

**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,	)	
<i>Petitioners Pro Se,</i>	)	Proceeding Under
	)	The Land Reclamation Act
v.	)	§§ 444.760 - 444.789, RSMo
	)	
DEPT. OF NATURAL RESOURCES,	)	Permit #1094
KEVIN MOHAMMADI, Staff Director,	)	
Land Reclamation Program,	)	
Division of Environmental Quality,	)	
<i>Respondent,</i>	)	
	)	
AA QUARRY LLC,	)	
<i>Applicant.</i>	)	

**APPLICANT'S REPLY TO PETITIONERS' POST-TRIAL BRIEF**

**I. Response to Petitioners' Burden of Proof Argument**

Petitioners misinterpret §444.773.4 R.S.Mo. concerning Petitioners' burden of proof. §444.773.3 R.S.Mo. states that if the Director recommends issuance of a permit, it is to be issued except in those instances where a petitioner's health, safety and livelihood will be unduly impaired by issuance of the permit.

§444.773.4 first addresses the issue of direct impairment of the petitioner. It states that where the Commission finds, based upon competent and substantial scientific evidence on the record, that an interested party's (petitioner's) health, safety and livelihood will be unduly impaired by issuance of the permit, the Commission may deny it. Obviously, there are any

number of ways that a petitioner might choose to prove that direct impairment to the petitioner's health, safety and livelihood.

Section 4 goes on to provide a petitioner a second method to satisfy its obligations under the statute. This method, more or less, relates to an indirect impact to the public at large and possibly the environment. Section 4 further goes on to say that where the petitioner can demonstrate by competent and substantial scientific evidence past acts of noncompliance by the applicant at other locations in Missouri which suggest a likelihood of noncompliance as to the current application, that the permit may be denied. However, limits are placed on this indirect impairment or alternative means of proof. For example, the statute says that past acts standing alone cannot meet the test. Such past acts must indicate the probability of future noncompliance and future noncompliance cannot be found unless (a) the noncompliance is caused, or has the potential to cause, risk of harm to health or environment, (b) has caused, or has potential to cause, pollution, (c) was knowingly committed or (d) is other than "minor" as defined by the United States Environmental Protection Agency.

In the event that the applicant has no history of noncompliance at other locations in Missouri, the statute also permits a petitioner to satisfy the "noncompliance" alternative by a second method. The petitioner can demonstrate "present acts" of noncompliance or that there is a reasonable likelihood the applicant will not comply in the future. The statute goes on to state that this present-acts alternative ". . . will satisfy the noncompliance requirement of this subsection."

Therefore, it is clear that both past acts of noncompliance and present acts of noncompliance can be demonstrated in order to satisfy the indirect noncompliance alternative to the direct undue impairment alternative in the statute.

However, like the past noncompliance alternative, the present and future noncompliance alternative has limits. There must be

- (1) Multiple noncompliances, not a single noncompliance; and
- (2) The noncompliance must be of a law administered by the Missouri DNR; and
- (3) At a single facility; and
- (4) Result in harm to the environment; or
- (5) Impair the health, safety or livelihood of a person outside of the facility (apparently not necessarily the petitioner's).

Therefore, the statute is clear in setting forth two alternative methods of proof regarding permit challenges:

- (1) Personal, direct, undue impairment to the Petitioners' health, safety and livelihood by Applicant's quarry operation; or
- (2) Possibly indirect impairment to the public at large by non-compliance with laws of Missouri broken down into two parts
  - (a) Past acts of noncompliance at other facilities indicating potential for future acts of noncompliance; or
  - (b) Present acts of noncompliance or facts illustrating potential future noncompliance.

Both the statute §444.773.3 and .4, R.S.Mo., and the regulation 10 C.S.R. 40-10.080(3) set out these two alternatives, both of which require proof by competent and substantial scientific evidence as to the Petitioners' burden of going forward or burden of production.

The Petitioners would have the Hearing Officer break the requirement down into three separate alternatives rather than two; i.e., (1) direct impairment, (2) past noncompliances, and (3) present noncompliances, so that the Petitioners might argue that the present noncompliance requirement does not require proof by competent and substantial scientific evidence. Petitioners

make that argument predicated on the theory that there is no predicate statement about the quality of proof prior to the statute discussing present noncompliances.

This argument runs directly contrary to the language of the statute that specifically states in Subsection (4) (§444.773.4) that present acts ". . . will satisfy the noncompliance requirement of this subsection." The only other noncompliance requirement in the subsection is the past acts segment. Therefore, the language can mean nothing other than present acts of noncompliance will in fact satisfy the past acts of noncompliance alternative, which requires proof by competent and substantial scientific evidence.

There is no legal support to the argument that the legislature intended Petitioners to prove impairment to their health, safety and livelihood and past acts of noncompliance by competent and substantial scientific evidence, then give Petitioners a pass or a bye on the burden of proof for present acts of noncompliance where the latter is simply intended to satisfy the former (if demonstrated). The argument is illogical and contrary to the entire intent of the section.

As further support for Applicant's position, the present acts requirement also requires a demonstration that the ". . . noncompliance resulted in harm to the environment or impaired the health, safety or livelihood of a person outside of the facility." Again, it makes no sense that this could be proven but not by virtue of the burden of competent and substantial scientific evidence. In *Lake Ozark/Osage Beach Joint Sewer Board v. The Missouri Department of Natural Resources, the Land Reclamation Commission and Magruder Limestone Company, Inc.*, 326 S.W.3d 38 (Mo.App. W.D. 2010), the court reviewed the burden of proof issue and clearly indicated the burden is broken down into two categories, the burden of production and the burden of persuasion. It indicated that the initial burden of production is upon Petitioners to produce evidence sufficient to have the issue decided by the fact finder and to meet that burden,

Petitioners must present competent and substantial scientific evidence of impact. It is only at that point that the burden shifts to the Applicant to present competent and substantial scientific evidence that Petitioners (health and safety) ". . . will not be unduly impaired by the impact from the permitted activity." *Id.* at p. 43, 44.

Following Petitioners' argument then, that Petitioners need not prove present acts of noncompliance or harm or impairment to the health, safety or livelihood of persons outside of the facility by competent and substantial scientific evidence, then is Applicant excused from satisfying its burden of persuasion by bringing forth competent and substantial scientific evidence? If so, then Petitioners have set a portion of §444.773.4, R.S.Mo., outside of the statute and established an entirely new and different proof scheme contrary to the statute, the regulation, and Missouri Court of Appeals Western District statements in *Lake Ozark v. Missouri DNR*. Rest assured that the Petitioners by their argument only intend to excuse Petitioners from their burden of proof in connection with their burden of production and do not intend to excuse Applicant from Applicant's burden of proof in connection with Applicant's burden of persuasion.

Furthermore, tying the past acts and present acts alternative together is *Lincoln County Stone Co., Inc. v. Koenig*, 21 S.W.3d 142 (Mo.App. E.D. 2000), stating that statute should be considered in such a way as to avoid unreasonable, oppressive or absurd results. *Id.* at 148. The court there looked at the issue of whether both past and present acts of noncompliance should be the subject of the Commission's consideration for the effect upon health, safety and livelihood and permit issuance. The court found the clear intent of the legislature to look at both in order to avoid an absurd interpretation result. Although the burden of proof itself was not the subject of direct discussion by the court, the court did make it clear that the two were inextricably

intertwined in the statute and to separate them as if they were totally different made for an incorrect interpretation.

"If one were to interpret §444.773.3 to permit consideration of past acts of noncompliance as being dispositive . . . a permit seeker could never put to rest past noncompliance. . . . Conversely, if [the] section . . . were interpreted only to pertain to current noncompliance, a permit seeker could preclude the hearing petitioner from bringing suit by simply complying with applicable laws and regulations at the time the hearing petitioner requested the hearing." *Id* at 147-148.

In a footnote on page 148 the court also noted:

"A hearing petitioner must show what the language of the statute requires, namely a noncompliance with applicable laws and regulations by the permit seeker. . . . Any remedy to prevent the operation of a mine short of noncompliance is outside the purview of the Act."

The court then went on to make it clear that the Hearing Officer and the Commission can look at both past and present noncompliance to satisfy the statute and as a means to satisfy the noncompliance requirement of the statute. Again, the noncompliance requirement is in effect a single requirement that may be demonstrated by both present and past acts of noncompliance.

As to the burden of proof stated in the statute, there is no indication on the part of the legislature to adopt two different burdens of proof for essentially what is a single ground to deny a permit. Since both past and present acts of noncompliance can be used to satisfy the noncompliance requirement of the statute, it is abundantly clear that both must be demonstrated by competent and substantial scientific evidence.

## **II. Alleged Noncompliances**

As to the alleged noncompliances themselves, Petitioners continue to rehash previously made arguments, interpretations and claims of lack of DNR oversight or improper interpretation of statutes and regulations by DNR personnel. Petitioners point to no evidence in the record which demonstrates an act of present or past noncompliance within laws and regulations

administered by the Missouri DNR except for the single item in September of 2013 involving the oil spot and some erosion on the downstream side of the large dam. Both were immediately remedied and neither resulted in any harm to the environment or impaired the health, safety or livelihood of any person outside of the facility regardless of whether the applicable burden of proof is competent and substantial scientific evidence or merely a preponderance of the evidence.

Petitioners have wholly failed in any burden of proof on all issues required by the statutes and regulations and, therefore, Petitioners' request for relief should be denied.

Respectfully submitted,

**BROWN & RUPRECHT, P.C.**

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Certification of Service

I hereby certify a copy of foregoing has been sent via email this 20th day of October, 2014, to:

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