

BEFORE THE MISSOURI LAND RECLAMATION COMMISSION

In the matter of:)
)
HEARTLAND MATERIALS, LLC,)
Proposed Limestone Quarry)
Cape Girardeau, Missouri,)
)
SAXONY LUTHERAN HIGH SCHOOL,)
INC. and SAVE OUR CHILDREN'S)
HEALTH, INC.,)
Petitioners,)
)
v.) Permit No. 1072
)
DEPT. OF NATURAL RESOURCES,)
KEVIN MOHOMMADI,)
Respondent.)
)
HEARTLAND MATERIALS, LLC,)
Applicant.)

**RESPONDENT'S SUGGESTIONS IN OPPOSITION TO
MOTION TO APPROVE SETTLEMENT AGREEMENT**

Petitioners and Applicant have filed with the Commission's hearing officer a Joint Motion to Dismiss the Subject Appeal, based upon those parties having executed a settlement agreement between themselves. The motion imbeds a request that the Commission "enter an Order incorporating the Settlement Agreement and dismissing the subject appeal." In the email transmitting the Joint Motion and the Settlement Agreement, counsel for Petitioners asserts:

In the Joint Motion, these parties are requesting the Land Reclamation Commission enter an Order to approve the Settlement Agreement they have entered into and dismiss the pending appeal.

Because it is not clear whether Petitioners and Applicant are asking for a recommendation, Respondent requested an opportunity to respond to the motion, if the hearing officer thinks that she should make a recommendation to the Commission.

For clarity, Respondent notes that the Joint Motion incorrectly casts this matter as an “appeal.” In fact, the Commission has appointed a hearing officer to preside over a hearing that Petitioners requested, pursuant to § 444.773 RSMo, to allow Petitioners opportunity to present competent and substantial scientific evidence that issuance of the permit will unduly impair any person’s health, safety or livelihood. Upon execution of the Settlement Agreement, Petitioners agreed, in ¶ 3, to waive the evidentiary hearing. They also agreed, in ¶ 6, to make no further challenges to the current mining permit and mine plan. Petitioners’ counsel has stated in an email:

The settlement agreement does not amend the permit. It imposes requirements on Heartland over and above what it is otherwise required to do.

Respondent agrees with the general assertion of Petitioners' counsel, and also with ¶ 17 of the Settlement Agreement, that ¶¶ 7-16 of that document impose upon Applicant requirements that go beyond Applicant's environmental permits, the Land Reclamation Act, and the Commission's rules. Respondent has not been invited to be a party to the Settlement Agreement, but if asked, Respondent would decline because the imposed requirements are beyond Respondent's enforcement powers.

Since the Settlement Agreement is not a modification of Permit No. 1072, and is intended to impose upon Applicant extraordinary contractual obligations, the Commission should not issue an order purporting to approve or incorporate it. The Commission has no authority to enforce against a permittee obligations that are not imposed by the Land Reclamation Act, but arise from a third-party contract. The Commission is not a court.

The Commission is also not empowered or required to approve Petitioners' voluntary withdrawal of their hearing request. Just as under Supreme Court Rule 67.02(a) a plaintiff may voluntarily dismiss an action before the introduction of any evidence, without the court's order, Petitioners are free to withdraw their hearing request before evidence is introduced. Respondent is not aware of any law to the contrary, and requiring the Commission to approve a waiver of a hearing that has not occurred and that nobody wants would not make sense.

Finally, the Settlement Agreement expressly reserves Petitioners' right to pursue applications for attorneys' fees and expenses in connection with the litigation that resulted in the hearing Petitioners have waived. Because these claims are asserted against Respondent's budget, as a practical matter, and Respondent is not a party to the Settlement Agreement, Respondent objects to the Commission entering an order that could be construed as approving or conceding Petitioners' applications.

Petitioners may withdraw their hearing request without imposing conditions upon the Commission. The Commission is not legally authorized or obligated to approve the Settlement Agreement to make it enforceable as a contract. For these reasons, Respondent suggests that the Commission deny the motion as presented, without prejudice to Petitioners providing notice that they voluntarily withdraw their hearing request.

Respectfully submitted,

CHRIS KOSTER
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was sent via first class mail, postage prepaid, and sent via electronic mail this 16th day of July, 2013.

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