

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

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

**PETITIONERS’ REPLY TO APPLICANT AND RESPONDENT’S
RESPONSES TO PETITIONERS’ BRIEF**

Petitioners, through counsel, respectfully submit the following reply (the “**Reply**”) to the responses (the “**Responses**”) of Applicant AA Quarry (“**Applicant**”) and the Department of Natural Resources (“**Respondent**”) to Petitioners’ Brief (the “**Brief**”). In support of the Reply, Petitioners state as follows:

As all parties have filed a statement of facts, Petitioners’ Reply will not rehash all of the information, facts, and legal analysis. However, that does not mean that Petitioners agree that the facts set forth by Applicant and Respondent are correct, true, or accurate. In fact, Petitioners specifically deny such factual allegations to the extent that they are a misstatement, incorrect, or inaccurate and reserve the right to present evidence to the contrary at the hearing in this matter.

Petitioners' focus in this Reply centers on the following arguments that Applicant and Respondent advance in their Responses – namely that: 1) Petitioners' reliance on R.S. Mo. § 444.773.4 and 10 CSR 40.10.080(3)(E)(F) is misguided; 2) the Court should deny Petitioners' because they did not present competent scientific evidence in their Brief; 3) there is no evidence of Applicant's noncompliance with relevant statutes and regulations; and 4) Petitioners fail to meet their burden of proving harm to their health, safety, and livelihood under R.S. Mo. §444.773.4 and 10 C.S.R. 40-10.080.3(D). Each of the above arguments fails as a matter of law.

I. PETITIONERS PROPERLY RELY ON R.S. Mo. § 444.773.4 and 10 CSR 40.10.080(3)(F).

Applicant's argument regarding whether it falls under the legal requirements of R.S. Mo. §444.773.4 is unpersuasive, erroneous, and stands against significant legal precedent. In summary, Applicant supports its argument on this issue by stating that: 1) R.S. Mo. § 444.773.4 is inapplicable to the Applicant because the term "and other locations in Missouri" excludes consideration of the Applicant acts of non-compliance because Applicant is a "first-time applicant"; 2) Applicant is not considered an "operator" under Missouri Law; and 3) Applicant's alleged non-compliance that impacts a petitioner's health, safety, or livelihood must result from the violation of a law that the DNR administers.

A. The Hearing Officer May Consider Applicant's Acts of Non-Compliance Because R.S. Mo. § 444.773.4 Applies to the Applicant Even Though it is a First-Time Applicant.

Applicant's reasoning that its acts of non-compliance fall outside the provisions of R.S. Mo. §444.773.4 because it is first-time applicant is nonsensical. Applicant relies on R.S. Mo. §444.773.4, which provides in relevant part;

If the Commission finds, based on competent and substantial scientific evidence on the record, that the operator has demonstrated, during the five year period immediately preceding the date of the permit application, a pattern of noncompliances *at other locations*, in Missouri, that suggests a

reasonable likelihood of future acts of noncompliance the Commission may deny the permit” (emphasis added).

Applicant argues that §444.773.4 “addresses past non-compliances by existing operators at other locations in the State in the preceding five years, and is not designed to address applications by new applicants without any past history.”¹ Such an interpretation of this statute points to the absurdity of Applicant’s argument. At its core, Applicant’s position results in the illogical result that the DNR has no mechanism in which to deny a permit based on a first-time applicant’s non-compliance. Essentially, Applicant argues that the DNR must simply grant applications to first-time applicants without reviewing that applicant’s actions or behavior in obtaining the permit solely because the applicant is excluded from the only statute that the legislature has provided to review applicants. This argument is circuitous at best.

In reaching such an implausible result, Applicant incorrectly applies the holding in *Lincoln County Stone Company, Inc. v. Koenig*, 21 S.W.3d 142 (Mo. Ct. App. 2000), to support its argument. The *Lincoln* court simply held that “[t]he application for a permit must include whether the applicant or any person associated with the applicant holds or has held any other permit...and an identification of such permits.” *Lincoln County Stone Company, Inc. v. Koenig*, 21 S.W.3d 142, 147 (Mo. Ct. App. 2000). The court did not hold that an applicant must have made previous applications to fall under the purview of the statute. Rather, the court held that if there were previous permits, they must be disclosed to the Commission. *Id.* The Court’s reasoning behind its holding obviously was to prevent companies from “simply form[ing] a ‘new’ corporation or legal entity to avoid commission scrutiny of their current permits and history of compliance in evaluating their effect upon a hearing petitioner’s health, safety or livelihood.” *Id.* If the legislature had intended such a ridiculous result, it could have stated that

¹ See Applicant’s Answer In Opposition to Petitioners’ Petition, 9.

subsection 4 applies only to repeat applicants, which it did not do either in the heading to, or the body of, the statute. Therefore, Applicant's argument that §444.773.4 only applies to an applicant with other locations within the State is without merit and legal precedent.

The overriding concern that the *Lincoln* court expressed focused on the impact of past sins, i.e., that an Applicant past should not haunt him forever. The Missouri legislature responded to the *Lincoln* court's concern by establishing a five-year look back period in the statute that creates a measurable time in which an applicant's non-compliance is relevant with respect to a current permit application. *Id.* at 148.

Applicant also relies on 10 CSR 40-10.080(3)(F) to support this argument. 10 CSR 40-10.080(3)(F) provides in pertinent part:

If a hearing petitioner or the director demonstrates either present acts of noncompliance or a reasonable likelihood that the applicant or the operations of associated persons or corporations in Missouri will be in noncompliance in the future, such a showing will satisfy the noncompliance requirement in this subsection, but such basis must be developed by multiple noncompliances of any environmental law administered by the Missouri Department of Natural Resources at any single facility in Missouri where such noncompliances resulted in harm to the environment or impaired the health, safety, or livelihood of persons outside the facility" (emphasis added).

Notably, the first sentence of this regulation undercuts Applicant's position that R.S. Mo. §444.773.4 does not apply to first-time applicants. Specifically, "[i]f a hearing petitioner or the director demonstrates either present acts of noncompliance or a reasonable likelihood that the applicant or the operations of associated persons or corporations in Missouri will be in noncompliance in the future, such a showing will satisfy the noncompliance requirement in this subsection." 10 CSR 40-10.080(3)(F). By its express language, this regulation permits examination of an applicant's current conduct relating to whether the applicant is complying with applicable laws regardless of whether the Applicant has "other locations" within the State.

In fact, the *Lincoln* Court observed that present acts of non-compliance or a reasonable likelihood that the applicant will be non-compliant in the future will also satisfy the showing of the noncompliance requirement set forth in the statute and regulation. *Lincoln*, 21 S.W.3d at 148. Consequently, the language in R.S. Mo. §444.773.4 and its sister regulation 10 CSR 40.10.080(3)(F) expressly allow the Petitioners to present evidence on the Applicant's acts of non-compliance.

B. Applicant's is an "Operator" Under Missouri Law.

Applicant is considered an "operator" under Missouri law. As Applicant points out in the Answer, the term "operator" is defined as "[a]ny person, firm or corporation engaged in and controlling surface mine operation." 10 C.S.R. 4010.100 Definitions (19) Operator. In Applicant's own words, as of July 6, 2012, Radmacher Brothers Excavating ("**RadBro**") already had applied for a General Operating Permit for land disturbance. By Applicant's own admission, "RadBro proceeded to work under this Land Disturbance Permit utilizing some of the rock for site improvements and for a RadBro project for the City of Kansas City, Missouri on Choteau Trafficway."² Therefore, RadBro, an extension of AA Quarry, had become an operator under the DNR definition. Applicant, through RadBro, was using the rock for jobs outside of the site. Therefore, it was not engaging solely in remedying the land trauma that previous owners caused, as Applicant told investigators in July 2012. Further, this activity was in violation of their "borrowing site" permit.

Applicant would have one believe this type of use is permitted because it is not on a "frequent and on-going basis," but Applicant misapplies the statute. Essentially, Applicant urges that a form over substance inquiry is appropriate when in fact the analysis should focus on substance over form. Specifically, R.S. Mo. §444.766(2)(2)(b) provides that excavation for

² See *Applicant's Answer In Opposition to Petitioners' Petition*, 3.

purposes of land improvement doesn't require a permit *unless* the minerals are being used for a commercial purpose.

As stated above, an “operator” is any person engaged in and controlling a surface mine operation. “Surface mining” is defined as “[t]he mining of minerals for *commercial purposes* by removing the overburden lying above natural deposits of the minerals, and mining directly from the natural deposits exposed...” 10 C.S.R. 4010.100 Definitions (30) Surface Mining (emphasis added). Applicant points out in the Answer, “the term ‘commercial purpose’ is defined in §444.765(3) as: ‘. . . extracting minerals for their value in sales to other persons *or for incorporation into a product*’ (emphasis added).³ Because Applicant, through RadBro, was using rock from the quarry to fulfill a contract with the City of Kansas City, Missouri, it was engaging in commerce and concerned with earning money for this job. Therefore, Applicant, through RadBro, was an operator of a surface mining operation by incorporating the limestone into a finished product for the Choteau Trafficway, and thus is considered an “operator” under the regulations.

Furthermore, even if Applicant or RadBro did not separately charge for this limestone material that was incorporated into the Choteau Trafficway project, the use of the limestone constituted materials necessary in RadBro completing its the scope of work under the contract with the City for the completed project. Since the need for the limestone was necessary to fulfill the contract, and, in fact, Applicant commercially supplied the limestone through RadBro for that project, it does not matter whether Applicant or RadBro separately invoiced the City for the limestone. The rock was still part of the transaction and was included in RadBro’s contract price with the City of Kansas City, Missouri. In every sense of the word, this was a commercial

³ See Applicant’s Answer In Opposition to Petitioners’ Petition, 12.

transaction involving the minerals regardless of whether Applicant or RadBro ever generated an invoice for these materials.

Likewise, Applicant relies on the fact that it was allowed to excavate and move the minerals without a permit because it fell under a regulatory exclusion. However, Applicant was only allowed to remove the minerals from the site to an off-site location if the materials were “not crushed, screened, or passed through other benefactions.” R.S. Mo. §444.766 (2012). It would have been impossible for RadBro to use these minerals in their project on the Choteau Trafficway unless the minerals were in fact crushed. Therefore, Applicant needed a permit for the removed minerals. Without this permit, Applicant engaged in mining without a permit, which is a clear violation of Missouri law.

C. Applicant’s Acts of Non-Compliance Can Be Considered Even If the Non-Compliance is Unrelated to a Law or Regulation that the DNR Administers.

Applicant maintains that instances of non-compliance must arise from an environmental law “administered by the DNR that have resulted in personal or environmental harm.”⁴ Applicant reliance on this regulatory language again is misguided.

During the Pre-Hearing Conference held in Jefferson City, Missouri, on August 27, 2013, the interpretation of whether an act of non-compliance that involves the health, safety, or livelihood of a person outside of the proposed facility must be tied to any law that the DNR administers caused the Hearing Officer to set a briefing schedule on the issue. The language in R.S. Mo. §444.773.4 and its sister regulation 10 CSR 40.10.080(3)(F) should be construed in the disjunctive. That is to say that a permit may be denied if an applicant’s non-compliance involves *either* a violation of a DNR environmental law *or* impairs the health, safety and livelihood of persons outside of the proposed facility. The impairment to a person’s health, safety and

⁴ See Applicant’s Answer In Opposition to Petitioners’ Petition, 11.

livelihood is of a general nature, and if the regulations were intended to cover only those impairments that could be considered under the scope of the DNR, it easily could have written “administered by the Missouri Department of Natural Resources” at the end of the sentence instead of separating the environmental law violation from the health, safety and livelihood violation.

Applicant believes because he is a first-time applicant, he can have no “past” history of noncompliance, and, therefore, falls outside the scope of R.S. Mo. §444.773.4 and its sister regulation 10 CSR 40.10.080(3)(E)(F). This argument fails for the above-stated reasons. Additionally, Applicant’s present non-compliance and likelihood of future non-compliance must be considered if they impair a person’s health, safety, or livelihood regardless of whether the non-compliance is rooted in a violation of a law or regulation that the DNR administers.

In sum, Applicant and its conduct falls within the scope of R.S. Mo. §444.773.4 and 10 CSR 40.10.080(3)(F) regardless of whether it is a “first-time applicant.” Applicant’s argument defies the express language of the statute and its sister regulation, together with the holding in *Lincoln*. Further, Applicant is an “operator” under Missouri law because it engaged in the sale and use of the quarry’s minerals for a commercial purpose. Additionally, its use of minerals on the project exceeded the scope of its land disturbance permit and the scope of Missouri’s statutes allowing excavating without a permit because Applicant used crushed rock for the Choteau project, which is further evidence of Applicant’s non-compliance. Lastly, Applicant’s acts of non-compliance that impact the health, safety, and livelihood of person’s outside the facility are within the purview of this matter regardless of whether they arise from compliance with a law that the DNR administers.

II. PETITIONERS WERE NOT REQUIRED TO PRESENT SCIENTIFIC EVIDENCE IN THEIR BRIEF.

Applicant's argument that no scientific evidence has been presented, and, thus, Petitioners argument should fail is counter to the purpose of the requested hearing. The entire point of the hearing is to allow Petitioners to present competent scientific evidence to establish the harm to their health, safety, and livelihood that would justify denying Applicant the requested permit. To fault Petitioners before they have had a chance to present such scientific evidence would run contrary to the administrative process.

The hearing provides the chance for Petitioners to present experts and lay witnesses whose testimony will provide sufficient evidence to meet the burdens required under R.S. Mo. §444.773.4 and 10 C.S.R. 40-10.080.3(D). The purpose of the Brief was to set forth Petitioner's claims and how the health, safety and welfare of petitioners will be affected. R.S. Mo. §444.773.4 provides that "[i]n any public hearing, if the commission finds, based on competent and substantial *scientific evidence on the record*, that an interested party's health, safety or livelihood will be unduly impaired by the issuance of the permit, the commission may deny such permit." The required "evidence on the record" would be Petitioner's evidence at the hearing. Facts in a brief, unless supported by evidence on the record do not constitute "evidence."

Petitioners believe there is sufficient scientific and factual evidence to create issues of fact that the proposed permitted activity will unduly impair the health, safety, and livelihood of those situated in the area.

III. PETITIONERS CAN ESTABLISH APPLICANT'S ACTS OF NON-COMPLIANCE.

Applicant states that it wasn't until the beginning of 2012 that it began moving "broken"

rock from the project site to ravines along the property.⁵ Petitioners contend this is false, and that Applicant began actually breaking limestone rock early in 2011 that violated both State and Federal Law.⁶

Furthermore, Applicant did not apply for a land disturbance permit until July 6, 2012, after it had already begun disturbing the subject land. According to DNR regulations, a state operating permit that identifies the site must be issued *before* the site is disturbed. Land disturbance prior to the issuance of a permit is in violation of state and federal law. Additionally, the permit that the DNR issued was for the creation of a “borrowing site,” and nothing more. Applicant informed the DNR that the permit was for a new site. Consequently, the DNR gave Applicant a waiver on air compliance regulations because Applicant informed the DNR there was currently no air emissions on the site. However, the Applicant’s information was false in that the site had been up and running for some time.

Because Applicant had already begun breaking rock and using rock on projects outside the project area, Applicant’s purpose was not in fact for the establishment of a “borrowing site” as the permit stated, but instead a mining site. Land improvement is defined as “work performed by or for a public or private owner or lessor of real property for the purposes of improving the suitability of the property for construction at an undetermined future date, where specific plans for construction do not currently exist.” R.S. Mo. §444.765.10 (2012). Mining, however, is defined as “the removal of overburden and extraction of underlying minerals or the extraction of minerals from exposed mineral deposits for a commercial purpose...” *Id.* at 12. Because

⁵ See Applicant’s Answer In Opposition to Petitioners’ Petition, 2.

⁶ See Missouri State Operating Permit number MORA01538, page 1, issued 7/6/2012, “Any site owner/operator subject to these requirements for stormwater discharges and who disturbs land prior to permit issuance from the Department is in violation of both State and Federal Laws.”

Applicant was removing rock, and, by its own admission, using it on a project for the City of Kansas City, Missouri, it was conducting a mining operation and not just improving land.

Applicant admitted in the Answer that it had designs of making commercial use of the quarry as far back as Summer 2012, and, therefore, the improvements to the land were with the commercial quarry in mind. Petitioners contend that the Applicant knew from the time it purchase the property it would be using the property as a commercial quarry. Robert Radmacher made this statement at a public meeting held in March 2012, at Lone Jack, Missouri. Specifically, Mr. Radmacher stated on the record: "How often do you have the chance to purchase 540 acres of land with limestone on it?"

Applicant states that in January 2013, at the Direction of the DNR Regional Director of the Water Pollution Control Program, Andrea Collier, it posted public notice on the bulletin board of its principal place of business. Petitioner presumes this was Applicant's business location in Pleasant Hill, Missouri. However, land disturbance and storm water permits are supported by the same statute and 10 CSR 20-6.020(1)(E)(1)-(2) outlines the process for providing notice for public participation. Specifically, "[n]otice will be circulated within the geographical areas of the proposed discharge; the circulation may include any or all of the following: 1. Posting in the post office and public places of the municipality nearest the proposed discharge; and 2. Posting near the entrance to the applicant's premises." 10 CSR 20-6.020(1)(E)(1)-(2).

Additionally, Applicant's own general permit MORA01538 contains a public notice provision stating:

The permittee shall post a copy of the public notification sign described by the Department at the main entrance to the site. The public notification sign must be visible from the public road that provides access to the site's main entrance. An alternate location is acceptable provided the public can

see it and it is noted in the SWPP. The public notification sign must remain posted at the site until the permit has been terminated.”⁷

Applicant failed to post public notification at the main entrance to the site, at a location visible from the public road, or at an acceptable alternate location in which the public would be reasonably able to view the notification, all in violation of 10 CSR 20-6.020(1)(E)(1)-(2).

Furthermore, Applicant states that “[i]nitially there was a question as to the requirement for certified mail notices to contiguous and adjacent landowners” but that after consulting with the DNR, “Robert Radmacher confirmed with Tucker Frederickson of the DNR that because the AA Quarry mine plan area utilized a 100-foot setback from the boundary lines of the 520-acre site for mining operation limits, the certified mail notice to contiguous or adjacent landowners was not necessary...”⁸ However, nowhere in 10 CSR 40-10.020(I)(1)(B) do the regulations provide for any 100-foot setback that would release Applicant from its duty of providing notice to residents. In fact, the relevant language states;

At the time the application is deemed complete by the director, the *applicant shall also* mail letters containing a notice of intent to operate a surface mine...” to “[t]he last known addresses of all record landowners of contiguous real property or real property located adjacent to the proposed mine plan area” (emphasis added).

Respondent fails to discuss the 100-foot setback in its Response, and Applicant fails to provide the authority on which Mr. Fredrickson relied on when informing Applicant they need not comply with the written regulations.

Moreover, Applicant’s statements to the DNR during inspections in November 2012, that the land being modified with a dam was “agricultural use,” and, therefore, did not require a

⁷ See Missouri State Operating Permit number MORA01538, page 9, section 13, issued 7/6/2012.

⁸ See *Applicant’s Answer In Opposition to Petitioners’ Petition*, 5.

permit, was an intentional distortion of Applicant's true purpose for the site.⁹ In fact, by the time that Respondent inspected the site for compliance, but seemingly unbeknownst to Respondent at the time of the November 2012 inspection, Applicant already had established itself as a limited liability company whose stated purpose in its Operating Agreement was ". . . to engage in the mining of rock and manufacturing of gravel and related products. . . ." ¹⁰

Therefore, Applicant, from the time it purchased the property until present day, intended to use the property as a commercial mining operation, but failed to inform the DNR of their ongoing plans, and, therefore, DNR issued no citations relating to Applicant's construction of the dam because of Applicant's representations to the DNR that Applicant constructed the dam for the purpose of cattle and agricultural uses. In fact, Respondent states that when Applicant later indicated its intent to use the pond it created with the dam as a retention basin for commercial quarry, department staff immediately informed Applicant that a permit was required.¹¹ The DNR instructed Applicant that in order to be in compliance, it would need a second land disturbance permit. This was after the time in which Petitioners reported to Respondent that Applicant needed a land disturbance permit based on Applicant constructing the dam.

Moreover, Applicant states in the Answer that prior to submitting its application for a land reclamation permit, it began land improvements in November 2012 on the dam, check dams, and pond intending to "preserve terrain, manage vegetation, manage runoff and supply water to cattle on the site, *as well as a potential sedimentation basin and water source which*

⁹ See *Applicant's Answer In Opposition to Petitioners' Petition*, 4, "Shortly thereafter, in the month of July 2012, RadBro determined to explore the possibility of opening a commercial quarry to allow the "crushing and sizing" of rock for RadBro projects and for commercial sale of crushed rock to other parties."

¹⁰ *Id.*

¹¹ See *Respondent's Answer*, 5, "When Applicant indicated intent to use the pond as a retention basin for a future quarry operation, Department staff informed that a permit is required, if the pond was not to be used solely for agricultural purposes."

might also serve the proposed quarry operation in the future” (emphasis added).¹² Applicant admits the construction of the dam and check dams were for the purpose of a commercial quarry, but failed to get proper clearances and permits prior to construction. Based on this activity alone, DNR should have found Applicant to be noncompliant when investigators began receiving complaints in Fall 2012. At the time Applicant constructing the dam and basis, it had not submitted a permit application to the DNR for these improvements and no SWPP measures were in place.

In addition, once it began expanding its operations beyond the permitted 9.15 acres, Applicant was required to essentially redo the entire permit process. Under 10 CSR 40-10.020(2)(H):

The applicant shall advertise a public notice in accordance with this subsection each time the applicant files a permit application for a new mine, files a request for expansion to an existing mine...” Under the DNR regulations, Mine expansion is defined as “involv[ing] expansions to the area beyond the area described in an existing operation and reclamation plan. With the exception of a permit fee, a mine expansion requires an application equal to a new permit. An expansion may be requested at any time during the term of an existing permit and *requires the filing of a new public notice*” (emphasis added).¹³

Applicant fails to establish that it provided new public notice of its expansion with regard to the new 214 acres it sought cover under the new permit application.

Applicant’s attempt to further the notion that only past noncompliance is relevant under R.S. Mo §444.773.4 simply is wrong. For all of the reasons previously stated, and the *Lincoln* court’s holding that a petitioner can use present acts of noncompliance establish a reasonable likelihood of the Applicant’s future noncompliance, Petitioners assert that they can meet the noncompliance threshold. *Lincoln*, at 148. Additionally, when determining the likelihood of

¹² See Applicant’s Answer In Opposition to Petitioners’ Petition, 5.

¹³ 10 C.S.R. 4010.100 Definitions (15) Mine expansion.

future noncompliance, the Commission may look to past acts of noncompliance. *Id.* Under 10 CSR 40-10.080(F) it is expressly stated that present acts of non-compliance are contemplated by the Commission. *See* 10 CSR 40-10.080(F).

Applicant argues that its failure to obtain a §404 permit is not an act of non-compliance because that regulations falls under the auspices of the Army Corps of Engineers and not the DNR. Petitioners agree with this narrow statement. However, the DNR requires a §401 certification whenever a §404 violation occurs. Over a month before the ACOE cited Applicant with the §404 violation, Petitioners contacted the DNR Regional Office with their concerns that Applicant was in violation of the Clean Water Act by building the dam and that the ACOE required a §404 permit for such activity and the DNR had to issue a §401 certification once Applicant remedied the violation. The DNR Regional Office, through Michael Alcana, informed Petitions that the §401 certification and §404 permit were not required. However, the DNR does not have the discretionary authority to make such a determination. In fact, when the ACOE inspected the Applicant's property and found the dam, it issued a citation for the §404 violation, which then triggered the requirement that the DNR issue a §401 certification before could move forward with its land disturbance activities. It also was during this time that Applicant was in violation of the Clean Water Act that the DNR advised Applicant that a second land disturbance permit was necessary to bring Applicant back in compliance with DNR regulations.

Applicant further argues that because the Supreme Court opinion in *Rapanos v. U.S.*, 547 U.S. 715 (2006) was not "clear," Applicant was unable to determine whether the waters on the property were protected. However, in the letter accompanying the MORA01538 borrowing site permit, issued on July 6, 2012, Mr. John Madras, Director of the DNR, states:

This permit does not authorize land disturbance activity in jurisdictional waters of the United States as defined by the Army Corps of Engineers,

unless the permittee has obtained the required Clean Water Act Section 404 Permit...land disturbance activities are not to be conducted in the jurisdictional area of the project until the 404 permit has been obtained...Please contact the applicable Regional Office if you would like to schedule an Environmental Assistance Visit (EAV)...During the visit, Department staff will review the requirements of the permit and answer questions pertaining to Land Disturbance activities.”¹⁴

Therefore, help for the Applicant was just a phone call away. The DNR was willing to clear up the issue of whether a §404 permit was necessary for Applicant’s activities and Applicant had the opportunity to take the DNR up on their offer, but failed to do so. Applicant’s plea of ignorance and confusion fail as it had assistance available prior to the land disturbance work on the dam construction site. Therefore, Applicant knowingly and willfully, or at the very least negligently, acted in violation of the Clean Water Act and in operating without a permit.

Regarding Applicant’s arguments as to dam height violations, Petitioners did supply Mr. Paul Simon of the DNR Dam Safety Program with the method of measurement Petitioners relied on when reporting the alleged violation. Petitioners further provided Mr. Simon with photos showing the dam was being lowered. In fact, Mr. Radmacher admitted to Respondent that the dam had been lowered, and Respondent admitted it had no way of knowing whether the dam had originally exceeded 35 feet in height.¹⁵ Petitioners can only speculate as to why Applicant, confident it crafted a dam height of proper proportions, would expend the effort in lowering it. Additionally, the dam was lowered while Applicant was under an Army Corps of Engineers order to cease all land disturbance and activity in the §404 violation area. The risk of further violating the Army Corps of Engineers order did not stop Applicant from lowering the height of a dam, which he claims was already in compliance.

¹⁴ See Missouri State Operating Permit number MORA01538, letter to Radmacher Brothers from John Madras, issued 7/6/2012.

¹⁵ See *Respondent’s Answer*, 7, “Although Mr. Tom Radmacher, speaking on behalf of Applicant, admitted that the dam had been lowered, the DRSP has no way of knowing whether the dam ever exceeded 35 feet in height.”

Contrary to Applicant's assertion, Petitioners do not claim that Dam Safety has jurisdiction over storm water pollution. However, 10 CSR 40-10.050(9)(C) provides that a dam over 35 feet tall does require a permit from Dam Safety to be modified. Because MORA02837, the permit issued March 13, 2013, was under a FOIA seal, Petitioners had no knowledge of the permit's existence and only became aware of the permit through the Response. Nonetheless, Applicant was still operating without a permit when the land disturbance occurred, and, therefore, was in noncompliance when the DNR issues this second permit. Essentially, this second permit covers Applicant after the fact for everything Applicant did wrong in creating the basin and brings Applicant into compliance with no repercussions for Applicant's violations and non-compliance.

In conclusion, Applicant should not be able to rely on the assumption that because no governing body issued any citations for non-compliance during investigations, it is free from misbehavior. In fact, Applicant has engaged in a series of half-truths and falsities to the DNR that, when revealed, demonstrate Applicant's violations. These include, without limitation, engaging in land disturbance prior to obtaining a land disturbance permit, failing to tell the DNR of its intention to operate a commercial quarry as far back as July 2012, failing to inform the DNR of the ongoing air emissions prior to obtaining a permit, operating a commercial mining operation without a permit, failing to obtain the proper permit when Applicant admitted that it was building the dam with the intent create a water retention basin for a commercial quarry, and going through the process of incorporating itself as a commercial quarry in July 2012 while still representing to the DNR that Applicant was constructing only agricultural improvements.

IV. PETITIONERS MEET THEIR BURDEN OF PROVING HARM TO THEIR HEALTH, SAFETY, AND LIVELIHOOD UNDER §444.773.4, R.S.MO., and 10 C.S.R. 40-10.080.3(D).

Petitioners have scientific, competent evidence to support their claims that the Applicant's quarry will significantly impact their health, safety, and livelihood. It is vitally important that Petitioners move forward with these claims and arguments. From past history, Petitioners are fully aware that the Land Reclamation Commission ("LRC") has never denied a permit to a quarry applicant on these grounds. It is also equally true that once the LRC grants a quarry permit to an applicant it has never revoked that permit if the alleged impact to health, safety, and livelihood that was presented at the hearing actually occurs once the quarry begins operation. This seems to put the cart before the horse. In light of the competing policies that the LRC must consider in determining whether to grant a quarry permit to an applicant, as set forth above, the LRC should give more upfront consideration to the evidence presented on these issues at the hearing and permit stage given Petitioners lack of recourse once the permit is issued and the quarry begins operation.

Due to the close proximity of the quarry to the residences, it is common sense that dust migrating from the quarry to the homes could have negative health implications for these residents. Fumes could also result from explosive powder. Additionally, blasting that is unregulated could cause damage to neighboring structures by way of flying rock. According to the DNR website, the Land Reclamation Commission, while responsible for permitting a quarry to begin blasting, does not regulate the blasting activities on the non-coal quarries that result.¹⁶ Respondent avers that the Land Reclamation Act "does not provide standards for activities that

¹⁶ See DNR web site "Land Reclamation Facts Sheet" page 5, regarding what types of blasting activities are regulated by the Land Reclamation Commission.

occur outside the mine plan boundary relating to the protection of nearby residents,” effectively leaving residents no recourse for true harm to their health, safety and livelihood.¹⁷

In addition to noise from blasting, the use of explosives on-site so close to AA Highway and the residences of many homeowners will unduly impair the safety of drivers, children, and adults, as the vibrations caused by such blasting could weaken the structural integrity of the highway and surrounding homes, placing residents and travelers in further danger. Because of this danger alone, the permit application should be denied.

When AA Highway was first designed, it was not intended to carry high-volume, heavy-load vehicles. The road itself is a chip-and-seal surface, a surfacing that is not designed with high-volume, heavy-load vehicles in mind. Based on a recent MoDOT traffic study, the existing chip-and-seal surfacing cannot withstand the current traffic volume, let alone take on additional gravel trucks on a regular basis. While MoDOT has scheduled maintenance for AA Highway, the re-surfacing will not occur until 2015 at the earliest. Until re-surfacing occurs, AA Highway will not be safe for the increased volume of gravel quarry traffic.

Moreover, even with the re-surfacing, AA Highway is still too narrow to safely accommodate the commercial gravel trucks. AA Highway averages 21' in width from US 50 South to MO 58. Large commercial vehicles like the gravel trucks Applicant utilizes, carry an 8' width, not including attachments such as side-view mirrors. With the mirrors attached, the gravel trucks are now 9'8" wide, leaving only 2'8" of clearance on each side of the pavement plus clearance in the center.

Between US 50 and the entrance to the proposed quarry site at 381 NW AA Highway, there are five (5) Johnson County roads that enter AA Highway from the east, and four (4) roadways that enter from the west. These roads provide access points for residents living along

¹⁷ See Respondent's Answer, 12.

the highway. Between US 50 and the entrance to the proposed quarry site, there are 53 driveways that have direct AA Highway access. Many of these driveways are “blind driveways” that are not visible due to hilltops and curves along the roadway.

Moreover, near the proposed quarry entrance site there are approximately 50 mailboxes placed within two feet of the AA Highway pavement to accommodate US Postal Service carriers. The proximity of the mailboxes to the entrance of the proposed quarry site and the highway creates a significant danger to residents when the commercial gravel trucks are entering and exiting the highway. Additionally, the intersection of US 50 and AA Highway consists of two Stop signs crossing a central median. From eastbound US 50, a large commercial vehicle slowing to turn south on AA Highway has significantly impaired vision of approaching traffic in the left lane. On westbound US 50, there is a blind hilltop approximately 500’ to the east which results in a line-of-sight that does not meet current MoDOT safety standards. This creates a significant risk because MoDOT reports that approximately 20,000 vehicles per day pass through the AA Highway/US 50 intersection.

The Missouri State Highway Patrol Commercial Vehicle Enforcement Unit states that gravel trucks such as Applicant’s will be limited to an overall weight of 56-58,000 pounds on AA Highway and US 50. With a weight of 24,000 pounds in an empty state, the gravel trucks will only be able to carry around 32,000 pounds of gravel per load. With a reduced load, a greater number of truck loads will be required to move product. Applicant has stated that it will move an estimated 300,000 tons of gravel per year. The volume of trucks moving back and forth along AA Highway and US 50 to accommodate this number would be extraordinary. This also would increase the probability of accidents. Because AA Highway contains no shoulders, has multiple

driveway access points, and has an abundance of blind curves and blind hilltops, the constant running of gravel trucks will exacerbate an already precarious driving situation.

While Applicant will receive the profits of the proposed quarry, it is the residents and the neighboring school districts that will bear the economic costs of the quarry thereby impairing the community's livelihood. Respondents claim they do not need to take into consideration the effect on sales tax revenues or the decline in property values when deciding whether to approve a permit, however that line of "passing the buck," or transferring blame to other organizations is what ultimately leads to the demise in prosperity of certain areas with no accountability on the part of business owners who cause the economic disruption in these areas. While it is true that the DNR is not responsible through its regulatory or statutory authority for maintaining property values, the job of The Land Reclamation Act is to "strike a balance of serving the interests of the mining community with protecting the health, safety and livelihood of Missouri citizens."

The presence of a new gravel quarry will have a negative impact on existing property values in western Johnson County. The decline in existing property values will impair the livelihood of 545 homeowners who moved to the AA Highway corridor prior to Applicant purchasing the subject property to construct a quarry. Therefore, it is the nuisance that is moving to the homeowner.

As in most communities, residents in Johnson County have a substantial percentage of their personal wealth invested in their home. Applicant has not offered any potential solutions for compensating property owners for their losses, nor can Applicant guarantee that property values

will not decline. Applicant and Respondent can only state that property values before the quarry have not declined.¹⁸

The decline in aggregate property values of homes providing property taxes to the Holden R-III school district – currently just under \$45 million – will impair the livelihood of the district. Approximately 72% of the current collected tax revenue is allocated to the Holden school district. The Holden school district currently uses the ceiling tax levy rate approved by Johnson County voters. Therefore, for each decline of \$1 in property tax on these properties, the Holden school district will suffer a loss of revenue, with no way to correct the situation. The Holden school district is currently attempting to solve a \$650,000 budget shortfall for the current school year.

The decline in aggregate property values in the Kingsville R-I school district – approximately \$23 million - will impair the livelihood of the district. Increased tax collections from the quarry will only partially offset the decline in property tax collections. The Kingsville R-I school district is currently using the ceiling tax levy rate that Johnson County voters approved.

Moreover, the threat of the proposed quarry site already has had a chilling effect on surrounding home prices in 2013. Properties that have sold, have sold for less than their listed amounts. Additionally, other properties remain unsold because realtors are advising potential homebuyers of the possibility that a new quarry will be built. Impairment of the livelihood of current residents wishing to sell their properties already has occurred. Petitioners will present evidence that it is the original homeowners surrounding a quarry that suffer the impairment to

¹⁸ See *Applicant's Answer In Opposition to Petitioners' Petition*, 32 "... the DNR staff in the Land Reclamation Program contacted the Johnson County Tax Assessor, who advised the DNR that property values near the other four quarries in the county have not decreased."

their livelihood through decreased property values. Following this initial reduction in valuation, the market has accounted for the devaluation that the new quarry causes.

With regard to Applicant's determination that Petitioners' beliefs concerning the impairment to their health, safety, and livelihood are "subjective" and speculative, Petitioners can demonstrate with competent scientific evidence that their beliefs are neither subjective nor speculative. Petitioners assert that the Brief possessed information relating to the current impairment as a result of Applicant's noncompliance and the effect of Applicant's current blasting and mining. Additionally, Petitioners will establish at the hearing that increased blasting at the quarry site would such impairments will be immensely magnified if the Applicant is granted its permit.

CONCLUSION

In conclusion, Applicant's arguments that it falls outside the relevant statutes and regulations of R.S. Mo. § §444.773.4 and 10 CSR 40.10.080(3)(F) fail as it is clear Applicant is the type of permit seeker the legislature had in mind when drafting the legislation. The *Lincoln* court's holding makes clear that prior permits or existing operations are not required for an applicant to fall under the purview of these statutes and regulations. Further, Applicant is an operator of a mining operation by definition because Applicant already has used crushed rock from the quarry for a commercial purpose. Applicant's belief that Petitioners must state scientific evidence in the Brief is incorrect, as the statute clearly states scientific evidence will be submitted during the hearing. Petitioners again show a pattern of noncompliance on the part of Applicant, and under Missouri statute, present acts of noncompliance are sufficient to meet the noncompliance statute contemplated by the legislature. Finally, Petitioners advance concrete impairments to their health, safety and livelihood, and Applicant's belief that the impairments

are subjective fails as Petitioners have demonstrated current impairments that will be even more exacerbated as quarry productions increase. Applicant's acts of noncompliance, continued operations without a permit, deceptions to the DNR, and all of the other arguments set forth above patently demonstrate that the Land Reclamation Commission should award a permit to Applicant.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I certify that on September 19, 2013, I served a true and accurate copy of the above via electronic mail on:

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