

**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, <i>et seq.</i> RSMo
New Site Permit Application)	
)	
DAVID EARLS, et al,)	
)	
Petitioners,)	
)	
v.)	Permit # 1094
)	
DEPT. OF NATURAL)	
RESOURCES, KEVIN)	
MOHAMMADI, Staff Director,)	
Land Reclamation Program,)	
Division of Environmental Quality,)	
)	
Respondent,)	
)	
AA QUARRY LLC,)	
)	
Applicant.)	

**Respondent's Reply to Petitioners' Suggestions in Opposition to
Applicant's Motion to Exclude Evidence and Dismiss Claims**

The Commission's granting of a hearing constitutes a finding that Petitioners made a good faith showing that their health, safety or livelihood may be unduly impaired by the issuance of the permit. Under 10 CSR 40-10.080(2)(B), impacts to Petitioners must be within the authority of any environmental law or regulation administered by the Department of Natural

Resources. It cannot be said that the Commission has already determined any facts that were presented by the Petitioners to justify the hearing request. This is because § (3)(B) of the same rule provides a new burden of proof at the formal hearing. *Saxony Lutheran High School v. Missouri Land Reclamation Com'n*, 392 S.W.3d 52, 57 (Mo. App. W.D. 2013).

Petitioners now must establish an issue of fact regarding such impact with competent and substantial scientific evidence, not merely good faith. If they do, then Applicant has the burden of proof for that issue. No issue of fact has been established already because the veracity or persuasive force of Petitioners' evidence may be challenged at the hearing. *Id.* at 59, fn. 10.

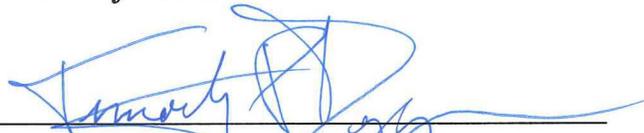
Similarly, the Commission cannot be said to have already determined any impact's legal relevance to a possible permit. Under § (3)(D) of the rule, the Commission must determine, based upon competent and substantial scientific evidence on the hearing record, whether a petitioner's health, safety or livelihood will be unduly impaired "by impacts from activities that the recommended mining permit authorizes." The Commission might find that issuance of the permit is not barred by an impact if it is from an activity that the recommended permit does not authorize. For example, the Commission could find that a safety hazard on Route AA resulting from increased truck traffic related to the quarry may not be a basis for denying the permit because the permit does not "authorize" the traffic. Perhaps increased truck

traffic could result from issuing a permit, but it does not follow that such highway use is “authorized” by the permit.

In the Magruder case, before the hearing commenced, this hearing officer was presented with the same question raised here: Should some claims and evidence be excluded if they involve matters that are not regulated by the Department of Natural Resources? There, this hearing officer issued the order attached to this reply. The order provided that the hearing officer would not admit such evidence, but would allow offers of proof for purposes of any judicial review. The order made sense, and the hearing officer should adapt it for this case. All questions related to relevance and the Commission’s jurisdiction can be addressed during the hearing or in the hearing officer’s recommendation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was electronically mailed, this 19th day of November, 2013 to:

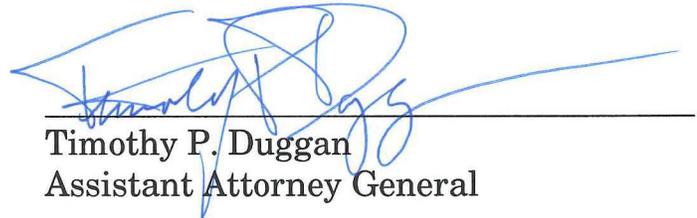
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**MISSOURI DEPARTMENT OF NATURAL RESOURCES
LAND RECLAMATION COMMISSION**

In the Matter of:)	
)	
MAGRUDER LIMESTONE CO., INC.)	Proceeding Under
Osage Beach Quarry, Miller County, Mo.,)	The Land Reclamation Act,
<i>Applicant,</i>)	Sections 444.760 – 444.789, RSMo.
)	
LINDA WEEKS, et al)	
<i>Petitioners,</i>)	
)	
v.)	
)	
LARRY P. COEN,)	
Staff Director,)	
Land Reclamation Program,)	
Division of Environmental Quality,)	
<i>Respondent,</i>)	

DECISION AND ORDER RULING ON COLLATERAL ISSUES

Applicant, prior to and at the Pre-Hearing Conference, held on November 20, 2007, raised the issue of: *Whether matters relating to the sewer plan easement; noise pollution; traffic; dust outside the mining site; blasting activities; property devaluation and quarry impact on surrounding businesses can be considered?*

Pursuant to the Post Pre-Hearing Conference Order, Applicant timely filed its Brief on Collateral Issues, Respondent and Petitioner Sewer Board timely filed their Response to Applicant’s Brief, and Applicant timely filed its Reply Brief. The McGovern Petitioners and Pro Se Petitioners did not file a Brief on the Collateral Issues. The Hearing Officer having considered the Briefs of the parties and the relevant statutes and regulations issues the following Decision and Order.

Controlling Statutes and Regulations

The statutes and regulations controlling the disposition of the items that have been designated as the Collateral Issues are set out as follows:

Section 444.773.3 RSMo, states in relevant part:

“If the recommendation of the director is for issuance of the permit, the director shall issue the permit without a public meeting or a hearing except that upon petition, received prior to the date of the notice of recommendation, from any person whose health, safety or livelihood will be unduly impaired by the issuance of this permit, a public meeting or a hearing may be held. ... If the public meeting does not resolve the concerns expressed by the public, any person whose health, safety or livelihood will be unduly impaired by the issuance of such permit may make a written request to the land reclamation commission for a formal public hearing.”

10 CSR 40-10.080(2)(B) provides in relevant part:

“The petitioner is said to have standing to be granted a formal public hearing if the petitioner provides good faith evidence of how their health, safety, or livelihood will be unduly impaired by the issuance of the permit. The impact to the petitioner’s health, safety, and livelihood must be within the authority of any environmental law or regulation administered by the Missouri Department of Natural Resources.”

10 CSR 40-10.080(3)(B) provides in relevant part:

“The burden of establishing an issue of fact regarding the impact, if any, of the permitted activity on a hearing petitioner’s health, safety or livelihood shall be on that petitioner by competent and substantial scientific evidence on the record.”

Decision

The statute and regulations establish the threshold for standing to be granted a formal public hearing. In particular to have standing, a petitioner must provide “*good faith evidence* of how their health, safety, or livelihood will be unduly impaired by the issuance of the permit.” A governmental entity – the LAKE OZARK-OSAGE BEACH JOINT SEWER BOARD and thirty-one (31) individuals provided “good faith evidence”

of how they believed their health, safety, or livelihood would be unduly impaired by the issuance of the permit in this case. The individuals are: LINDA WEEKS, LARRY & VICKY STOCKMAN, ANDREW ZAVISLAK, CLINTON & TAMIRA SHEPPARD, JERRY VINCENT, JOSEPH M. BAX, DENNIS & LINDA CROXTON, TODD & REBECCA REINECKE, JOHN M. & MARLINE ZAWISLAK, JACK & BARBARA FARRIS, ROBERT ZAWISLAK, STEVE & TERESA BEENY, DONALD BAKER, MICHAEL C. & JACQUELINE ATTKISSON, JUDY TAYLOR, MR. & MRS. WILLIAM MOORE, KEVIN & JUDITH MEYER, STEVE TERVIEL, JOHN & CARL WILLIAMS, and JOYCE MACE.

Therefore, this entity and these individuals were granted standing for a formal public hearing. The threshold for standing is slight – good faith evidence. The standard for evidence to establish the position asserted is not so slight.

Standard for Evidence to be Received

Having been granted standing, the evidentiary requirements established by the regulations are controlling. The first evidentiary standard to be met is spelled out in the second sentence of 10 CSR 40-10.080(2)(B). Any impact to the health, safety, or livelihood of a petitioner “*must be* within the authority of any environmental law or regulation administered by the Missouri Department of Natural Resources.” *Emphasis Added*. Therefore, evidence tendered by a petitioner of an alleged impact on health, safety, or livelihood not within the authority of the laws and regulations administered by DNR cannot be considered in a formal public hearing.

This requirement is foundational for the receipt of evidence by a petitioner, just as is the other evidentiary mandate of “competent and substantial scientific evidence.” 10 CSR 40-10.080(3)(B). The regulations establish that to be relevant and therefore admissible, these two standards must be met (1) impact within authority of laws and regulations administered by DNR, and (2) competent and substantial scientific evidence of the asserted impact.

The matters which Applicant contends are outside the authority of laws and regulations administered by DNR include the following: *sewer plan easement; noise pollution; traffic; dust outside the mining site; blasting activities; property devaluation and quarry impact on surrounding businesses*. No statutory citations were provided in

response to Applicant's Brief to establish that any of these matters are under the authority of laws and regulations administered by DNR.

Sewer Line Easement and Sewer Plant

While the existence of the sewer plant easement is not under the authority of laws and regulations administered by DNR, the potential impact if a rupture of the sewer lines or damage to the sewer plant itself were to occur, would clearly come under those laws and regulations administered by DNR and the Clean Water Commission under section 644.006 et seq RSMo. Therefore, evidence of the impact on the safety of the sewer lines and sewer plant comes within the requirement imposed by 10 CSR 40-10.080(2)(B). Testimony and exhibits addressing this issue (*safety to sewer line and plant*) upon proper foundation and shown to be relevant can be received into evidence with regard to a determination of whether the requested permit should be issued.

Other Matters Relating to Potential Impacts

The matters of noise pollution, traffic, dust outside the mining site, blasting activities, property devaluation and potential impact on businesses in the area where the quarry will be located do not fall under any statutes or regulations which the Hearing Officer has been able to determine are administered by DNR. Therefore, alleged impacts from these items having not been established to be under laws and regulations administered by DNR are not matters that can be considered in determining if the requested permit should be granted. Testimony and documents relating to such matters cannot be received as evidence in the evidentiary hearing – formal public hearing.

Any such proffered testimony and documents that might be tendered could only be received to maintain the record as an offer of proof and not as evidence upon which a decision could be rendered on the underlying issue of granting or denying the requested permit.

Order

The issue of the potential impact on the safety of the sewer line and plant is properly a matter that can be considered relative to issuance or denial of the requested permit as an impact within the authority of environmental law or regulation administered by the Missouri Department of Natural Resources. *10 CSR 40-10.080(2)(B)*.

The issues of the potential impact on the health, safety or livelihood of the individual petitioners based upon noise pollution, traffic, dust outside the mining site, blasting activities, property devaluation and potential impact on businesses in the area where the quarry will be located are not matters which can be considered relative to issuance or denial of the requested permit as an impact within the authority of environmental law or regulation administered by the Missouri Department of Natural Resources. *10 CSR 40-10.080(2)(B)*.

Any proffered testimony and documents from individual petitioners on the matters of noise pollution, traffic, dust outside the mining site, blasting activities, property devaluation and potential impact on businesses will only be received to maintain the record as an offer of proof and not as evidence upon which a decision could be rendered on the underlying issue of granting or denying the requested permit.

Certification of Service

The Hearing Officer certifies that he has sent a copy of this Decision and Order to each Pro Se Petitioner at their address of record in this proceeding on January 29, 2008 and the Attorneys of record for Applicant, Joint Sewer Board, McGovern Petitioners and Respondent by email attachment on January 28, 2008.

SO ORDERED January 28, 2008.

MISSOURI DEPARTMENT OF NATURAL RESOURCES



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