

**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 AA QUARRY, LLC'S POST-HEARING BRIEF

I. THE CLAIMS

This action is brought by Petitioners under the Missouri Land Reclamation Act.¹ Petitioners seek both a finding by the Hearing Officer and a recommendation to the Land Reclamation Commission that the Applicant's Permit Application for Industrial Mineral Mines, filed with the Land Reclamation Program under 10 C.S.R. 40-10.020(1), should be denied by the Commission.

The Applicant² has requested issuance of an Industrial Mines Permit for AA Quarry, LLC regarding a tract of land located in Johnson County, Missouri. *Applicant's Exhibit 8.* The

¹ §444.760 R.S.Mo. Rights and Duties of Mine Owners

² In this brief Applicant may refer to one or more of the several Radmacher related entities as "Applicant", including Robert Radmacher, Thomas Radmacher, Radmacher Brothers Construction Company, Inc., Radmacher Land and Equipment Company and the true applicant for the permit, AA Quarry, LLC.

Applicant intends to quarry limestone rock for commercial purposes as defined in the Land Reclamation Act within a 214-acre tract located within the larger 520-acre farm property. The quarry site location or mine plan boundary is set back 100 feet from the farm property lines or boundaries. *Applicant's Exhibit 8.*

The Applicant's forms and submissions to the Land Reclamation Program were deemed complete by the program staff on December 11, 2012. *Applicant's Exhibit 9.* The required public notices were sent by the Applicant. *Applicant's Exhibit 9-A, 50.* A public meeting was conducted by the Land Reclamation Program on March 7, 2013. *Applicant's Exhibit 18.* A written staff recommendation to the Commission for issuance of the permit was made to the Commission by the Land Reclamation Program Director on April 2, 2013. The recommendation included the Land Reclamation Program's consideration of all the comments made by the public at the public hearing. *Applicant's Exhibit 18.*

Under §444.773 R.S.Mo. and 10 C.S.R. 40-10.080(2) a permit is to be issued to an applicant by the Commission after the Land Reclamation Program Director recommends issuance; except in those instances where a member of the public requests a public hearing and such request is received by the Land Reclamation Program prior to the Director's recommendation. The public hearing may be granted to anyone who can establish standing to claim that his health, safety or livelihood may be unduly impaired by issuance of the permit. It was the obligation of the Petitioners to present "*good faith evidence*" to the Commission as to how their health, safety and livelihood would be unduly impaired and that any such impact would be within the authority of the environmental laws or regulations administered by the Missouri Department of Natural Resources.

Petitioners in this case made such a request to the Land Reclamation Commission and appeared before the Commission on May 23, 2013. The Commission granted a formal public hearing in an effort to resolve the concerns of the public raised by Petitioners.

II. PETITIONERS' HEARING BURDEN

The Petitioners' burden in the formal public hearing is a standard different from that of "good faith evidence." *Saxony Lutheran High School Inc. v. Heartland Materials, LLC, et al.*, 392 S.W.3d 52 (Mo.App. 2013). The regulations, 10 C.S.R. 40-10.080(3), place upon Petitioners the burden to establish one or more of several issues of fact alleged. All alleged issues must be established by the Petitioners at the hearing through presentation of competent and substantial scientific evidence. *See Lake Ozark, et al. v. Magruder Limestone, Inc.*, 326 S.W.3d 38, 43 [4] (Mo.App. 2010), stating that Petitioners must introduce enough evidence on an issue to have the issue decided by the factfinder. For example, the Petitioners are obligated to adduce evidence to demonstrate issues of fact as to:

- A. The impact, if any, of the suggested permitted activity on Petitioners' health, safety or livelihood, 10 C.F.R. 40-10.080(3)(B), or
- B. That during the five year period preceding the date of the permit application, the Applicant demonstrated a pattern of noncompliances with laws and regulations administered by the DNR at other locations in Missouri that suggest a reasonable likelihood of future acts of noncompliance and where that noncompliance has a potential to cause a risk to human health or to the environment or has caused or has the potential to cause pollution or was knowingly committed, 10 C.F.R. 40-10.080(3)(E), or
- C. That the Applicant engaged in either present acts of noncompliance or a reasonable likelihood that the Applicant or the operations would be in noncompliance in the future.

The "present acts" regulation above, however, is limited in that such acts will satisfy the noncompliance requirements of 10 C.S.R. 40-10.080(3) only if three additional issues of fact are established:

- A. There were multiple acts of noncompliance, not a single act;
- B. The multiple acts of noncompliance relate to environmental laws administered by the Missouri Department of Natural Resources; and
- C. The noncompliances resulted in harm to the environment or impaired the health, safety or livelihood of persons outside of the facility. 10 C.S.R. 40-10.080(F).

III. THE HEARING

A pre-hearing motion was filed by Applicant to limit the pleaded issues for the evidentiary hearing. A ruling by the Hearing Officer confirmed the jurisdiction of the Commission (and, therefore, the Hearing Officer) to consider only issues related to the environmental laws and regulations administered by the Department of Natural Resources. The case then proceeded to evidentiary hearing on August 11 through August 14, 2014, then again on September 23, 2014.

Prior to commencing presentation of evidence, counsel for Petitioners stated on the record that Petitioners would not attempt to establish issues of fact regarding: (a) the impact of Applicant's permitted activities upon Petitioners' health, safety and livelihood (10 C.S.R. 40-10.080(3)(A)); or (b) a pattern of past acts of noncompliance by Petitioners at other locations (10 C.S.R. 40-10.080(3)(E) (*Tr. 19, 20*)). Instead, Petitioners stated their intent to limit the proof to alleged multiple acts of present noncompliance (and/or future acts of noncompliance) within the laws administered by the Department of Natural Resources and where such noncompliances resulted in harm to the environment or impaired the health and safety or livelihood of persons outside the facility. *Lincoln County Stone Co., Inc. v. Koenig*, 21 S.W.3d 142 (Mo.App. 2000).

IV. SCOPE OF ALLEGED NONCOMPLIANCES

In the pre-hearing written submissions, in the opening statements at the hearing, and in the evidence presented, Petitioners stated their intent to address eleven different alleged issues of

fact supporting claims of noncompliances by Applicant. The eleven issues can be summarized and categorized as follows:

A. ISSUES RELATIVE TO LAND RECLAMATION LAWS AND REGULATIONS

1. Applicant quarried limestone without first obtaining a permit from the Land Reclamation Commission as required by the Land Reclamation Act and Regulations. §444.772, R.S.Mo. and 10 C.S.R. 40-10.010.

2. Applicant failed to mail certified letters containing a notice of intent to operate a surface mine as required by §444.772(10), R.S.Mo. and 10 C.S.R. 40-10.020(2)(I) and particularly 40-10.020(2)(I)(1) to the last known addresses of all record landowners of contiguous property or real property located adjacent to the proposed mine plan area.

B. ISSUES RELATIVE TO CLEAN WATER LAWS AND REGULATIONS

1. Applicant disturbed land on the farm without first obtaining a Missouri State Operating Permit (or Land Disturbance Permit) from the Clean Water Commission as required by the Missouri Clean Water Act and Regulations. §644.051.1, R.S.Mo. and 10 C.S.R. 20-6.200.

2. Applicant made a misrepresentation to the Clean Water Commission in the Applicant's e-Permitted Certification and Signature document regarding MSOP 1538 by stating that no part of the area to be disturbed by Applicant under the permit was located in the jurisdictional waters of the United States. *Applicant's Exhibit 3.*

3. Applicant failed to post a copy of the "Public Notification Sign" required by MSOP 1538 in accordance with MSOP procedures set forth at page 9, ¶13 "at the main entrance of the site", "visible from the public road that provides access to the site's main entrance." *Applicant's Exhibit 3.*

4. Applicant failed to prepare a proper Storm Water Pollution Prevention Plan (SWPPP) (*Applicant's Exhibit 4*) in accordance with Applicant's Exhibit 3, the MSOP, at page 3, ¶¶(C), (2) and (3).

5. Applicant failed to continuously maintain the SWPPP on site in accordance with Applicant's Exhibit 3, the MSOP, at page 3, ¶¶(c)(2) and at page 10, ¶F.

6. Applicant failed to prepare and maintain complete and accurate "site inspection records" as required by MSOP 1538 (*Applicant's Exhibit 3*) and MSOP 2837 (*Applicant's Exhibit 16*, Permit body, page 9, ¶(c)(10) and (f).

7. Applicant failed to design, install and maintain appropriate storm water control measures or best management practices (BMP's) as set forth in *Applicant's Exhibit 3*, MSOP 1538 at page 3 ¶¶(c)(1); and at pages 5 and 6 ¶¶3(e)(f)(g)(i) and (j).

C. ISSUE RELATED TO ALLEGED VIOLATION OF §404 OF THE FEDERAL CLEAN WATER ACT, 33 U.S.C. §1344.

1. Applicant failed to provide the Corps of Engineers District Engineer a "Preconstruction Notification" before beginning regulated activities including the placement of fill into the waters of the United States. *Applicant's Exhibit 19*, Corps of Engineers Notice of Permit Noncompliance.

D. ISSUE RELATED TO ALLEGED VIOLATION OF CHAPTER 236, R.S.MO. "DAMS, MILLS AND ELECTRIC POWER".

1. Applicant constructed and/or modified a dam on site without first obtaining a construction permit from the Missouri Department of Natural Resources and Safety Council in accordance with §236.435(1), R.S.Mo. and/or 10 C.S.R. 22-2.010(1).

V. LAND RECLAMATION COMMISSION JURISDICTION REGARDING ISSUES IV(B), (C) AND (D) ABOVE

The first issue that cuts across multiple allegations of the Petitioners is that of the jurisdiction or powers of the Land Reclamation Commission relative to the allegations contained in Sections IV(B)(C) and (D) above.

The Land Reclamation Act defines the powers and jurisdiction of the Land Reclamation Commission to regulate "surface mining" in the state. §444.530, et seq; and 10 C.S.R. 40-1.010(1). Among the various powers given to the Commission are both rule-making and the adoption of regulations designed specifically to administer the Land Reclamation Act. Chapter 444.530(1)(1). In addition, the Commission is given enforcement powers regarding the Commission's rules and regulations. *See*, for example, §444.530(1)(1) wherein the Commission may:

"Adopt and promulgate rules and regulations . . . regarding the administration of §§444.500 to 444.789."

And §444.530(1)(4) providing that the Commission will have the power to:

"Make investigations and inspections which are necessary to ensure compliance with provisions of §§444.500 to 444.789."

By statute, the Land Reclamation Commission's enforcement powers are limited to the enforcement of the provisions of the Land Reclamation Act and/or the Commission Rules and Regulations relative to surface mining. The Commission has no statutory authority over other rules or regulations promulgated under other acts.³

For example, the Land Reclamation Commission has no power to promulgate rules and regulations or to investigate, inspect and enforce noncompliance issues relative to the Missouri Clean Water Laws (§644.026 R.S.Mo.) which are within the powers of the Clean Water Commission (10 C.S.R. 20-1.010(2)). The same is true for the Federal Clean Water Act (33 U.S.C. §1251, et seq.) which is under the jurisdiction of a federal agency. Dam Safety is controlled by the Dam and Reservoir Safety Council §236.410, R.S.Mo; 10 C.S.R. 22-1.010, et seq.

Applicant previously briefed for the Hearing Officer on September 30, 2013, a similar issue regarding Petitioner's claims relative to state highways, controlled by the Missouri State Highway Commission (Chapters 226 through 238, R.S.Mo.) and blasting controlled by the State Blasting Safety Board. The Hearing Officer ruled on these issues and found that the Land Reclamation Commission had no powers (or jurisdiction) over those matters which were controlled by other statutes and other commissions.

Applicant adopts and incorporates by reference herein Applicant's legal arguments made in the brief in support of that motion. Applicant also renews that motion relative to jurisdiction in this post-hearing brief and requests the Hearing Officer to rule against Petitioners as to all claims described in §§IV (B), (C) and (D) to the extent that the Petitioners request this Hearing

³ *Curdt v. Missouri Clean Water Commission*, 586 S.W.2d 58 (Mo.App. 1979), the Commission has only those powers which the legislature has expressly or impliedly conferred on it.

Officer and the Land Reclamation Commission to find noncompliances where no findings of noncompliance were made by the Clean Water Commission, or the Dam and Reservoir Safety Council. To the extent the Corps of Engineers cited Petitioner for a noncompliance under the Federal Clean Water laws, and the Missouri Clean Water Commission made a single finding of a noncompliance with the State Clean Water laws, it is requested that the Hearing Officer make a separate finding relative to those two issues as more specifically set forth in this brief.

VI. FACT ISSUE OF HARM COMMON TO ALL ASSERTED ISSUES OF FACT

As noted above, §10 C.S.R. 40-10.080(F), relative to acts of noncompliance, requires in the first instance that Petitioner establish all issues of fact by competent and substantial scientific evidence. The second critical issue that cuts across all of Petitioners' alleged issues of fact is that such acts must have ". . . resulted in harm to the environment or impaired the health, safety or livelihood of persons outside of the facility." There must be some damage to something or somebody demonstrated.

Petitioners have failed to adduce any evidence at the hearing, let alone competent and substantial scientific evidence on the record, of impact or harm to the environment or to any person's health, safety or livelihood resulting from such alleged noncompliance issues or that such impact or harm is likely in the future. For example:

A. ALLEGED CLEAN WATER LAW IMPACT

Mr. Snyder, one of the Petitioners, testified regarding alleged land disturbance on the farm and that he saw "white material" or "a white substance" in the ephemeral stream beds of the farm upstream from Echo Lake. He claimed this white material or substance flowed from the 9.15 acre land disturbance area. (*Snyder Tr. 83-86; Petitioner Exhibits X and Y.*)

On cross examination Mr. Snyder admitted that Petitioners possessed no competent and substantial scientific evidence that any material or substance from the Applicant's farm found its way into Echo Lake. (*Snyder Tr. 126*) And, while Snyder obtained water samples, he never had them analyzed. (*Snyder Tr. 126, 127*) He admitted he was not competent to testify regarding "sediment" (*Snyder Tr. 128*) and did not attribute to the farm the "white stuff" that he observed in Echo Lake photographs. (*Snyder Tr. 131*) He also could not testify that any sediment that might have come off the farm exceeded any legally allowable tolerances. (*Snyder Tr. 132*) Snyder also acknowledged Applicant's Exhibit 18, page 21, expressing that less than 1% of the Echo Lake drainage area comes from the farm. No other witness for Petitioners supported Petitioners' claim on this issue of sediment contamination or pollution entering state waters from the land disturbance area under MSOP 1538. *Applicant's Exhibit 3.*

Petitioners' testimony developed from other witnesses did not support Petitioners' position. Patrick Peltz, a Clean Water Program Environmental Specialist, visited the Applicant's site on November 20, 2012, and again on November 28, 2012 for the purpose of performing a routine water pollution compliance inspection regarding MSOP 1538. (*Peltz Tr. 911, 912*) Mr. Peltz's written report, *Applicant's Exhibit 10*, concluded that the conditions of the borrow site subject to the permit were satisfactory and the site was in compliance with the Clean Water Law, the Clean Water Commission regulations, and MSOP 1538, the existing Land Disturbance Permit of July 6, 2012. His conclusions were based upon his observations at the time of the inspection and, specifically, he found no "noncompliances" nor any violations of laws or regulations administered by the Department of Natural Resources. (*Peltz Tr. 918, 919*) Mr. Peltz testified that if he had found

any noncompliances, he would have noted them in his report in accordance with standard procedure. (*Peltz Tr. 919, 918, 923*). Moreover, Mr. Peltz did not observe any conditions with the potential to cause a risk to human health or environment or to cause pollution in the future. (*Peltz Tr. 919*) And, he stated if he had, he also would have noted in his report. (*Peltz Tr. 919*)

Mr. Peltz's superior, Aron C. Bleibaum, another Clean Water Program specialist, testified that he signed off on Mr. Peltz's report. Mr. Bleibaum testified at the hearing that he recalled the Peltz report (*Bleibaum Tr. 286*) and did not see anything in it that was bothersome, odd or questionable. (*Bleibaum Tr. 289, 290*) He opined that if Peltz had observed any noncompliances in his report, that he would have informed the Applicant and noted it in his report. (*Bleibaum Tr. 291, 294-295*)

Kevin Mohammadi, the Land Reclamation Program Director, also testified and stated that he visited the site on March 7, 2013. He testified that he observed the sediment basins and did not observe any sediment runoff from the site. (*Mohammadi Tr. 201, 202*)

Jimmy Coles, another Clean Water Program environmental specialist, was called by Petitioners and stated that he visited the site on March 7, 2013, along with Mr. Mohammadi. He testified that he observed no conditions that constituted a noncompliance or a violation of clean water laws or any Missouri Department of Natural Resources Clean Water Program regulation and that none existed. (*Coles Tr. 348*)

Mr. Coles returned to the site again on September 4, 2013, for another Clean Water Program routine water pollution inspection. At that time his written report (*Appellant's Exhibit 25*) reflects that the site was out of compliance due to his observation of

two unsatisfactory features. The first was a spot oil leak from heavy equipment and the second was some erosion on the downstream side of the large dam due to a heavy rain. (*Coles Tr. 329, 330, 335*) His report indicates that the Applicant cured these two features on September 5, 2013, and that no further action by the Applicant was necessary. (*Coles Tr. 351*) Mr. Coles further testified these two features were "minor" in nature and "easily rectifiable." They did not warrant a letter to the Applicant or any enforcement action and, more importantly, "did not contribute to any water pollution." (*Coles Tr. 349, 350*)

Mr. Coles also stated that he viewed the toe of the large dam and walked the channel for 100 yards downstream and found no evidence of the deposition of silt or sediment in the downstream area. (*Coles Tr. 331*) He further stated he did not observe anything on site that was bothersome to him and, if he had, he would have so noted it in his written report or would have brought it up with the Applicant on site. (*Coles Tr. 358*)

Mr. Snyder testified that the Corps of Engineers 404 Noncompliance Letter confirmed that fill was placed by the Applicant into waters of the United States (at the rock check at the upper dam and also at the lower dam). Mr. Snyder apparently believed that this fact demonstrated impermissible impact or damage to the environment.

However, Nathan Hamm, Applicant's engineer who assisted the Applicant with the 404 Application to the Corps of Engineers, testified that the 404 Permit ultimately was issued by the Corps of Engineers after the fact and it specifically authorized the work of the Applicant about which Petitioners complain. The Corps of Engineers determined that any environmental concern regarding Applicant placing fill in the waters of the United States was "minimal". (*Hamm Tr. 720, 721; Applicant's Exhibit 26*)

Mr. Hamm also testified concerning the Missouri Department of Natural Resources issuance of a Clean Water Quality Certification subsequent to the Corps of Engineers 404 Permit. (*Hamm Tr. 722; Applicant's Exhibit 27*) In the Clean Water Quality Certification Letter of April 29, 2014, the Missouri Department of Natural Resources, Clean Water Program, stated that the impact of the 404 related work by Applicant "was not going to degrade water quality beyond applicable standards."⁴ (*Hamm Tr. 723; Applicant's Exhibit 27*) Hamm further opined that if the Applicant's activities regarding the rock check at the upper dam and the construction of the lower dam had degraded water quality beyond allowable standards, the Missouri Department of Natural Resources would not have issued Applicant's Exhibit 27. Moreover, the 401 Missouri Department of Natural Resources Water Quality Certification Letter contained thirteen conditions designed to assure that water quality standards are met. (*Hamm Tr. 731, 732*)

Therefore, land disturbance by the Applicant did not result in harm to the environment nor did it impair the health, safety or livelihood of any person outside the facility nor was it likely to in the future. Petitioners failed to meet the threshold standards outlined in 10 C.S.R. 40-10.080(3)(B) and did not establish an issue of fact of impact by competent and substantial scientific evidence.

Likewise, the issue of the harm to the environment and to the health, safety or livelihood of any individual was not impacted by any of the remaining six alleged non-compliance issues related to the Missouri Clean Water Law and regulations.

⁴ §644.051.1 R.S.Mo. prohibits the discharge of water contaminants into the waters of the state which reduce the quality of such waters below the Water Quality Standards established by the Commission.

There was no competent and substantial scientific evidence adduced by the Petitioners of any environmental harm or personal harm related to Applicant having stated in its application for MSOP 1538 that no part of the permit area to be disturbed was located within the jurisdictional waters of the United States. The same is true for complaint concerning the posting location of the public notification sign under MSOP 1538. There is no evidence in the record that the nature and extent of the SWPPP contents, the maintenance of the SWPPP document on site, the quality of the site inspection records or the placement of BMPs on site resulted in any harm of any kind.

Jimmy Coles said that no environmental harm resulted from the SWPPP not being located on the site. (*Coles Tr. 370, 371*) Kevin Mohammadi said he did not see any erosion on site and, therefore, there was no need for any BMPs in any event. (*Mohammadi Tr. 203*) Mr. Snyder admitted that he was not competent to testify regarding BMPs and whether they were properly designed or installed. (*Snyder Tr. 131-135*).

B. OTHER ALLEGED IMPACTS

As to the two claims regarding fact issues relative to the Land Reclamation Program, there was no competent and substantial scientific evidence presented of any environmental or personal harm regarding any alleged quarrying without a permit by the Applicant or the Applicant's failure to send certified mail notices to neighbors relative to the Land Reclamation Mine Permit. Regardless of the merits of these two issues, there was no demonstrable evidence regarding any personal or environmental harm resulting from them.

As to the 404 Permit, the record is wholly devoid of any evidence of any personal or environmental harm resulting from that issue. The only evidence is from the Corps of Engineers which found that the impact on the environment was minimal.

Finally, Paul Simon for Dam Safety said that he observed no defects in the large dam. (*Simon Tr. 504*) No other witness attempted to testify regarding any damage or harm to persons or the environment resulting from any of the eleven alleged issues of fact raised by Petitioners.

Because Petitioners have wholly failed to adduce any competent and substantial scientific evidence that any of the alleged eleven noncompliances resulted in harm to the environment or impacted the health, safety and livelihood of any person outside the facility, Petitioners' claims under 10 C.S.R. 40-10.080(F) completely fail and a finding in favor of Applicant and against Petitioners is mandated.

VII. INDIVIDUAL FACT ISSUES OF ALLEGED NONCOMPLIANCE

Notwithstanding the Petitioners' failure to show jurisdiction and harm, Applicant will address each of the eleven noncompliance claims separately in order to demonstrate that the alleged noncompliance did not occur, or that the alleged noncompliance was outside of the DNR's jurisdiction, or in the case of the September 4, 2014 water program inspection, the issue was a single noncompliance that would not lead to a conclusion of a likelihood of future non-compliance or pollution.

A. ISSUE RELATIVE TO ALLEGED VIOLATION OF §404 OF THE FEDERAL CLEAN WATER ACT (33 U.S.C. 1344).

As noted above, Mr. Snyder claimed in his testimony that the 404 Permit non-compliance was a noncompliance that could be considered by this Hearing Officer in

making his findings. (*Snyder Tr. 46*) However, the allegations and proofs relative to this alleged noncompliance do not satisfy the requirements of 10 C.S.R. 40-10.080(F).

First, this alleged noncompliance did not involve an environmental law administered by the Missouri Department of Natural Resources or the Land Reclamation Commission. Instead, it involved an environmental law administered by the U.S. Army Corps of Engineers. This is demonstrated by Appellant's Exhibit 19, the U.S. Army Corps of Engineers Noncompliance Notice (*Appellant's Exhibit 19*) stating in the second paragraph that "The Corps of Engineers has jurisdiction over all waters of the United States." *See* 33 C.F.R. 320-332.

Second, Petitioners adduced no competent and substantial scientific evidence that this noncompliance involving the Applicant's failure to satisfy preconstruction notification requirement to the Corps of Engineers ". . . resulted in harm to the environment or impaired the health, safety or livelihood of persons outside of the facility." Nathan Hamm testified that the noncompliance cited in Exhibit 19 related to the failure of Applicant to give a written notice, not a determination by the Corps of Engineers of harm to the environment. (*Hamm Tr. 675, 676*)

Third, the evidence demonstrated that the Applicant satisfied all requirements of the U.S. Army Corps of Engineers relative to the Federal Clean Water Law and that the 404 Permit was issued. The permit determined that the Applicant's project, which involved placement of fill in the waters of the United States, "was authorized" by the Nationwide Permit (NWP (44)) Mining Activities; and, more importantly, that the Applicant's activities resulted in "minimal" adverse environmental effect. (*Hamm Tr. 720, 721; Applicant's Exhibit 26; Applicant's Exhibit 25; Hamm Tr. 678, Rock Check Photo-*

graph, Applicant's Exhibit 32; Hamm Tr. 692; Applicant's Exhibit 51, Large Dam Photograph; Hamm Tr. 694, 695; Applicant's Exhibit 62; Rock Road, Hamm Tr. 697)

Mr. Snyder admitted on cross examination that the 404 Permit has been issued by the Corps of Engineers and he had no complaint with regard to it. His only complaint was that the Applicant originally omitted to notify the Corps of Engineers prior to constructing the rock check dam and the large dam. (*Snyder Tr. 171, 173*)

Moreover, the 404 Permit issue provides no basis for the Hearing Officer to conclude that there exists a reasonable likelihood that the Applicant will be in non-compliance in the future relative to this matter. Mr. Radmacher testified regarding the circumstances of his misunderstanding regarding whether a notice to the Corps of Engineers was necessary in this case. He described how he did not believe that the land disturbance and work on the farm impacted any waters of the United States; and, particularly, the rock check and the lower dam construction. He believed these devices affected only dry gullies on the farm, but not U.S. waters. He researched the issue on line (*Applicant's Exhibit 39*) and discovered a document issued jointly by the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency. This document indicated that dry erosional features like gullies and ditches were not classified as waters of the United States. Therefore, he believed the work on the farm was exempt from 404 Permitting. Later, however, the Corps of Engineers expressed a different view and issued Applicant's Exhibit 19. The dry features or gullies and ditches on the farm were designated as ephemeral streams and, therefore, waters of the United States. (*Radmacher Tr. 412-415; Hamm Tr. 680-682 regarding Corps of Engineers jurisdictional determination; Applicant's Exhibit 19 (last page)*)

Mr. Radmacher now understands the 404 related requirements relative to the farm and any further noncompliances regarding a notice of intent to construct or place fill in waters of the United States is subject to the Corps of Engineers investigation and approval. Because Applicant obtained a 404 Permit from the Corps of Engineers, no further notices of noncompliance regarding this particular issue are expected or even likely under the circumstances.

Also, with respect to the issue of likelihood of future noncompliances regarding 404 Permits, the Hearing Officer heard a great deal of evidence from Mr. Hamm, the engineer hired by Applicant, who described in detail Applicant's efforts to comply with the law once notified of the 404 issue. Mr. Hamm noted that if Radmacher had notified the Corps of Engineers timely before construction of the rock check and the lower dam, the process with the Corps would have been virtually the same (*Hamm Tr. 728*) and that issuance of "after the fact" 404 Permits was not unusual for the Corps of Engineers. (*Hamm Tr. 700, 701*)

Therefore, Issue VII(A) provides no basis for a conclusion by the Hearing Officer of a present act of noncompliance by the Applicant of an environmental law administered by the Missouri Department of Natural Resources or that the noncompliance resulted in any harm to the environment or any persons, or that there is a reasonable likelihood there will be a similar noncompliance in the future.

B. ISSUE REGARDING ALLEGED VIOLATION OF CHAPTER 236, R.S.MO. DAMS, MILLS, AND ELECTRICAL POWER AND 10 C.S.R. 22-2.010(1) (DAM CONSTRUCTION PERMITS).

The Petitioners' evidence on this issue was somewhat sketchy and confusing. Mr. Snyder stated that there was an issue of noncompliance relative to construction of the dam without a permit. (*Snyder Tr. 46*) He identified a photograph of the lower or large

dam (*Snyder Tr. 92; Petitioner Exhibit J*). However, Mr. Snyder did not provide further details regarding Petitioners' position.

Petitioners also called Jim Martin, a neighboring property owner, who said that he saw construction activity at the top of the dam on April 29, 2013. (*Martin Tr. 242, 244, 248; Petitioners Exhibits K and L*) Martin, however, provided no other relevant evidence.

Paul Simon from DNR Dam Safety was called by Petitioners to describe how to measure the height of a dam from the low point on the crest to the low point on the toe. (*Simon Tr. 477, 478*) Mr. Simon stated that dam height is determined when representatives of the Missouri Department of Natural Resources Dam Safety Program come to a site and measure the dam. (*Simon Tr. 478, 513*) Mr. Simon said that if a dam is greater than 35 feet in height when Dam Safety measures it, then the dam is regulated by the Missouri DNR. (*Simon Tr. 479*) In that case, a regulated dam would need permits. (*Simon Tr. 481, 488, 489*)

It appeared that this testimony elicited by Petitioners was offered in an effort to lay groundwork that the dam in this case was greater than 35 feet in height and, therefore, regulated. And that a permit was needed either to construct it and/or to modify it. However, Petitioners also elicited testimony from Mr. Simon that if a dam was constructed at greater than 35 feet before Dam Safety, or a certified engineer, measured it, but less than 35 feet when Dam Safety measured it, it would not be regulated. Thus no permits would be needed. (*Simon Tr. 478*)

Petitioners then went on to offer Appellant's Exhibit 60, a topography drawing dated May 17, 2013, with summary information of elevation points affixed from an April

5, 2013 survey. (*Simon Tr. 489*) Mr. Simon testified that the dam height, per the survey points shown on Exhibit 60, was approximately 34 feet in height. (*Simon Tr. 491, 492*). Next, Mr. Simon acknowledged that Dam Safety inspected and measured the dam on May 9, 2013. (*Applicant's Exhibit 22*) The dam at that time was approximately 33.5 feet in height and, therefore, not regulated by the Missouri Department of Natural Resources. (*Radmacher Tr. 761, 762*) Mr. Simon also identified Applicant's Exhibit 66, a July 23, 2014 letter from Dam Safety, describing a remeasurement of the dam approximately one year later. This letter noted that the dam was still less than 35 feet in height and, therefore, not regulated. (*Simon Tr. 502, 503*)

Mr. Hamm was called by Petitioners and he described how his firm secured the dam topographic elevation shots in Applicant's Exhibit 60. (*Hamm Tr. 669, 688, 689, 690*) He confirmed that the shots were taken on April 5, 2013. (*Hamm Tr. 685*) The shots were taken prior to Mr. Martin's view of the work on the dam on April 29, 2013. (*Hamm Tr. 685*) He also identified Applicant's Exhibits 58 and 59, which were additional drawings with elevation shots and/or contour lines drawn from the April 5 survey points. Hamm opined that the dam, when constructed, was approximately 30 feet in elevation, if you look at the contour lines only that are shown in Figure 3 of Applicant's Exhibit 57 (the draft Application to the Corps of Engineers for the 404 Permit). (*Hamm Tr. 697, 698, 699*) This information was given to Robert Radmacher in April of 2013. (*Hamm Tr. 703, 704*) Applicant's Exhibit 59 contains more specific elevation information from the April 5, 2013 shots. (*Hamm Tr. 704, 705*) Again, these shots show the dam height from the edge of grade (EOG) to the top of the dam with the difference being approximately 34 feet. (*Hamm Tr. 706, 707*) This information also was given to

Robert Radmacher. (*Hamm Tr. 708*) Hamm also identified Applicant's Exhibit 23, the final Permit Application to the Army Corps of Engineers for the 404 Permit. (*Hamm Tr. 713*)

There was extensive discussion with Mr. Simon for Dam Safety regarding the agricultural exemption for dams found in the statutes and regulations. Mr. Simon testified that even if the dam was greater than 35 feet in height at some point in time, he did not view anything regarding the dam that would have disqualified it for an agricultural exemption; and that it probably could have been exempted on an agricultural basis. He also stated that he found nothing defective with respect to the dam. (*Simon Tr. 481, 482, 493-500, 512, 513*)

Robert Radmacher was asked about the original construction of the dam and described how it was designed, laid out and constructed to be no greater than 28 feet in height. (*Radmacher Tr. 738-745*) He testified that concerning the dam height and measurement between location of the dam toe and edge of grade on the road on the front side of the dam as to how the edge of the grade (the road he installed to reach the pipes for the water) covered the dam toe and increased the measured height of the dam without an actual increase in the height of the dam crest. This explains the difference between the 28-foot design and construction and the later 34-foot measurement. (*Radmacher Tr. 733-737*) He also stated that he reviewed the draft 404 Permit Application prepared by Mr. Hamm in April of 2013. (*Applicant's Exhibit 57*) He noted a 30-foot height statement in Paragraph 18 of that exhibit and firmly believed the dam to be no taller than 30 feet at that time. (*Radmacher Tr. 746, 747*)

Mr. Radmacher explained the reasons for working on the top of the dam in late April of 2013 as viewed by Mr. Martin. The purpose of starting work on the dam was not to reduce the height of the dam prior to the time that Dam Safety came to measure it; but instead, it related to efforts by Applicant to reduce the dam height slightly in relation to the 404 Permit. Mr. Hamm and Mr. Radmacher were attempting to calculate the volume and extent of soil placed within the waters of the United States and measure anticipated water inundation of the reservoir to document impacts for the 404 Permit Application and the cost of "credits" necessary to be paid as a result of the inundation. (*Radmacher Tr. 747-758*) However, Mr. Radmacher testified that shortly after beginning work on top of the dam in late April, it was stopped. This testimony of Mr. Radmacher regarding dam height was corroborated by Mr. Hamm. (*Hamm Tr. 708-713, 718, 720*)

Petitioners apparently intended to demonstrate that the lower dam was constructed at a height greater than 35 feet, thus requiring a Dam Safety permit to construct the dam in the first instance; and/or was not an agricultural dam and, therefore, exempted; and/or was lowered at later date to less than 35 feet, thus also requiring a permit; and that all of the above constituted a noncompliance of dam safety regulations by the Applicant.

However, since the evidence and testimony adduced demonstrated that the official regulated height of the dam was under 35 feet when measured by Dam Safety on both May 9, 2013 and July 14, 2013 and was less than 35 feet when constructed by Radmacher, and less than 35 feet in height when measured by Nathan Hamm on April 5, 2013, there is a total absence of competent and substantial scientific evidence of any violation or noncompliance relative to the large lower dam construction or later modification, whether or not the dam qualified as an exempt agricultural structure.

C. ISSUES RELATIVE TO THE LAND RECLAMATION LAWS AND REGULATIONS

1. FACT ISSUE THAT APPLICANT QUARRIED LIMESTONE WITHOUT FIRST OBTAINING A LAND RECLAMATION PERMIT FROM THE LAND RECLAMATION COMMISSION AS REQUIRED BY THE LAND RECLAMATION LAW

Mr. Snyder stated that Petitioners' complaint in this regard was that Applicant operated a quarry for commercial purposes without first obtaining a permit from the Land Reclamation Commission. (*Snyder Tr. 43*) He identified two photographs (*Petitioners' Exhibits T and W*) claiming that they depicted quarry operations and equipment being used to excavate limestone. (*Snyder Tr. 92-96*) He also mentioned that blasting occurred at the farm in July of 2012 (*Snyder Tr. 97*); and that this activity occurred prior to Applicant applying for its Land Reclamation Permit from the Land Reclamation Commission. Based on this testimony it is assumed that Petitioners claim that the Applicant quarried minerals (limestone) for commercial purposes without first obtaining a Land Reclamation Permit, thus resulting in an alleged noncompliance.

In an effort to support this position, Petitioners called Bill Zeaman from the Land Reclamation Program. Mr. Zeaman did not support Petitioners' view. He confirmed that 10 C.S.R. 40-10.010, relative to permit requirements for mining operations, requires a party to seek and obtain a Land Reclamation Permit for "commercial operations", including limestone mining. (*Zeaman Tr. 524, 525*) Mr. Zeaman was questioned regarding surface mining for commercial purposes and the meaning of the term "commercial purposes." He answered that it related to the sale or exchange of minerals in a sale, barter or trade transaction. (*Zeaman Tr. 526*) He also stated he was familiar with the concept of "borrow sites" and

that it was permitted to remove consolidated materials from a borrow site without a Land Reclamation Permit "as long as you don't process the material"; i.e., size it, sort it or put it through other forms of beneficiation. (*Zeaman Tr. 528, 529*). Mr. Zeaman also said that if limestone material was taken off the site (borrowed) for any use offsite, so long as ". . . they just blasted off the side of a hill and scoop it up with a front end loader and do not sort it or anything, and they take everything, then it's a borrow site." (*Zeaman Tr. 530*) He said the same would be true if someone used a rock hammer instead of blasting the rock. (*Zeaman Tr. 530, 531*) Taking rock from the Radmacher borrow site to a bridge project would not constitute a "commercial purpose" without the material being processed, such as beneficiation. (*Zeaman Tr. 531, 532*)

Mr. Radmacher testified that after Radmacher received MSOP 1538 on July 6, 2012 to use the 9.15 acres land disturbance site on the farm as a borrow site, Radmacher broke rock and trucked some of it off site to the Chouteau Trafficway Project being constructed by Radmacher Brothers Excavating. Radmacher used a "hoe ram" to break the rock and did not put the rock that went to the Chouteau Project through any form of beneficiation or improvement. (*Radmacher Tr. 405-411*) When Applicant considered quarrying for "commercial purposes", Applicant formed AA Quarry, LLC to do that. (*Radmacher Tr. 439, 440*) Applicant bought a commercial crusher plant in anticipation of commercial operations and this crusher plant currently sits disassembled on the ground at the farm. (*Radmacher Tr. 441*) This is true despite the fact that the Missouri Department of Natural Resources Air Commission issued a permit to Applicant to

construct the crusher plant. (*Applicant Exhibit 12; Applicant Exhibit 24*) Applicant has engaged in no efforts to begin quarry operations until a determination regarding the Land Reclamation Permit is obtained. (*Radmacher Tr. 443, 444*)

As to allegations of Petitioners that Applicant conducted quarry operations on the farm prior to obtaining the Land Disturbance Permit of July 6, 2012 for the borrow site, Mr. Radmacher testified that Radmacher Land and Equipment Management bought the farm in early 2011 to run cattle operations. (*Radmacher Tr. 394-396*) The farm was in a run-down condition so Radmacher built ponds, put in fences, broke rock with a hoe ram, and moved it around the farm to various locations for erosion control, and overseeded the land and rotated their cattle around the farm. (*Radmacher Tr. 397-400*)

As noted by Mr. Zeaman, §444.766 R.S.Mo. of the Land Reclamation Act exempts excavations on site of minerals for purposes of construction of land improvements as unrelated to the mining of minerals for a commercial purpose.

§444.765(8) R.S.Mo. defines "excavation" as any operation in which minerals are moved, removed or displaced for purposes of construction at the site of the excavation by means of any tools, equipment, explosives, and includes but is not limited to digging, boring, ripping, etc. §444.765(11) defines "minerals" as a constituent of the earth in a solid state when extracted from the earth is usable in its natural form. And, most importantly, §444.765(3) defines "commercial purpose" as the extracting of minerals for their value in "sales" to "other persons" or incorporation into a product.

§444.766(2)(2)(b) further provides that no permit is required to move minerals within the confines of real property where the excavations occur or to remove minerals from the real property when at no time are they subject to ". . . crushing, screening, or other means of beneficiation. . ."; and "are not used for a commercial purpose on a frequent and on-going basis."

Therefore, Applicant's farm related improvements involving the excavation and using of limestone on the site were exempted activities. As to the borrow operations, there was no evidence that the borrow operations involved anything other than borrowing excavated limestone materials that were unprocessed. No witness from the Missouri Department of Natural Resources Land Reclamation Program testified that the Applicant engaged in commercial quarry operations subject to permit regulations.

Larry Slechta from the Land Reclamation Program issued a single report (*Applicant Exhibit 43*) regarding the farm operations and concluded that limestone of the farm was being used as riprap and was not being sold. (*Applicant Exhibit 43*)

By statute, §444.766(3) R.S.Mo., if the Program Director had determined that a surface mining permit was required for Applicant's actions on the farm, such determination was to be sent to the Applicant in writing, an informal conference conducted, a written determination made, and a Land Reclamation Commission hearing conducted. But until a determination was made, the Applicant could have continued its activities. §444.766(2). None of this occurred. *See also* 10 C.S.R. 40-10.070 regarding enforcement procedures

employed by the DNR for quarry operations without a permit and notices and remedial actions.

Moreover, 10 C.S.R. 40-10.010(2)(B)(1) states that "surface mining for industrial minerals may be conducted without a permit by an individual for personal use." Therefore, any operations on the farm (and even the borrow operations) were exempted from permitting requirements as they were for the personal use of the Applicant.

In summary, the Missouri Department of Natural Resources Land Reclamation Program did not conclude that the Applicant was engaging in commercial quarrying operations without a permit or that the Applicant had failed to apply for a permit prior thereto. No other witnesses, expert or otherwise, testified for the Petitioner and offered any competent and substantial scientific evidence sufficient to establish an issue of fact that the Applicant's activities on the farm required the issuance of a Land Reclamation Permit and/or the Applicant was quarrying minerals for commercial purposes without first obtaining a permit from the Land Reclamation Commission.

2. APPLICANT FAILED TO MAIL CERTIFIED LETTERS CONTAINING A NOTICE OF INTENT TO OPERATE A SURFACE MINING TO NEIGHBORING LANDOWNERS IN ACCORDANCE WITH 10 C.S.R. 40-10.020(2)(H).

On this point Mr. Snyder stated that after the filing of its Application for an Industrial Mines Permit with the Department of Natural Resources, the Applicant was required, but failed, to send certified letters of intent to operate a surface mine to adjacent or adjoining landowners. (*Snyder Tr. 44*) Petitioners offered a copy of the relevant notice statutes and regulations. §444.772, *R.S.Mo.*, and

Petitioners Exhibit TTTT; Snyder Tr. 105 and 10 C.S.R. 40-10.020, Petitioners Exhibit WWWW; Snyder Tr. 106, 107. Mr. Snyder then stated that there was no evidence of certified letter notifications being sent on this project. (*Snyder Tr. 109, 110*)

On cross examination, Mr. Snyder disputed Applicant's Exhibit 48 (Mo DNR Publication regarding letter notices) and the concept that "if the mine plan area is incised into the land wholly owned by the operator, then the owner legally does not have to send these certified letters." (*Snyder Tr. 160, 161*) Mr. Snyder disagreed with Applicant's Exhibit 48 because he said there was no statute or regulation stating that position. (*Snyder Tr. 161, 162*)

Applicant's Exhibit 8, the Land Reclamation Program Application, contains an aerial view map of the mine plan boundary (in red) and boundaries of the land owned by the Applicant (in blue). According to Applicant's Exhibits 48 and 49, the proposed mine plan area (in red) is set back 100 feet from the existing boundaries of the land owned by the Applicant (in blue). Petitioners admitted on the record that the mine plan boundary is set back 100 feet from the farm property line or boundary.

Clearly, the landowner's property boundary would not meet the definition of "contiguous", which means in constant contact with or touching neighboring property. It also seems self-evident that the Missouri Department of Natural Resources interprets its regulations so that the separation of 100 feet between the mine plan boundary and the neighboring property boundary does not render the neighboring property "adjacent" to the mine plan boundary. As previously noted,

the Missouri Department of Natural Resources interpretation of its own regulation is to be given great weight by the court. *Lincoln County Stone, Inc. (and the Missouri Land Reclamation Commission) v. Koenig*, 21 S.W.3d 142, 145 [1-3] (Mo.App. 2000); *State of Mo. ex rel Webster (and the Missouri Department of Natural Resources)*, 825 S.W.2d 916, 931 [8-9], stating that an agency's interpretation generally is to be given deference if an agency's interpretation of a statute is reasonable and consistent with the language of the statute. Deference to agency action is even more clearly in order when interpretation of its own regulation is at issue.

Mr. Radmacher testified that he inquired of the Missouri Department of Natural Resources regarding the application of this particular statute and regulation to the Applicant's permit application and received confirmation that if the Applicant set back the mine plan boundary 100 feet from the property boundaries, certified letters to landowners would not be required. (*Applicant's Exhibit 49*)

Kevin Mohammadi from the Land Reclamation Program also testified on this issue regarding certified letters to landowners and the 100-foot setback rule. Mr. Mohammadi concurred that certified letter notices were not required to the neighboring landowners in this case. (*Mohammadi Tr. 192-200*) The evidence reflected that the other necessary certified letter had been sent to the County Commission and that the public notices had been published in the local newspapers. (*Mohammadi Tr. 199, 200, 206, 207*) No other witnesses testified favorably to Petitioners' position on this issue.

Nevertheless, the purpose of all three notices (publication, notice to public officials, certified letters to neighbors) is to provide notice of the surface mining permit application. In this case, Petitioners' witness Misty Cutright testified concerning a neighborhood meeting held in January of 2013, the month after the Land Reclamation Permit Application was received in Jefferson City and a month before the DNR public meeting was held in early March of 2013. (*Cutright Tr. 260-266*) She testified that virtually all of the landowners surrounding the farm were present at this neighborhood meeting in January of 2013, the purpose of which was to advise neighbors of the permit application and to discuss putting together a community group to stop the quarry.

While the statute and regulations and DNR interpretation do not require sending certified letters to the neighboring landowners in this case, all of them were aware of the quarry permit circumstances at or about the same point in time that the certified letters, if they had been sent, would have been received by the neighbors.

In summary, the certified letters of notice pursuant to statute and regulations were not required to be sent in this instance; but notwithstanding the exemption, notice was received by the neighbors in any event and no prejudice occurred to anyone as a result. Petitioners established no issue on this question with competent and substantial scientific evidence. *See Lake Ozark, et al. v. Magruder Limestone, Inc.*, 326 S.W.3d 38 (Mo.App. 2010), holding that Petitioners' failure to demonstrate prejudice relative to notice issue under 10 C.S.R. 40-10.020(2)(H) defeated Petitioners' claim. There was no evidence that

Applicant's failure relative to notice caused any potential petitioners to miss the opportunity to join in the case.

D. ISSUES RELATIVE TO CLEAN WATER LAWS AND REGULATIONS

1. APPLICANT DISTURBED LAND ON THE FARM WITHOUT FIRST HAVING OBTAINED A LAND DISTURBANCE PERMIT (MISSOURI STATE OPERATING PERMIT) FROM THE CLEAN WATER COMMISSION AS REQUIRED BY §644.051.1 R.S.MO. AND 10 C.S.R. 20-6.200.

Petitioners' first position on this issue was that the Applicant had disturbed land on the farm of an amount greater than one acre in size prior to obtaining Applicant's MSOP of July 6, 2012; and that such activity was in violation of the Clean Water Law and the Clean Water Law regulations, 10 C.S.R. 20-6.200(1)(A) "Storm water permits - General" (*Snyder Tr. 44, 51-69, 70, 81*)

On cross examination Mr. Snyder acknowledged the existence of the farm land and agricultural exemptions from the permitting process as contained in 10 C.S.R. 20-6.200(1)(B)(5)(6). (*Snyder Tr. 119, 120*) However, he asserted that the work performed by the Applicant on the farm (described above) was not agricultural in nature. He stated he complained about this issue to the Missouri Department of Natural Resources but the Department representatives disagreed with his conclusion and stated that they believed the work was agricultural in nature. (*Snyder Tr. 123-126*)

Petitioners called Patrick Peltz on this issue as well, who indicated that he was familiar with the agricultural exemption for storm water permits and that no permits from the Clean Water Commission were needed relative to storm water discharges and land disturbances for agricultural uses or functions. (*Peltz Tr. 915, 929*)

Petitioners also called Aron Bleibaum from the Clean Water Program to support their argument. Mr. Bleibaum, however, said that anything being done on the farm, whether plowing, pond construction, road construction, etc., was work for an agricultural use and, therefore, no permit was required for the work. *(Bleibaum Tr. 297, 305)*

Robert Radmacher testified, as described above, that during this early period (February 2011 through July 2012) Radmacher's activities on the farm were agriculturally related relative to improvement of the farm land and enhancing the cattle operation. *(Radmacher Tr. 394-396, 397-403)* No other witnesses or evidence was offered by Petitioners to contradict Mr. Peltz, Mr. Bleibaum and Mr. Radmacher.

Mr. Radmacher went on to testify that on July 6, 2012, he obtained MSOP 1538, a Land Disturbance Permit, for work in the 9.15 acre tract in the center of the farm, in part, to use the area as a borrow site for rip rap rock to be taken to the Radmacher project at Chouteau Trafficway. He said he applied for the Land Disturbance Permit because based on prior experiences in construction using the area as a borrow site would not qualify for the agricultural exemption. *(Radmacher Tr. 405-411)*

Aron Bleibaum also weighed in on this point and stated that he also believed the permit was issued because the area would be used as a borrow site. *(Bleibaum Tr. 297-298)* He testified that the Land Disturbance Permit allows the permittee to borrow soil and rock from the area and also permits excavation. *(Bleibaum Tr. 303, 304, 308)* As to any other work on the farm outside of the

9.14 acres covered by the Land Disturbance Permit, the agricultural use exemption would continue to apply for that work.

Mr. Bleibaum, as noted above, reviewed Mr. Peltz's report (*Applicant Exhibit 10, Bleibaum Tr. 286*) wherein Mr. Peltz concluded that the Radmacher work on the farm outside the 9.15 acres was agriculture in nature. (*Bleibaum Tr. 286-289*) He agreed with this conclusion. Bleibaum did not see anything bothersome in the report. (*Bleibaum Tr. 289, 290*) As stated before, any noncompliance issues would have been noted in the Peltz report. (*Bleibaum Tr. 291*). If additional Land Disturbance Permits would have been required of Applicant in November of 2012, the Applicant would have been advised. (*Bleibaum Tr. 292*) The Peltz report cited no violations or noncompliances under the permit (*Bleibaum Tr. 294*) and if there were any, they would have been noted. (*Bleibaum Tr. 294, 296*) Jimmy Coles stated that he had suggested to Mr. Radmacher on March 7, 2013 to apply for and obtain an expanded Land Disturbance Permit from the original 9.15 acres to 104.77 acres to cover the construction of the lower dam because at that time it was announced that the lower dam might serve a dual purpose due to Applicant obtaining a permit to mine from the Land Reclamation Commission. However, he stated that no violation existed at that time. (*Coles Tr. 346-348*) Coles also observed no noncompliances or violations in his view and stated that none existed. (*Coles Tr. 348*)

From this evidence it is abundantly clear that Petitioners have failed to adduce any competent and substantial scientific evidence to establish an issue of

fact as to the existence of a noncompliance by Applicant relative to disturbing land without a permit as required by law.

2. APPLICANT IMPROPERLY COMPLETED ITS APPLICATION FOR MSOP 1538 IN THAT APPLICANT PROVIDED THE DEPARTMENT OF NATURAL RESOURCES FALSE INFORMATION.

The Petitioners' evidence on this issue was extremely limited. Mr. Snyder referred to the Land Disturbance Permit e-certification page where the Applicant had checked the box "no" with respect to the question as to whether or not any part of the area that was going to be disturbed was in the jurisdictional waters of the United States. Mr. Snyder simply expressed his unsupported opinion that the 9.15 acre borrow site infringed on waters of the United States and, therefore, the Applicant had made a false statement to the Missouri DNR. (*Snyder Tr. 111-115*) Petitioners presented no competent and substantial scientific evidence, nor for that matter any evidence at all, to support Mr. Snyder's opinion on this issue.

On cross examination Mr. Snyder admitted that only the U.S. Army Corps of Engineers could determine the identity and location of the waters of the United States. He said he reviewed Applicant's Exhibit 19 (the Corps of Engineers Non-compliance Notice) and particularly the last page of that exhibit. The Corps of Engineers "blue lines" on the last page indicate that waters of the United States do not enter into the 9.15 acre borrow site area (*Snyder Tr. 135-141*), thus contradicting Petitioners' position.

Nathan Hamm also reviewed Applicant's Exhibit 19, the last page, and testified that the Corps of Engineers made a jurisdictional determination in this case as to the identity and location of the waters of the United States and did not

identify or locate any U.S. waters within the boundaries of the 9.15 acre borrow site. (*Hamm Tr. 680-682*)

Mr. Hamm also explained that the issue with respect to Applicant's Exhibit 19 was two-fold. First, some of the work by Radmacher outside of the 9.15 acre borrow site did involve placement of fill into the waters of the United States at the location of the upper dam rock check and the lower dam but not in the 9.15 acre area. Second, the issued noncompliance, as stated above, was procedural in nature in that the Corps of Engineers did not find harm to the environment with respect to Applicant's Exhibit 19; but only that the placement of fill had impacted or affected the waters of the United States and, therefore, the Applicant had failed to follow protocol to notify the Corps of Engineers of the fill placement prior to that work occurring. (*Hamm Tr. 674-675*)

Also, as noted above in the section on harm or damage, the Corps of Engineers determined that any adverse environmental impact by displacement was "minimal" in nature. (*Applicant's Exhibit 26; Hamm Tr. 720, 721*) There was absolutely no finding that the noncompliance itself (the failure to give the Corps of Engineers advance notice of work) had any environmental or health safety impact at all.

Mr. Radmacher admitted that he had stated in the application for the 9.15 acre Land Disturbance Permit that no part of the disturbance area would impact the waters of the United States. However, he also explained how he came to that conclusion due to Exhibit 39 and as more thoroughly described above. (*Radmacher Tr. 412-415*) Petitioners offered no competent and substantial

scientific evidence, or for that matter any evidence, of any damage or harm to any person or to the environment by reason or on account of the information contained in the e-certification Land Disturbance Permit Application.

With respect to the issue of whether or not any actions by Mr. Radmacher in filling the form out in this matter might lead to future noncompliances, Applicant calls the Hearing Officer's attention to Applicant's Exhibit 16, the second Land Disturbance Permit obtained for the enlarged 104-acre area on March 13, 2014. By the time Applicant applied for this enlarged permit, Applicant had been made aware of the Corps of Engineers 404 requirements. In the e-certification document for the application identified as Applicant's 16, Applicant checked the box "yes" as to whether waters of the United States would be impacted by work in the larger area.

In summary, Mr. Radmacher's certification to the Missouri Department of Natural Resources regarding whether any disturbed land in the 9.15 acre disturbance site would impact waters of the United States was correct in the first instance and not misleading or false. Therefore, Petitioners have failed to establish any issue of noncompliance by competent and substantial scientific evidence on this point.

3. APPLICANT FAILED TO POST A COPY OF THE PUBLIC NOTIFICATION SIGN PROVIDED WITH MSOP 1538 IN ACCORDANCE WITH THE INSTRUCTIONS SET OUT IN THE PERMIT AT PAGE 9, PARAGRAPH 13.

Petitioners' evidence on this point included Mr. Snyder's assertion that the public notice sign which was part of the permit was not properly posted. (*Snyder Tr. 44*) In support, he identified Petitioners' Exhibit MM, MSOP 1538 (also

Applicant's Exhibit 3). Mr. Snyder referred to page 9, paragraph 13, stating the location for sign posting. (*Snyder Tr. 99, 100; Petitioners Exhibit YY, GF and Applicant's Exhibits 41, 42; Snyder Tr. 100-104*)

In summary, Mr. Snyder pointed out that the sign was not located at the AA Highway entrance to the farm; but instead was located up the road from the entrance on a signboard behind a farm house but at or near the fenced-in entrance to the borrow site. (*See also Radmacher Tr. 430-432*) The claim is that the sign was not posted at the main entrance to the site near AA Highway and visible from AA Highway.

First, as noted above, there was no competent and substantial scientific evidence presented of any harm to the environment or the health and safety of any person as a result of the sign placement.

Second, it was agreed that no statute or regulation existed mandating the location of the sign at the entrance to the farm. (*Snyder Tr. 141-154*) The posting protocol is found only in the Land Disturbance Permit instructions on page 9 of the permit. The regulation 10 C.S.R. 40-10.080(f) requires a finding that the conduct of the applicant must relate to a noncompliance with an environmental law administered by the Missouri Department of Natural Resources. This particular issue of alleged fact does not address a noncompliance or a violation of any environmental law or regulation but only the protocols set forth in the permit.

Mr. Radmacher testified that it was standard practice in his construction business to post land disturbance permit notices in project job trailers and that at the time he did not focus on trying to hide the sign. After the complaint was

made, the sign was moved to the farm entrance at AA Highway. (*Radmacher Tr. 430-432*)

Jimmy Coles from the DNR visited the site on March 7, 2013 and observed the sign up the driveway behind the house. He said typically the sign should be located where the public can see it. (*Coles Tr. 326-328*) However, he never indicated to Mr. Radmacher that the sign should be moved. (*Coles Tr. 356*) Likewise, Mr. Radmacher indicated that no one from DNR had instructed him to move the sign or advised him that it was posted in the wrong location. (*Radmacher Tr. 430-432*)

Mr. Snyder admitted on cross examination that the DNR representatives had told him that the Applicant could place the sign somewhere else. (*Snyder Tr. 153*) As noted above, the Missouri Department of Natural Resources own interpretation of the application of any rules and regulations and requirements under the statutes should be given deferential weight. In this instance no one from the Department of Natural Resources Clean Water Program believed that the location of the sign constituted any noncompliance or violation and none was issued.

Once again, there is no harm to the environment or to any person demonstrated by the location of the sign, there is no evidence of any prejudice to any person as a result of the sign placement, there is no evidence that any statute or regulation was violated and no evidence of the likelihood of the Applicant's failure to properly post the sign in the future given the facts revealed on this issue at the hearing and, particularly, given the fact that Applicant has now moved the

sign in order to comply with Petitioners' interpretation of the requirements of the permit.

4. APPLICANT FAILED TO PREPARE A PROPER STORM WATER POLLUTION PREVENTION PLAN.

Petitioners' evidence on this proposed issue was rather sparse. Mr. Snyder claimed that the SWPPP was deficient. (*Snyder Tr. 44*) He reviewed the index of the SWPPP which listed various documents as part of the SWPPP and then noted that they were not attached to the SWPPP. (*Snyder Tr. 115, 116*) From this evidence Petitioners conclude the SWPPP violates the Clean Water Law and Regulations. Petitioners presented no further evidence on this issue. No one from Petitioners side of the case testified in support of Mr. Snyder's unsupported conclusion that the SWPPP was defective, deficient or in noncompliance with laws and regulations.

Mr. Radmacher testified that he and his staff had prepared the SWPPP and simply used a template form that existed in their office from other SWPPPs prepared for other construction projects. (*Radmacher Tr. 415-420*) Mr. Radmacher also testified that Mr. Peltz came to the farm in November 2012 and reviewed the SWPPP document in question with Mr. Radmacher. (*Radmacher Tr. 448-451*) Mr. Peltz also observed the upper pond and rock check and lower dam. (*Radmacher Tr. 454*) The only comment Mr. Peltz made to Mr. Radmacher was to sign and date Applicant's Exhibit 4(a), the SWPPP BMP drawing page, which was the last page of the SWPPP. (*Radmacher Tr. 454, 455, 456*)

On cross examination Mr. Snyder acknowledged that Patrick Peltz for the Clean Water Program had reviewed Applicant's SWPPP in November 2012 and

did not find fault with the SWPPP. Mr. Peltz simply did not agree with Mr. Snyder's conclusions. (*Snyder Tr. 168*)

Petitioners also examined Aron Bleibaum on this point. He testified that the purpose of the SWPPP was to detail erosion control measures to be employed relative to permits and the location of the BMPs. (*Bleibaum Tr. 298*) The SWPPP is the on-site control plan for storm water management. (*Bleibaum Tr. 299*) The SWPPP is not submitted to the Missouri DNR for approval as part of the permitting process. (*Bleibaum Tr. 298, 299*) Instead, the permittee simply needs to have one for site inspection review and visits. (*Bleibaum Tr. 298, 299*) If there is a problem or a defect with any SWPPP when reviewed, but no storm water sediment or pollution discharge, an inspector can simply ask that the SWPPP be improved. It would not necessarily be any type of a violation. The permittee may simply receive a warning. (*Bleibaum Tr. 299, 300*)

Jimmy Coles came to the site in September of 2013 and also reviewed the SWPPP provided to him by the Applicant. He stated the SWPPP contained all necessary components and information required by the Land Disturbance Permit. (*Coles Tr. 324*) The SWPPP was examined to determine if it contained the minimum requirements of the MSOP. (*Coles Tr. 352, 353*) In his opinion, if the SWPPP contained the minimum requirements of the permit and was capable of achieving the required water quality standards within the permitted boundaries, then that would be sufficient for compliance purposes. (*Coles Tr. 354*) The emphasis was to assure that water is clean. The paper work (the SWPPP) may

come into play but the ultimate goal of the program is clean water. (*Coles Tr.* 354)

As noted above, there is no evidence in this case of any sediment or pollution in state or federal waters in excess of any limits permitted by law. Once again, Petitioners have failed to present any competent and substantial scientific evidence establishing any issue of fact demonstrating a noncompliance with any Clean Water Act statute or regulation relating to Applicant's SWPPP.

5. APPLICANT FAILED TO KEEP THE SWPPP AND LAND DISTURBANCE INSPECTION RECORDS CONTINUOUSLY ON SITE.

Petitioners claim that the SWPPP was not present on site when Mr. Snyder visited in March of 2014. (*Snyder Tr.* 46, 116, 117) Petitioners, therefore, claim that the failure of the Applicant to maintain the SWPPP on site continuously is a violation or noncompliance with the MSOP permit requirements. The permit requirements are found in Applicant's Exhibit 3, the July 6, 2012 Land Disturbance Permit and Applicant's Exhibit 16, the March 13, 2013 Land Disturbance Permit. The relevant requirements are found on page 9, paragraph 10 and on page 10 in paragraph F(1). The provisions provide that the applicant is to maintain copies of the MSOP, the SWPPP and the site inspection records and they shall be accessible during normal business hours; and a log of each inspection and a copy of the inspection report should be kept on site.

Mr. Radmacher acknowledged that the SWPPP was not maintained on site continuously as there was no permanent location in which to store or maintain it. Applicant maintained the SWPPP in vehicles when present on site and working. (*Radmacher Tr.* 432-434)

Mr. Peltz testified and identified Applicant's Exhibit 4 as the SWPPP referred to in his report of November 2012. (*Peltz Tr. 912, 913*) With respect to the question of continuous presence of the SWPPP on site, Mr. Peltz testified that the SWPPP needs to be on site when the inspector is there and can have it immediately. The Department of Natural Resources allows permittees to bring the SWPPP to the site. The idea is that the SWPPP be "functional" and "available". (*Peltz Tr. 913, 914*)

Jimmy Coles also testified on this issue and he said that Mr. Radmacher had provided both the SWPPP records and the inspection reports to him when he came on site in September of 2013 for his review. (*Coles Tr. 323, 396*) He said that if there is no office on site nor any place to keep the SWPPP and inspection records, it would be acceptable to keep them off site so long as they were made available to the inspector enabling the inspector to make a determination if the SWPPP and inspection records were acceptable. (*Coles Tr. 356, 363, 368 and 369*) Mr. Coles stated that his position on this issue was consistent with Missouri Department of Natural Resources policy. (*Coles Tr. 369*) The Land Disturbance Permit requires the SWPPP to be on site when land disturbance operations are in progress. See Applicant's Exhibit No. 3, MSOP 1538, page 3, paragraph C(2), which states: "A copy of the SWPPP must be available on site when land disturbance operations are in progress or other operational activity that may affect the maintenance or integrity of the best management practices (BMP) . . . structures and made available as specified under Section F Records of this permit." Mr. Coles stated that when he was on site on September 4, 2013, land

disturbance was not in progress and at that time the site was stabilized. Therefore, he used his discretion regarding the issue of whether the SWPPP was to be maintained on site continuously.

When reading the MSOP permit requirements regarding record retention and maintenance in Applicant's Exhibit 3, page 9, paragraph 10, and page 10, paragraph F, one can conclude that Jimmy Coles' interpretation of the requirements is correct. The MSOP requires that the SWPPP and inspection records be retained and that they are to be made "accessible during normal business hours" (page 10(F)(1)); "shall be kept on site" (page 9, paragraph 10). However, it is less than abundantly clear whether they are to be kept on site continuously.

Applicant received no complaints from the Missouri Department of Natural Resources representatives regarding location of the SWPPP and the inspection records and no citations were issued by the Clean Water Program. Both the inspections by Mr. Peltz (Applicant's Exhibit 10) and Mr. Coles (Applicant's Exhibit 25) indicate the records were supplied and reviewed by the Clean Water Program specialists and no negative comments made. Mr. Peltz's report, Applicant's Exhibit 10, states, "SWPPP and inspection reports were provided and inspection records were "available and up to date". Mr. Coles' report, Applicant's Exhibit 25, states, "The Storm Water Pollution Prevention Plan (SWPPP) and required inspection records for the site were provided by Mr. Radmacher. The SWPPP contained all the components and information required by the SWPPP. *

* * The site inspection records review indicated that the site inspections have been conducted every two weeks." *Applicant's Exhibit 25, page 2.*

Therefore, Petitioners have adduced no evidence of a competent and substantial scientific nature to develop an issue that the SWPPP and inspection records were to be maintained on site continuously, even when business operations were not in progress and no activity conducted on site. There is no record support for Petitioners' and Mr. Snyder's unilateral interpretation of the MSOP contrary to that of the Missouri Department of Natural Resources Clean Water Program representatives.

6. APPLICANT MAINTAINED INCOMPLETE OR INACCURATE LAND DISTURBANCE INSPECTION RECORDS.

Petitioners claim that Applicant failed to maintain complete and accurate site land disturbance inspection records in accordance with the Land Disturbance Permit requirements. (*Snyder Tr. 45*) Specifically, Petitioners asserted inspections were not conducted at the intervals required by the permit. (*Snyder Tr. 73-77*)

As noted above, Patrick Peltz inspected the project in late November 2012 and, in accordance with his written report, Applicant's Exhibit 10, he reviewed Applicant's site inspection reports and stated: ". . . I examined the Storm Water Pollution Protection Plan (SWPPP) *and all documents required* by the SWPPP." He further noted that "The site had sat idle for a period with no construction activity. During the idle period, the site had been inspected monthly * * * Regular weekly inspections were being conducted since construction had restarted and was continuous * * * Required records were available and up to date." Applicant's Exhibit 10, page 2. Mr. Peltz concluded that monthly inspections in

the absence of any site activity in the permitted area was sufficient and, when work began again in the permitted area, weekly inspections were recommended.

At the hearing, Mr. Peltz confirmed that he had reviewed the inspection reports during his November inspection and the reports were "comprehensive". (*Peltz Tr. 897*) As noted in his report, he testified there was a "gap" in the reports for the period September 15 through October 15. (*Peltz Tr. 898, 899*) However, he noted that the gap was not worth noting in his report and that he normally would not cite a permittee for something like that involving a small time frame. (*Peltz Tr. 927, 928*)

There were no water discharges at the time of the Peltz inspection and the borrow site was found to be in compliance with the Clean Water Regulations and the Land Disturbance Permit.

Mr. Coles, who, as noted, reviewed the site on September 4, 2013, stated in his report, Applicant's Exhibit 25, page 2, "At the time of the inspection no land disturbance activity was taking place within the permitted area. All previously disturbed land had been stabilized . . . * * * The Storm Water Pollution Prevention Plan (SWPPP) and required inspection records were provided . . . * * * The MSOP requires . . . that the areas that have been stabilized must be inspected at least once per month. The *inspection reports reviewed indicated that site inspections have been conducted every two weeks.*" Mr. Coles concluded that monthly inspections in stabilized areas was sufficient. (*Coles Tr. 322-323, 325-326*)'

Both Mr. Peltz and Mr. Coles for the Water Program reviewed Applicant's site inspection records and found no defects or deficiencies or grounds to conclude that the records were inaccurate or incomplete as argued by the Petitioners. Both concluded that monthly inspection reports were sufficient in cases where no land disturbance activity was ongoing or in areas where land disturbance activity had occurred but the site was stabilized. In either instance a monthly report was sufficient. No witness for Petitioners, other than Mr. Snyder, indicated in any way that Applicant's inspection records were inaccurate or incomplete.

Thomas Radmacher testified that he conducted the site inspections for the reports and called the information into the office (*T. Radmacher Tr. 574*) and noted that the reports were filled out in the office by others. (*T. Radmacher Tr. 577*) He stated that he reviewed the completed records (*T. Radmacher Tr. 577-579*) He said that inspections were conducted at a minimum weekly (*T. Radmacher Tr. 639*) and at times reports were filled out every two weeks, as noted above. (*T. Radmacher Tr. 588*) He had others go to the farm daily and then report to him regarding any rain events and whether areas were wet. (*T. Radmacher Tr. 592*) He would then have the office check local rain records for further action that needed to be taken relative to reports. (*T. Radmacher Tr. 593*) Mr. Radmacher further testified that at no time did he ever observe any sediment leaving the Radmacher farm property. (*T. Radmacher Tr. 638, 639*) In sum, there is no evidence supporting the Petitioners' position.

7. APPLICANT FAILED TO INSTALL MECHANICAL BMPs IN THE 9.15 ACRE BORROW SITE.

Petitioners stated this claim was that the Applicant failed to ". . . place BMPs in the permit area as required by statute or regulations" (*Snyder Tr. 44-45*); and/or as required by the Land Disturbance Permit. (*Snyder Tr. 77-78*) Mr. Snyder testified that in his opinion there were no BMPs placed by the Applicant in the 9.15 acre area, (*Snyder Tr. 79*); and that the BMPs illustrated on Applicant's Exhibit 4, last page, and Applicant's Exhibit 4(a) and also the last page of Applicant's Exhibit 17, were outside the 9.15 acre permit area. (*Snyder Tr. 79, 80*) It is the Petitioners' position that this somehow created a noncompliance with the Clean Water Law.

Applicant's Exhibit 3, the Land Disturbance Permit of July 6, 2012, requires the Applicant to install "site specific" practices to best minimize the soil exposure, soil erosion and the discharge of pollutants." Applicant's Exhibit 3, page 3, paragraph (c)(2).

The type and location of required BMPs are set forth at pages 5 and 6 of the Land Disturbance Permit and particularly on pages 4-6 in paragraph C (Requirements), subparagraph (3) (SWPPP Requirements) and subparagraphs (e) (f) and (g) relative to nonstructural and structural BMPs. In all three subparagraphs the stated BMPs are referred to as "for use" "at the site". There is no requirement that the BMPs be "on" the site, if the site is defined as the 9.15 acre permit area. Nonstructural BMPs can include, for example, vegetation, trees, mulch, sod, seed, geotextiles, etc.; and structural BMPs can include diverting water flows, silt fences, diversion dikes, drainage swales, sediment traps, rock check dams, subsurface drains, pipe drains, soil drains, gabions, and sediment

basins, etc. See also 10 C.S.R. 20-6(1)(c) Definitions (2) BMPs for Land Disturbance.

BMPs for storm water control are specifically described in the regulations as a schedule of activities, prohibitions of practices or maintenance procedures or other practices that reduce the amount of soil available for transport or a device that reduces the amount of suspended solids in runoff "before discharged to the waters of the state."

Neither the Land Disturbance Permit nor the regulations specifically state that all BMPs must be placed or located within the confines of the specifically permitted disturbed area. The express intent is to implement BMPs or place structural or nonstructural BMPs "at the site" to prevent or reduce sediment being discharged to "the waters of the state."

For example, the regulation cited above lists a number of types of BMPs for storm water control as: state approved standard specifications and permit programs . . . employee training in erosion control . . . site preparation, surface stabilization, runoff control measures, runoff conveyance measures, inlet and outlet protection, stream bed protection, a critical path method or schedule for performing erosion control and other proven method for controlling runoff and sedimentation. These BMPs (or practices) are of many different types and only some are recognized structural BMPs that can be placed in a permitted area. The regulation apparently recognizes nonstructural BMPs which obviously cannot be placed or located physically within the permitted boundaries as argued by the Petitioners. How would one locate "employee training" within a 9.15 acre site?

In addition, the BMPs are required to be "site specific" and, therefore, it is implicit that they may be varied depending on the location or site layout.

Even the Land Disturbance Permit at page 6, paragraph (i) states that "storm water discharges from disturbed areas which leave the site shall pass through an appropriate impediment to sediment movement such as a sedimentation basin, sediment traps and silt fences prior to leaving the land disturbance site." This is exactly what was implemented by Applicant on the farm site.

Mr. Snyder admitted on cross examination that Applicant had installed a ditch check, rock check and a sediment basin and he also admitted that he was not competent to testify regarding the issue of BMPs and whether they were properly designed or installed or whether they were right or wrong. (*Snyder Tr. 133-135*) Since he was the only witness providing the only evidence for Petitioners, there is no competent and substantial scientific evidence for Petitioners' position on this issue.

Also, as noted above, Mr. Peltz inspected Applicant's site regarding the 9.15 acre permit in November of 2012 and reviewed the Applicant's SWPPP and specifically the last page of the SWPPP and stated on page 2 of Applicant's Exhibit 10 that "Radmacher Brothers have the site plan with all BMPs drawn on the plan . . . Radmacher Brothers have engineered and constructed the site in order to manage storm water discharges associated with the facility . . ." He went on to note that the structures constructed the dam and the rock checks, and their purpose was to preserve soil. He preliminarily concluded "Radmacher's BMPs

will serve as structural conservation practices to preserve soil resources . . . Assorted BMPs have been constructed throughout . . . to manage storm water before it runs onto the excavation and mining area and also to manage storm water in the excavated zones. Agricultural practices were incorporated as BMPs to conserve soil and manage storm water runoff on the entire site."

His ultimate conclusion was that the Radmacher borrow site, the 9.15 acres, was in compliance with the Clean Water Law and the Land Disturbance Permit. The report's conclusions are directly contrary to the Petitioners' position on this issue.

Mr. Peltz also testified at the hearing that the BMPs generally are to be located in the permitted area but can be located outside of that area where the permitted area is only part of the area owned by the permittee. (*Peltz Tr. 915, 916, 917, 930*). Mr. Peltz indicated the key factor is that sediment does not get into the state or U.S. waters beyond prescribed limits. (*Peltz Tr. 915, 916, 917, 930*). Mr. Peltz volunteered that the Radmacher borrow site was "very well managed." (*Peltz Tr. 918, 920*) Mr. Radmacher further testified that Mr. Peltz never advised the Applicant of any problem or issue of noncompliance with the Land Disturbance Permit, the SWPPP or relative to BMPs. (*Radmacher Tr. 452*)

Mr. Snyder on cross examination admitted that he had read Mr. Peltz's report but simply disagreed with his conclusions.

Petitioners also called as witnesses on this same subject Kevin Mohammadi, Aron Bleibaum, Jimmy Coles and Nathan Hamm.

Mr. Mohammadi said, as noted above, that he did not see any erosion on his site visit and did not see any need for BMPs. (*Mohammadi Tr. 203*)

Mr. Bleibaum also reviewed the site on March 7 and stated that water runoff from the land disturbance area was going into a pond outside of the permit area but within boundaries of the property and, therefore, there was no violation. (*Bleibaum Tr. 307, 300*) His position on that issue was similar that of Mr. Peltz.

Jimmy Coles from the Water Program, who inspected this site on September 4, 2013, said the project was stabilized and vegetated and covered with gravel in the disturbed area to prevent erosion. (*Coles Tr. 325, 326*) He went on to say that the BMPs are not designed to prevent storm water from leaving the project. BMPs, whether procedural, managerial or structural, are intended to make the water clean before it leaves the property. (*Coles Tr. 336, 337*) As to the 9.15 acre permitted area, there was no existing water course flowing through it. It was all sheet flow on rock. There was no distinct channel or stream. The permit area had a general slope and rain simply soaked in or ran off. (*Coles Tr. 371, 372*) Appropriate BMPs for sheet runoff under the regulations would include rock liners, rock checks, ditch checks to slow the water runoff. The sheet flow on Applicant's property led to the ditch check area and these BMPs were "appropriate sediment control measures used in these situations." (*Coles Tr. 374*)

Nathan Hamm also testified that the rock check and large dam both served the purpose to "reduce sediment leaving the site." (*Hamm Tr. 700*) In other words, the BMPs in this situation were "site specific" as required by Land Disturbance Permit 1538.

Robert Radmacher also explained the BMPs installed by Applicant including the rock check in Applicant's Exhibit 51 at the upper pond (*Radmacher Tr. 420, 421*) and noted that it collects the sheet flow and the sediment from the 9.15 acre site because of the lack of any channel on the flat area to control the flow. The rock check location was the best place to cap sediment off the 9.15 acre site. (*Radmacher Tr. 420-424; Applicant's Exhibits 4 and 4(a)*) Radmacher further testified that neither Mr. Peltz nor Mr. Coles had ever advised the applicant of any issue with respect to Applicant's BMPs after their site inspections. (*Radmacher Tr. 424, 425*)

In summary, Petitioners have adduced no competent and substantial scientific evidence to demonstrate that the Applicant's on-site BMPs failed to comply with the Land Disturbance Permit, the SWPPP, the Clean Water Act or the Clean Water Act Regulations. All evidence was contrary to the Petitioners' position. The BMPs obviously were effective in that no pollution, no sediment nor environmental harm was demonstrated by Petitioners nor observed by the permittee or any of the DNR representatives that visited the site on multiple occasions over a one-year period.

CONCLUSION

Petitioners' burden in this case is to establish one or more issues of fact by competent and substantial scientific evidence regarding noncompliances by the Applicant sufficient to constitute cause for denial of the permit application. Petitioners acknowledge that they have no claim of actual impairment of health, safety or likelihood to any person, and that Applicant did not demonstrate a pattern of noncompliances at other locations in Missouri. Therefore, they elected

to rely solely on 10 C.S.R. 40-10.080(F) to support the noncompliance requirement in the relevant section. In order to do that, Petitioners were required to establish three critical points on each of the eleven issues by enough evidence to allow the Hearing Officer to "find" the issues in Petitioners' favor; i.e.,

A. Present acts of noncompliance or a reasonable likelihood that the Applicant would be noncompliant in the future; and

B. There existed multiple acts of noncompliance; and

C. The acts were within the laws administered by the Missouri Department of Natural Resources; and

D. Such acts of noncompliance resulted in harm to the environment or impaired the health, safety and livelihood of persons outside the facility.

Stated another way, Petitioners had to prove *multiple acts* of present or future *non-compliances* with the Missouri Department of Natural Resources *laws* that result *in harm* to the environment or to a person. Petitioners have wholly failed to satisfy that burden with sufficient evidence to allow the Hearing Officer to find even one of the eleven issues.

Of Petitioners' eleven suggested noncompliances, one (the 404 Permit issue) is totally unrelated to Missouri Department of Natural Resources statutes and regulations and, therefore, is excluded.

Of the remaining ten, only one constitutes a recognized noncompliance of a Missouri Department of Natural Resources law or regulation (the September 4, 2013 oil spot and erosion at the dam). The other nine are "suggested" noncompliances that Petitioners ask this Hearing Officer (and the Land Reclamation Commission) to make findings of noncompliance. Of the remaining nine, only two are related to Land Reclamation laws and regulations. Six relate to Clean Water Commission statutes and regulations and one to the Dam Safety Council statutes and regulations.

As demonstrated by the existing law, the Land Reclamation Commission has no jurisdiction to make initial or new findings of noncompliances with Clean Water Commission statutes and regulations and Dam Safety Council statutes and regulations to those seven. Therefore, seven of the remaining nine issues are excluded. Only two issues remain for consideration. Those two clearly related to matters having to do with the Land Reclamation statutes and regulations but were not established by a sufficient level of evidence.

Moreover, in all nine instances, neither the Clean Water Commission nor the Land Reclamation Commission found a noncompliance prior to this case being heard. As to all nine, there was no competent and substantial scientific evidence that any of the suggested noncompliances even existed. And, even if the nine alleged noncompliances existed, there was no competent and substantial scientific evidence that any of them harmed the environment or harmed the health and safety and livelihood of any person outside of the facility or was likely to do that in the future.

The single noncompliance for consideration remaining (the oil spot and dam erosion) is insufficient to satisfy the multiple noncompliance requirement in the regulation. Furthermore, it does not represent harm to the environment or the impairment to health and safety requirement of the regulation. The Clean Water Commission representative stated there was no harm to the environment as a result. Inasmuch as the two items were immediately remediated upon notice to Applicant, it is unlikely that future harm will result. Therefore, this single noncompliance does not satisfy Petitioners' burden.

Applicant suggests that Petitioners have not established any issue of fact by competent and substantial scientific evidence regarding noncompliances sufficient to support findings to deny the permit. And even if Petitioners had done so, Applicant adduced sufficient contrary

proof to refute each and every one of them. As a result, Petitioners have failed in their legal burden of "*production*" and Applicant has succeeded in its burden of "*persuasion*" under §444.773.4 R.S.Mo. and the Hearing Officer should make findings and conclusions favorable to Applicant on all issues and recommend to the Land Reclamation Commission that the pending permit of Applicant be granted.

Respectfully submitted,

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Certification of Service

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