

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

In the Matter of:)	
)	
AA QUARRY LLC)	
AA Quarry Site # 2462)	
Johnson County, Missouri,)	
New Site Permit Application)	
)	
DAVID EARLS, et al,)	Proceeding Under
)	The Land Reclamation Act
Petitioners Pro Se,)	§§ 444.760 - 444.789, RSMo
)	
v.)	Permit #1094
)	
DEPT. OF NATURAL RESOURCES,)	
KEVIN MOHAMMADI, Staff Director,)	
Land Reclamation Program,)	
Division of Environmental Quality,)	
)	
Respondent,)	
)	
AA QUARRY LLC,)	
)	
Applicant.)	

**APPLICANT'S REPLY IN FURTHER SUPPORT OF MOTION TO EXCLUDE
EVIDENCE OF ISSUES OUTSIDE OF THE LAND RECLAMATION COMMISSION'S
JURISDICTION AND TO DISMISS ANY CLAIMS RELEVANT THERETO**

COMES NOW AA Quarry LLC (“Applicant”) and for its Reply in Further Support of its Motion to Exclude Evidence of Issues Outside of the Land Reclamation Commission’s (“LRC”) Jurisdiction and to Dismiss Any Claims Relative Thereto, states as follows:

The Applicant is not seeking to reverse the LRC’s decision to grant the Petitioners a formal hearing, nor is it seeking to appeal the decision to grant such a hearing. Rather, the Applicant seeks to clarify—and properly limit—the scope of the formal hearing to issues that the LRC has authority to address and regulate in accordance with statutes and published regulations. The question whether the LRC has jurisdiction to consider *all* issues raised by Petitioners at a

formal hearing is different from the question whether the Petitioners are entitled generally to a formal hearing in the first instance. There is simply no support for the proposition that once a petitioner has established standing and secured a hearing that he or she can raise any perceived impairment to health, safety, and livelihood regardless of whether the issue falls under DNR's jurisdiction. Therefore, although the Applicant does dispute the Petitioners' alleged potential impairments to health, safety, and livelihood; even if such impairments existed, the alleged impairments relating to roads, blasting, noise, vibration, property values and general aesthetics are not within the expressed jurisdiction of the DNR as so expressed by the DNR. The important issue in Applicant's Motion to Exclude is the distinction between standing and jurisdiction.

The Petitioners agree that 10 CSR 40-10.080 sets forth restrictions for obtaining an evidentiary hearing. Yet they claim now that because they have secured a formal hearing, these restrictions somehow disappear and they can present evidence on any chosen topic for the LRC's consideration in reviewing Applicant's permit. There is no support for the Petitioners' claim that the LRC intended to grant a hearing on all issues conceived by the Petitioners. There is no evidence that LRC, in granting the Petitioners' request for a formal hearing, affirmatively determined that the Petitioners could present evidence regarding issues over which the DNR does not have authority to regulate. Exhibit A to Petitioners' Suggestions in Opposition to Applicant's Motion does not shed further light on the situation. While Applicant disagrees that the LRC's silence on the specific issues on which the Petitioners have standing can be characterized as a "readily apparent" conclusion on standing, a determination on standing is not the coextensive with a determination of jurisdiction. Indeed, the LRC could conclude that the Petitioners satisfied the standing requirement for a public hearing on some of the issues raised at

the meeting without concluding that the LRC has jurisdiction over all issues later raised in their Petition.

Significantly, the Petitioners do not provide any argument suggesting that the DNR can exercise jurisdiction over and regulate roads, blasting, property values, or noise, and do not cite any authorities that support such a conclusion. They have not cited any authority for their claim that the LRC can consider evidence related to issues which are outside of the issues regulated by the DNR. No Missouri case analyzes 10 CSR 40-10.080 or analyzes whether evidence and issues are properly before the LRC. All of the cases cited by Petitioners are silent on these issues and, therefore, not persuasive. *Stockman, et al. v. Magruder Limestone Co.*, LRC No. 11-0903 LRC, Recommended Decision (June 27, 2013); *Lake Ozark v. Missouri Department of Natural Resources*, 326 S.W. 2d 38 (Mo. App. W.D. 2010). The absence of analysis of jurisdiction in these cases does not justify forgoing such analysis in this case.

Petitioners incorrectly seek to equate “standing” with “jurisdiction.” “Standing” means that the petitioners are merely required to demonstrate some personal interest at stake in the dispute, even though the interest might be attenuated, slight or remote. *Continental Coal v. MO Land Reclamation*, 150 S.W. 3d 371, 378 (Mo. App. W.D. 2004). Petitioners’ claim to the LRC was that they would be adversely affected by the operation of the quarry, and on those grounds they were allowed to have a formal hearing. However, identifying a potential grievance regarding the quarry operation that might adversely affect the Petitioners’ personal interests is only part of the inquiry.

Jurisdiction, on the other hand, is the tribunal’s authority to hear and determine a particular kind of claim. When a tribunal is engaged in the exercise of a special statutory power, the tribunal is confined strictly to the authority given to it by statute. *Missouri Soybean Ass’n v.*

Missouri Clean Water Com'n, 102 S.W. 3d 10 (Mo. 2003). Whether a state agency possess subject matter jurisdiction is a question of law controlled by statute. *Missouri Coalition for the Environment v. Herrmann*, 142 S.W. 3d 700 (Mo. 2004). In reviewing a contested administrative case, a Missouri appellate court will uphold the agency's decision in all but six situations, one of which is that the agency's decision is "in excess of the statutory authority or jurisdiction of the agency." *Saxony Lutheran High School, Inc. v. Missouri Dept. of Natural Resources*, 404 S.W. 3d 902, 905 (Mo. App. E.D. 2013). The Missouri Supreme Court has recognized that "[a] provision conferring standing does not confer subject matter jurisdiction when the latter does not otherwise exist." *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 13 n. 8 (Mo. 1981); *see also*, *Fort Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918, 921 (Mo. 1995). Thus, the Petitioners' assertion that a determination of standing under 10 CSR 40-10.080.2(B) is the equivalent of a jurisdictional determination is simply wrong.

State agency jurisdiction was considered in *Herrmann*. Evaluating whether the Clean Water Commission had jurisdiction to hear an appeal by the Missouri Coalition for the Environment regarding the modification of a wastewater discharge permit, the Missouri Supreme Court acknowledged that the Clean Water Commission fell under the DNR pursuant to R.S.Mo. § 640.010, and cited 10 CSR 20-6.020 for the jurisdiction of the Clean Water Commission. 142 S.W. 3d 700. Regulation 10 CSR 20-6.020 sets forth standing and jurisdiction for the Clean Water Commission under the DNR just like 10 CSR 40-10.080 sets forth standing and jurisdiction for the LRC.

With respect to the Clean Water Act, pursuant to 10 CSR 20-6.020(1)(B) and 10 CSR 20-6.020(4)(A), interested persons may submit their views on requested construction and operating permits, and request a public hearing. The DNR is to hold a hearing if there is "significant

technical merit and concern related to the responsibilities of the Missouri Clean Water Law.” 10 CSR 20-6.020(4)(A)(1). Regulation 10 CSR 20-6.020(1)(H) specifically emphasizes that “[DNR] does not have jurisdiction to address questions of zoning, location, property values or other nonwater quality related items.”

Like the regulations applicable to the Clean Water Act, 10 CSR 40-10.080 provides that a person whose health, safety, or livelihood will be unduly impacted by the issuance of a land reclamation permit may seek a formal public hearing. In order to obtain a hearing, the person must show that the “impact to the petitioner’s health, safety, 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). As the Clean Water Commission regulations cited above acknowledged, the DNR does not have jurisdiction to address zoning, location, and property values. The regulation cannot confer jurisdiction on the LRC where none existed under Missouri statute. *Buchanan*, 615 S.W.2d at 13.

Regulation 10 CSR 40-10.080(3)(D) further instructs that the LRC can deny a land reclamation permit if it finds competent and substantial scientific evidence that a petitioner’s “health, safety or livelihood will be unduly impaired by impacts from activities *that the recommended mining permit authorizes*.” The permit at issue simply authorizes the Applicant to conduct surface mining on its property. The permit does not specify a required method for performing any of the activities permitted, and the Applicant could conduct surface mining in the manner it chooses, subject to applicable state laws and regulations. The permit does not authorize or regulate the transportation of the mined material. Accordingly, activities that are not specifically authorized by the permit are likewise excluded from being bases for the LRC to deny a permit.

Indeed, the interpretation of 10 CSR 40-10.080 proffered by the Petitioners is illogical because under their reading, the restrictions of 10 CSR 40-10.080 serve no purpose. There is no reason to require Petitioners to establish standing under 10 CSR 40-10.080 by identifying only “good faith evidence of how their health, safety, or livelihood will be unduly impaired” the impact to which “must be within the authority of any environmental law or regulation administered by the Missouri Department of Natural Resources;” but then turn around and allow the DNR to take evidence and base its decision on issues outside of these categories—which are, by definition, categories that the DNR explicitly *cannot* and does not regulate. The Petitioners essentially seek to render 10 CSR 40-10.080 as an arbitrary and meaningless gatekeeper.

The Petitioners’ proposed interpretation of 10 CSR 40-10.080 would result in similarly situated parties with similar evidence receiving different treatment. A petitioner who alleged one issue within the authority of any environmental law or regulation administered by the DNR (i.e. air, water and land reclamation) and also alleged numerous issues related to issues *not* within the authority of the DNR (i.e. roads, blasting, noise, vibration, property values and general aesthetics), would receive a formal hearing, while a petitioner who only alleged issues outside the authority of the DNR would not. The petitioner in the first scenario would be able to present evidence on roads, blasting, and noise, while the second petitioner would not. If non-DNR issues were to be contemplated to be taken into consideration when evaluating a permit application, they would be taken into consideration in all permit applications and not just those where the petitioners met the standing requirements in 10 CSR 40-10.080, and would be considered at all stages of the permit process.

If an issue cannot be considered in determining whether a petitioner has standing to have a formal hearing, it defies logic that the issue could later be considered when making a decision

about the permit at the formal hearing. Governor Jay Nixon and DNR Director Sara Parker Pauley make this clear in the description of the permitting process on the LRC portion of the DNR website: “Routinely many of the concerns brought to the LRC by local citizens are about issues outside of the regulatory authority provided to the program through The Land Reclamation Act. These issues include concerns about blasting, safety on public roads and the mine’s effect property values...While constraints in the laws have prohibited the commission from denying permits, this regular contact with the public has brought an acute awareness to the commission about what is most troubling to the citizens.” <http://www.dnr.mo.gov/env/lrp/homeim.htm>, retrieved 7/1/2013. This explanation from the Governor and Director further emphasize that the LRC and the DNR do not have jurisdiction to consider issues such as roads, blasting, noise, vibration, property values and general aesthetics when making determinations regarding land reclamation permits. A meeting was held for the public to express these concerns, but concerns that are not under the DNR’s jurisdiction are not proper evidence for the formal hearing.

The Petitioners’ proposed interpretation erases all circumstances in which the language of 10 CSR 40-10.080(2)(B) has meaning. When the regulation says the impact to the petitioner must be “within the authority of any environmental law or regulation administered by the Missouri Department of Natural Resources,” what does that mean under the Petitioners’ proposed interpretation? What *can’t* be considered by the LRC, if anything? Issues such as roads, blasting, noise, vibration, property values and general aesthetics are not addressed in the permit application, and are not considered by the LRC when it makes its initial recommendation whether to issue the permit. That is, they are completely irrelevant to the issuance of the permit.

These issues cannot be later added to the list of permit requirements simply because the issues are raised by Petitioners in their attempt to secure a formal hearing.

Moreover, the DNR and the LRC, exist to protect the environment, and these agencies are staffed with the experts qualified to evaluate and regulate environmental issues enumerated in Missouri statutes and regulations. Requiring the DNR and LRC to weigh evidence on issues beyond their environmental expertise, such as real estate valuation or highway traffic, and retain professionals to evaluate and make recommendations on the issues before approving a land reclamation permit is not in accord with the Land Reclamation Act, the statutes applicable to the DNR, or to the organization of these agencies.

Finally, the Petitioners' proposed interpretation of the DNR's authority and 10 CSR 40-10.080 is in direct contradiction to the only case that squarely addresses this issue: *Curdt v. Missouri Clean Water Comm'n*, 586 S.W.2d 58 (Mo. App. 1979). The Missouri Court of Appeals expressly held that the Clean Water Commission properly declined to consider issues raised by the petitioners which were outside the Clean Water Commission's agency authority. The court in *Curdt* also dismissed the reasoning behind the Petitioners' claim that they have no redress beyond the formal hearing, noting that "the [petitioners'] existing rights are not abridged by the issuance of a permit," and that the permit does not absolve the applicant from any liability. Likewise, Petitioners' overbroad claim that the LRC has a duty and the authority to protect the public's health and safety through any means possible, regardless of whether it involves environmental laws clearly contradicts the authority given to it in Missouri statutes and clearly stated in the regulations. The Petitioners' requests that the LRC expand its purpose beyond its logical boundaries of land reclamation and environmental protection in the name of "broad and liberal" construction should be denied.

Thus, while the LRC may have concluded that the Petitioners have standing—a personal interest at stake in the dispute—such a determination does not vest the LRC with jurisdiction to consider and decide issues related to roads, blasting, noise, vibration, property values and general aesthetics in determining whether the Applicant’s land reclamation permit will be issued. The Petitioners are attempting to erase the jurisdictional component to the hearing before the LRC. In so doing, they are ignoring the precedent in *Curdt*, and are essentially writing all restrictive language out of the statutes and regulations. The Missouri statutes vesting the DNR and LRC authority to issue permits for land reclamation, and the regulations governing such authority clearly exist to keep the permitting process within the DNR’s and LRC’s expertise. Accordingly, Petitioners’ evidence at the formal hearing must be limited to impacts to health, safety, or livelihood within the authority of the environmental laws and regulations administered by the DNR.

CONCLUSION

The Petitioners have not shown that the LRC has jurisdiction over issues outside of the authority of the DNR, and have not cited any support for their request that the LRC hear such evidence. Accordingly, evidence of roads, blasting, noise, vibration, property values and general aesthetics cannot be considered by the Land Reclamation Commission in reviewing Applicant’s application for a permit, and such evidence should be excluded from the formal hearing. If such evidence is not excluded from the formal hearing, it must not be considered by the LRC in determining whether to grant AA Quarry LLC’s application for a permit.

Respectfully submitted,

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Certification of Service

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