

No. ED99038

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IN THE  
MISSOURI COURT OF APPEALS  
EASTERN DISTRICT

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SAXONY LUTHERAN HIGH SCHOOL, INC.,

Respondent,

v.

STRACK EXCAVATING, LLC, and

MISSOURI LAND RECLAMATION COMMISSION,

Appellants.

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Appeal from the Circuit Court of Cape Girardeau County  
The Honorable William L. Syler, Presiding

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RESPONDENT'S MOTION FOR REHEARING OR, IN THE ALTERNATIVE,  
APPLICATION FOR TRANSFER

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**Date of Opinion:** May 14, 2013  
**Author:** Hon. Gary M. Gaertner, Jr.  
**Judges Concurring:** Hon. Robert M. Clayton, III  
Hon. Elizabeth B. Hogan

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May 28, 2013

ATTORNEYS FOR RESPONDENT

## RESPONDENT'S MOTION FOR REHEARING

Respondents, for their motion for rehearing, state:

The Panel overlooked or misinterpreted material matters of fact and law, as set forth below.

**1. Whether in reviewing the recommendation submitted by the Director, the Commission is empowered to “determine an appropriate course of action” and impose a condition in a permit.**

The panel's opinion (p. 11) misinterprets material matters of law when it states, “Additionally, under Section 444.773.3, the purpose of having a contested permit hearing is for the Commission to ‘resolve concerns of the public.’ This indicates the Commission will consider the views of the operator as well as those of anyone whose health, safety, or livelihood may be in danger and will determine an appropriate course of action.” In this regard, section 444.773.3 states, *inter alia*, “The land reclamation commission may grant a public hearing to formally resolve concerns of the public.” The panel's opinion suggests that the Commission is empowered to place a condition in a permit as “an appropriate course of action” if needed to “resolve concerns of the public.”

However, the Commission's own regulation – 10 CSR 40-10.080(3)(D) – states that if evidence is shown of an undue impairment to health, safety or livelihood, the Commission may deny the permit application. There is no statute or regulation allowing the Commission to place a condition in the permit to address the concern. Significantly, it is reasonable to believe that in enacting section 444.771, the General Assembly concluded that having a quarry located within 1,000' of an accredited school presents an undue impact

to health, safety or livelihood. Moreover, as of the effective date of section 444.771, the subject permit did not comply with the 1,000 foot buffer requirement.

Consequently, the Commission does not have the power to “determine an appropriate course of action” consisting of imposing a condition on a noncompliant permit application.

**2. Whether the language “pass on,” as used in section 444.767.3, RSMo., confers the power to the Land Reclamation Commission to impose conditions in a permit in connection with a recommendation that has been submitted to it by the Director.**

The panel’s opinion misinterprets material matters of law when it concludes that the phrase “pass on” authorizes the Commission to place conditions in a permit. In this context, the panel opinion states (p. 11) “The plain meaning of ‘pass,’ in this context, is ‘[t]o pronounce or render an opinion, ruling, sentence, or judgment.’ Black’s Law Dictionary 1233 (9th ed. 2009). This definition suggests the Commission is empowered to consider the evidence in front of it and render its decision.” However, as the panel’s opinion previously noted, the application has already been fully considered and reviewed by the Director. *See*, panel opinion at pp. 5-6. (“Before the application reaches the Commission, however, the Director initially receives the application and reviews it. Once the Director deems the application complete, there is a period of public notice and comment, followed by a recommendation by the Director for issuance or denial of the application. Sections 444.772.10; 444.773.1”).

Accordingly, because the procedure established by statute and the Commission’s

own regulations requires the Director to first consider, investigate and review a permit application, and then to submit a recommendation to the Commission, the Commission's ability to "pass on" an application is limited to making a decision on what is before the Commission - the recommendation submitted by the Director.

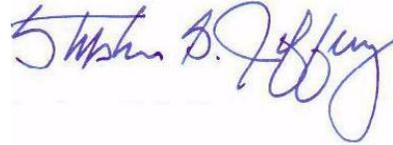
**3. Whether, when considering a recommendation submitted by the Director, the Commission is limited to a decision either to issue or deny the permit.**

The panel's opinion (p. 11) misinterprets material matters of law when it concludes, "Saxony's argument would limit the Commission's ability to balance and resolve concerns to simply approving or denying an application, yet the plain meaning of 'pass on' does not suggest the Commission's role is limited essentially to just checking one of two boxes on a form."

In accordance with its own regulations, the Commission expressly limits the Director to submit a recommendation to the Commission either for the issuance or denial of the permit. *See* 10 CSR 40-10.040(2) ("The recommendation will be to either issue or deny"). This limitation either to issue or deny is entirely consistent with section 444.773.1, RSMo. ("All applications for a permit shall be filed with the director, who shall promptly investigate the application and make a recommendation to the commission within four weeks after the public notice period provided in section 444.772 expires as to whether the permit should be issued or denied"). Significantly, there is no statutory provision or a regulation which provides for a third option for the Commission to issue a permit with conditions.

For the foregoing reasons, the Court should rehear and reconsider this appeal or, in the alternative, transfer the appeal to the Missouri Supreme Court.

JEFFERY LAW GROUP

A handwritten signature in blue ink that reads "Stephen G. Jeffery". The signature is written in a cursive style with a large, stylized "J" at the end.

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ATTORNEYS FOR RESPONDENT

## RESPONDENT'S APPLICATION FOR TRANSFER

### ***Question of General Interest and Importance***

1. Whether the General Assembly granted to the Land Reclamation Commission, an agency domiciled in the Department of Natural Resources, the authority to impose a condition in a permit which has the effect of moving an applicant's mine plan boundary, where the General Assembly expressly did not confer that authority in the Land Reclamation Commission's enabling statutes, but has consistently granted that express authority in all of the other enabling statutes for other regulatory agencies domiciled in the Department of Natural Resources.

### ***Existing Law that Requires Reexamination***

*Saxony Lutheran High School v. Missouri Department of Natural Resources*,  
No. ED99038 (Mo. App. E.D. May 14, 2013).

### ***Opinions of the Appellate Courts of this State That Are Contrary to***

### ***the Opinion of the Court of Appeals Sought to be Reviewed***

None. The question of general interest and importance set forth above is a question of first impression.

## STATEMENT OF FACTS

On November 4, 2010, Strack Excavating, LLC (“Strack”) submitted to the Missouri Land Reclamation Commission (“the Commission”) an application pursuant to Chapter 444, R.S. Mo., for a limestone quarry to be located east of Highway 61 and along County Road 601, just south of Fruitland, Missouri. LF 22, 169, Pet. Ex. B. Saxony Lutheran High School, Inc., an accredited, private Lutheran high school at 2004 Saxony Lane along County Road 601 in Jackson, Missouri (“Saxony”), is located adjacent, and to the south, of the proposed Strack quarry. LF 597-98. Saxony has operated an accredited school there since November, 2004. LF 591, 597-98.

Strack’s permit application identifies the acreage of its proposed quarry as 76 acres in size. LF 169, Pet. Ex. B. The entire southern portion of the Strack property comprises the 76 acre long term mine area, and Strack’s mine plan boundary is 55 feet from Saxony’s northern property boundary. LF 459. Detail Map #1 of the permit application shows the 76 acre long term mine area as well as the mine plan boundary. LF 169, Pet. Ex. B. The outer perimeter of the mine plan boundary is shown as the hashed line labeled “Approximate Limits of Mining” on Strack’s Location Map (LF 18, 169, Pet. Ex. B.

Pursuant to § 444.772.10, R. S. Mo., on November 22, 2010, the Department of Natural Resources (“DNR”) advised Strack of the requirement to advertise and mail notice of its intent to operate a surface mine. LF 170, Res. Ex. 2. Strack subsequently published and mailed notice of its proposal for a 76 acre quarry. LF 170, Res. Ex. 3.

Following the required notice, the Commission conducted a 45 day public comment period on the permit application and received approximately 2,600 letters and comments

opposing the proposed quarry. LF 170, Res. Ex. 4. The Commission asked Strack to conduct a public meeting regarding its permit application, but Strack declined. LF 169, Pet. Ex. C.

On January 11, 2011, Mike Larsen, Staff Director of the Land Reclamation Program, made his “formal recommendation to the commission regarding the issuance or denial of [the] applicant’s permit” as required by section 444.773.3 of the Land Reclamation Act. LF 87, 170, Res. Ex. 4. It was his “recommendation to the commission to issue the new site permit expansion for 76 acres at the Site #2 Quarry in Cape Girardeau County sought after by Strack Excavating L.L.C.” LF 87, 170, Res. Ex. 4. He “recommended approval of the pending mining permit application . . .” LF 87, 170, Res. Ex. 4. The Commission subsequently scheduled a public hearing on the proposed quarry on its January, 2011, agenda. LF 170, Res. Ex. 4.

On January 27, 2011, the Commission conducted the public hearing pursuant to § 444.773, R. S. Mo., 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. LF 169, Pet. Ex. C. “Standing” is defined in § 444.773, R. S. Mo., 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.”

On February 7, 2011, the Commission granted the request of Saxony for a Formal Public Hearing, assigning W.B. Tichenor as Hearing Officer. LF 5. Pursuant to § 444.773.3, R.S. Mo., a formal public hearing on Strack’s mining permit application was

held over four days on July 5, 6, 7 and 12, 2011. LF 172. Throughout the formal hearing, Strack's mine plan boundary was 55' north of Saxony's property. LF 48-49. In the midst of the hearing, on July 11, 2011, the Governor signed House Bill 89, which contained an emergency clause, into law. LF 42, 140. House Bill 89, *inter alia*, enacted § 444.771, R. S. Mo., which provides:

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.

LF 43, 140. Without delay, Saxony asked the Hearing Officer to take official notice of House Bill 89, and moved for accelerated determination on the ground that the newly enacted legislation prevented the Commission from issuing the permit because Strack's mine plan boundary was only 55 feet from Saxony's property. LF 41-45. On July 12, 2011, the Hearing Officer denied Saxony's motion for accelerated determination. LF 48-50. In light of the newly enacted legislation, Saxony rested its case. LF 1026. At that point, Strack moved for a directed verdict (LF 700), which the hearing officer granted on July 18, 2012. LF 60-61.

On August 24, 2011, the Hearing Officer issued his recommended order. LF 121.

The recommended order discusses at length House Bill 89 and, in particular, whether the Commission has the statutory authority to impose a special condition in a mining permit that moves a mine plan boundary. LF 141. The Hearing Officer's order recommended that the Commission approve the Strack permit application with the mine plan boundary to be located one thousand feet from the Saxony - Strack property line. LF 145. This, in the Hearing Officer's estimation, would effectively alter the project from a 76 acre mine to a 53 acre mine. LF 144. As of August 24, 2011, Strack's applied-for mine plan boundary still was located 55 feet from the School. LF 48-49.

On September 22, 2011, the Commission decided Saxony's appeal against Saxony and entered its Final Order, fully adopting the Hearing Officer's recommended order. LF 150-51. The Final Order states:

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 R. S. Mo. LF 151 (*italics in original*).

As of September 22, 2011, Strack had not submitted any documentation to the Commission or taken any other action whatsoever to change the location of its mine plan boundary from that shown in its original application in Figure 1. LF 169, Pet. Ex. B.

## LEGAL BASIS FOR SEEKING TRANSFER

**1. Whether the General Assembly granted to the Land Reclamation Commission, an agency domiciled in the Department of Natural Resources, the authority to impose a condition in a permit which has the effect of moving an applicant's mine plan boundary, where the General Assembly expressly did not confer that authority in the Land Reclamation Commission's enabling statutes, but has consistently granted that express authority in all of the other enabling statutes for other regulatory agencies domiciled in the Department of Natural Resources.**

The Department of Natural Resources (“DNR”), along with its assigned commissions, administers and regulates environmental concerns in Missouri. There are several commissions housed within DNR, including the Missouri Air Conservation Commission, which issues air construction permits in accordance with § 643.075, R. S. Mo., to new sources of air pollutants; the Missouri Clean Water Commission, which issues discharge permits under § 644.051, R. S. Mo., to facilities that discharge contaminants into waters of the State; the Missouri Hazardous Waste Commission, which issues permits under § 260.395, R. S. Mo., to persons who transport hazardous waste in Missouri; and the DNR, which issues permits under § 260.205, R. S. Mo., for the operation of solid waste disposal facilities in Missouri.

With respect to each of the foregoing environmental permits, the enabling statute expressly confers statutory authority on the issuing agency or commission to impose appropriate conditions in the permit. *See* § 260.205.5(7), R. S. Mo., (solid waste) (“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....***”); § 260.395.2, R. S. Mo., (hazardous waste) (“ 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 ...”); § 643.075.2, R. S. Mo., (air) (“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”); and § 644.051.3, R. S. Mo., (water) (“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...”) (emphases supplied).

No provision of the Land Reclamation Act authorizes the Land Reclamation Commission to impose a condition in a permit which has the effect of moving the applicant’s mine plan boundary, or to take any other action to relocate the applicant’s mine plan boundary. If the General Assembly had intended to confer authority on the Land Reclamation Commission to impose a condition in a permit, then it would have expressly done so by using language similar to that used when it expressly conferred such authority on the Missouri Air Conservation Commission, the Missouri Clean Water Commission, the Missouri Hazardous Waste Management Commission and the Missouri Department of Natural Resources.

**2. Whether the language “pass on” as used in section 444.767.3, RSMo., confers the power to the Land Reclamation Commission to impose conditions in a permit in connection with a recommendation that has been submitted to it by the Director.**

The panel’s opinion concludes that the phrase “pass on” authorizes the Commission to place conditions in a permit. In this context, the panel opinion states (p. 11) “The plain meaning of ‘pass,’ in this context, is ‘[t]o pronounce or render an opinion, ruling, sentence, or judgment.’ Black’s Law Dictionary 1233 (9th ed. 2009). This definition suggests the Commission is empowered to consider the evidence in front of it and render its decision.” However, as the panel previously noted, the application has already been fully considered and reviewed by the Director. *See*, panel opinion at pp. 5-6. (“Before the application reaches the Commission, however, the Director initially receives the application and

reviews it. Once the Director deems the application complete, there is a period of public notice and comment, followed by a recommendation by the Director for issuance or denial of the application. Sections 444.772.10; 444.773.1”).

In this context, this Court, as well as the Western District Court of Appeals, have held it is the Director who reviews and investigates permit applications. See *Lincoln County Stone Company v. Koenig*, 21 S.W.3d 142, 145 (Mo. App. E.D. 2000) (“The director shall promptly investigate the application and make a recommendation to the commission as to whether the permit should be issued or denied”); and *Saxony Lutheran High School v. Missouri Land Reclamation Commission*, Western District Court of Appeals, No. WD 74994 (January 18, 2013) (“In Missouri, section 444.773 governs the statutory procedure for the application for, and objections to, the issuance of land reclamation permits. Section 444.773.1 requires that all permit applications be filed with, and investigated by, the Director”).

Accordingly, because the procedure established by statute and the Commission’s own regulations requires the Director to first consider, investigate and review a permit application, and then to submit a recommendation to the Commission, the Commission’s ability to “pass on” an application is limited to making a decision on what is before the Commission - the recommendation submitted by the Director.

**3. Whether, when considering a recommendation submitted by the Director, the Commission is limited to a decision either to issue or deny the permit.**

The panel’s opinion (p. 11) concludes “Saxony’s argument would limit the

Commission's ability to balance and resolve concerns to simply approving or denying an application, yet the plain meaning of 'pass on' does not suggest the Commission's role is limited essentially to just checking one of two boxes on a form."

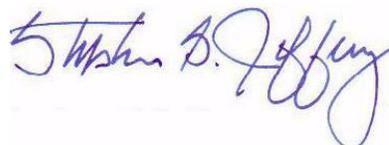
In accordance with its own regulations, the Commission expressly limits the Director to submit a recommendation to the Commission either for the issuance or denial of the permit. *See* 10 CSR 40-10.040(2) ("The recommendation will be to either issue or deny"). This limitation either to issue or deny is entirely consistent with section 444.773.1, RSMo. ("All applications for a permit shall be filed with the director, who shall promptly investigate the application and make a recommendation to the commission within four weeks after the public notice period provided in section 444.772 expires as to whether the permit should be issued or denied"). Significantly, there is no statutory provision for a third option for the Commission to issue a permit with conditions.

Thus, when the Commission "examines and passes on" the Director's recommendation, its decision must be limited to the contents of the recommendation – either issue or deny the permit. This conclusion (that the Commission is limited to an "issue or deny" decision and cannot include conditions to remedy an otherwise deficient application) is reinforced by the Commission's own regulations which provide that if an application is shown to present an undue impact to health, safety or livelihood, the Commission must deny it. *See* 10 CSR 40-10.080(3)(D). Significantly, it is reasonable to conclude that in enacting section 444.771, the General Assembly concluded that a quarry located within 1,000' of an accredited school presents an undue impact to health, safety or livelihood. Consequently, the underlying statutory scheme does not authorize

the Commission to place conditions on permit applications.

For the foregoing reasons, the Court should transfer the appeal to the Missouri Supreme Court or, in the alternative, rehear and reconsider the appeal.

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ATTORNEYS FOR RESPONDENT

#### Certificate of Service

The undersigned certifies that a true copy of the foregoing document was served via electronic mail on the persons set forth below on the 28<sup>th</sup> day of May, 2013, and further certifies that the foregoing document is being electronically filed, and that service will be provided through the electronic filing system upon:

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