*

⁵⁶ *Daubert v. Merrell Dow Pharm., Inc.* 509 U.S. 579, 113 S.Ct. 2786 (1993)

⁵⁷ *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999)

⁵⁸ Courtroom Handbook on Missouri Evidence -2011, Wm. A. Schroeder, Section 702.5.a, p.440

⁵⁹ Black's Law Dictionary, Seventh Edition – *scientific evidence*

⁶⁰ *Section 490.065, RSMo; State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. 2004 *en bacn*); Courtroom Handbook on Missouri Evidence, Wm. A. Schroeder, Sections 702-705, pp. 434 - 477; *Wulfig v. Kansas City Southern Industries, Inc.*, 842 S.W.2d 133 (Mo. App. E.D. 1992).

⁶¹ “The impact to the petitioner’s health, . . . and livelihood must be within the authority of any environmental law or regulation administered by the Missouri Department of Natural Resources.” 10 CSR 40-10.080(2)(B).

“The burden of establishing an issue of fact regarding the impact, if any, of the permitted activity on a hearing petitioner’s health, . . . or livelihood shall be on that petitioner by competent and substantial scientific evidence on the record.” 10 CSR 40-10.080(3)(B).

“If the commission finds, based upon competent and substantial scientific evidence on the record, that a hearing petitioner’s health, . . . or livelihood will be unduly impaired by impacts from activities that the recommended mining permit authorizes, the commission may deny the permit.” 10 CSR 40-10.080(3)(D).

⁶² *See, FINDINGS OF FACT* 15 & 16, p 11. – There are 5,280 feet in a mile. The location of the Quarry production plant is over 1,680 feet north of the Strack – Saxony property line or .32 of a mile beyond the Saxony property ($1,680 \div 5,280 = .318$).

⁶³ *See, FINDINGS OF FACT* 15 & 16, p 11. – There are 5,280 feet in a mile. The location of the Quarry production plant is over 2,600 feet north of the Saxony High School Building or .49 of a mile north of the Saxony building ($2,600 \div 5,280 = .492$).

⁶⁴ Vol. III – TR. 546:12 – 21

⁶⁵ Vol. III – TR. 613:10 – 614:24

⁶⁶ Vol. III – TR. 615:7 – 617:5

⁶⁷ Vol. III – TR. 620:15 – 637:5

⁶⁸ Vol. III – TR. 623:3 – 6

⁶⁹ Vol. III – TR. 620:22 – 621: 9

⁷⁰ Vol. III – TR. 634:10 – 636:7

⁷¹ McDonagh, *supra*, at 157

⁷² Cohen v. Bushmeyer, 251 S.W.3d 345 (Mo. App. E.D. 2008); Delgado v. Mitchell, 55 S.W. 3d 508 (Mo. App. S. D. 2001)

⁷³ It was rebutted by the testimony of Mr. Maevers, *See*, **FINDING OF FACTS 2**, a - i, *supra*.

⁷⁴ *Mountjoy v. Automobile Club Inter-Insurance Exchange*, 108 S.W.3d 710 (Mo. App. W. D. 2003); *Coon v. Dryden*, 46 S.W.3d 81 (Mo. App. W.D. 2001); *Tompkins v. Cervantes*, 917 S.W.2d 186 (Mo. App. E.D. 1996); *Thomas v. Myers*, 655 S.W. 2d 695 (Mo. App. E.D. 1983).

⁷⁵ *Powell v. State Farm Mut. Auto. Inc. Co.* 173 S.W. 3d 685 (Mo. App. W. D. 1005)

⁷⁶ *Tuf Flight Industries, Inc. v. Harris*, 129 S.W. 3d 486 (Mo. App. W.D. 2004)

⁷⁷ Vol. IV – TR. 656: 14 – 20

⁷⁸ PET Exhibit B, RES Exhibit 1

⁷⁹ PET Exhibit C; RES Exhibit 4

⁸⁰ PET Exhibit H

⁸¹ Exhibit C – Motion for Recommendation of Issuance of Permit Pursuant to Revised Mine Plan Boundary

⁸² Petitioner Reply to Motion for Recommendation etc.

⁸³ Based upon the Hearing Officer's calculation from scale given on APP Exhibit 12