

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

In the Matter of:)	
)	
BUILDEX, INC.,)	LRP Permit No. 0387
New Market Plant Site)	Proceeding Under
Platte County, Missouri)	The Land Reclamation Act,
Permit Expansion Application)	Sections 444.760 through 444.790,
)	RSMo.
CONCERNED CITIZENS)	
OF PLATTE COUNTY,)	
ALAN & PAULA WEBB,)	
KARI KNABE,)	
SUSAN BROWN,)	
JERALD & LORENE FANSHER,)	
)	
Petitioners,)	
)	
v.)	
)	
MIKE LARSEN,)	
Staff Director,)	
Land Reclamation Program,)	
Division of Environmental Quality,)	
Respondent,)	
)	
BUILDEX, INC,)	
Applicant,)	

RECOMMENDED ORDER

NOW on this 8th day of November, 2009, the undersigned Hearing Officer submits his Recommended Order to the Missouri Land Reclamation Commission in the above-referenced case.

HOLDING

The Application for Expansion Permit #0387 is granted to Applicant Buildex, Inc. pursuant to the following special permit conditions:

1. Front end loaders or similar equipment along with haul trucks will transport shale from the quarry to the shale hopper.

2. The conveyor systems will be covered to a point located below the conveyor belt.
3. There will be an enclosure for all conveyor transfer points.
4. When raw shale is transported to the existing site, it will be done so via covered conveyor and either processed or stored in an enclosed shale storage building.
5. Blasting may be used only when Buildex encounters a subsurface obstacle requiring blasting. If blasting is required, Buildex will give the Land Reclamation Program three (3) days notice before detonating explosives.
6. Buildex shall use its best efforts to periodically water, wash and/or otherwise clean the paved portions of roads from debris resulting from Buildex equipment as necessary to achieve control of fugitive emissions from these roads.

IDENTIFICATION OF PARTIES

1. Applicant Buildex, Inc. (hereinafter “Applicant”) appeared by Counsel, Richard S. Brownlee III and Adam Troutwine, Hendren Andrae, LLC, Jefferson City, Missouri
2. Petitioners Concerned Citizens of Platte County, Alan & Paula Webb, Kari Knabe, Susan Brown and Jerald & Lorene Fansher (hereinafter “Petitioners”) appeared by Counsel, Charles F. Speer and Tammy R. Dodson, Speer Law Firm, Kansas City, Missouri
3. Respondent Mike Larsen, Staff Director, Missouri Department of Natural Resources, Land Reclamation Program (hereinafter “Respondent”) appeared by Counsel, Kara Valentine, Assistant Attorney General, Jefferson City, Missouri.

BACKGROUND

Applicant owns and operates a haydite plant located at 22105 Highway 371, Dearborn, Missouri. The plant is approximately one mile south of New Market, Missouri. Activities at the plant include mining and crushing shale. The existing plant operates under an industrial mineral permit issued by the Missouri Land Reclamation Commission and an air permit issued by the

Missouri Air Conservation Commission. In 2008, Applicant applied for an expansion permit of the industrial mineral permit for 183 acres across Highway 371 from the existing haydite plant. This Order relates to the expansion location only.

ISSUES

The Commission takes this appeal to determine:

1. Whether there is competent and substantial scientific evidence on the record, that a hearing petitioner's health, safety or livelihood will be unduly impaired by activities that the recommended mining permit authorizes, i.e. operation of Applicant's New Market Expansion Site, located in Platte County, Missouri; *10 CSR 40-10.08(3)(D)*; or

2. Whether there is competent and substantial scientific evidence on the record that the Applicant has, during the period from August 28, 2003 to August 28, 2008, demonstrated a pattern of noncompliance at other locations in Missouri that suggests a reasonable likelihood of future acts of noncompliance. *10 CSR 40-10.08(3)(E)*.

In the absence of the required evidence to establish one of these propositions the Application for Expansion of Permit #0387 is to be approved.

FINDINGS OF FACT

The procedural history of this matter is as follows (*date given for attorney's filing of a document is the date shown on the Certificate of Service for the document*):

1. Applicant filed its Permit Expansion Application #0387 with Respondent on August 28, 2008.

2. By certified letter dated September 15, 2008, Respondent deemed Applicant's permit expansion application complete and instructed Applicant to proceed with public notice by advertising a notice of intent to expand a surface mine, in a newspaper qualified to publish public

notice pursuant to Section 493.050, RSMo., in the county where the mine area is located for four consecutive weeks, pursuant to 10 CSR 40-10.020(2)(H). Respondent also instructed Applicant to send, via certified mail, a notice of intent to expand a surface mine to any contiguous or adjacent land owners and the governing body of the county or city in which the proposed mine plan area is located pursuant to 10 CSR 40-10.020(2)(I).

3. Beginning September 24, 2008, Applicant published public notice in *The Platte County Citizen*, a newspaper qualified to publish public notice pursuant to Section 493.050, RSMo., for four consecutive weeks. The company also sent by certified mail a notice of intent to operate a surface mine to the appropriate government officials and any contiguous or adjacent landowners, thus complying with the public notice requirements of 10 CSR 40-10.020(2)(H-I).

4. Thereafter, during the public comment period, Respondent received correspondences from Petitioners requesting a public meeting and/or a public hearing be held regarding the approval of Applicant's Permit Expansion Application #0387.

5. On October 14, 2008, Respondent received a letter from Applicant declining to hold a public meeting.

6. Under Section 444.773.3, the Staff Director to the Land Reclamation Commission reviewed Buildex's expansion permit application #0387 and recommended issuance of the permit in a recommendation dated October 31, 2008.

7. On November 20, 2008, the Land Reclamation Commission held its regularly-scheduled meeting and received Respondent's October 31, 2008 Memorandum recommending approval of Applicant's Permit Expansion Application #0387. The Land Reclamation Commission also heard presentations by Applicant and Petitioners regarding the issues raised in Petitioners' hearing request, primarily on the issue of whether silica dust was being emitted from

Applicant's current site, and whether same posed a threat to Petitioners' health or safety. The Land Reclamation Commission ultimately voted to approve Petitioners' hearing request.

8. On or about December 8, 2008, W.B. Tichenor was appointed Hearing Officer to conduct the public hearing in this matter.

9. On July 23, 2009, the Hearing Officer issued his Order Setting Evidentiary Hearing, setting the public hearing of this matter for November 9-10 and 17, 2009.

10. Thereafter, from approximately August 18, 2009 to October 9, 2009, Applicant and Respondent engaged in settlement negotiations regarding special conditions to attach to the permit that would address Petitioners' concerns with Applicant's Permit Expansion Application. Petitioners were invited to join the negotiations on several occasions, but were unresponsive.

11. On October 16, 2009, Applicant filed its Motion to Dismiss Petitioners' Action for Failure to Prosecute and Suggestions in Support of same.

12. On October 18, 2009, the Hearing Officer issued his Order to Show Cause Why Motion to Dismiss Should Not be Granted.

13. On October 23, 2009, Petitioners filed their Unopposed Notice of Dismissal, dismissing their action without prejudice.

14. On November 5, 2009, Petitioners, by letter to the Hearing Officer, stated the following:

“Petitioners hereby notify the Court that they do not oppose the six additional Permit conditions that were negotiated between the Missouri Attorney General's Office, the MDNR and the Applicant Buildex as were outlined in the Draft Final Recommended Order as presented to the Court.

“Further Petitioners agree to have the expansion permit to be issued to Buildex be modified accordingly.”

CONCLUSIONS OF LAW
and
DECISION

JURISDICTION

The hearing in this matter is authorized by § 444.773.3 RSMo, which provides in relevant part: "...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. The land reclamation commission may grant a public hearing to formally resolve concerns of the public. Any public hearing before the commission shall address one or more of the factors set forth in this section." *See also, 10 CSR 40-10.080(1)(F).*

The Hearing Officer was duly appointed by the Land Reclamation Commission of the Department of Natural Resources to conduct a hearing and recommend to the Commission a decision. §444.789.3 RSMo; 10 CSR 40-10.080(5)(C)(3). The Hearing Officer and the Commission have jurisdiction over this appeal.

HEARING PROCEDURE

Section 444.789 provides that any hearing held in this matter is a contested case, that the parties may conduct discovery, make oral arguments, introduce testimony and evidence, and cross-examine witnesses. The statute authorizes a member of the Missouri Bar to be appointed to hold the hearing and make recommendations, with the final decision reserved to the Commission. The Hearing Procedure mandated by statute and regulation was followed in this case. 10 CSR 40-10.080(5). No formal hearing for the purpose of receiving evidence on the record was required as the matter was settled by agreement of the parties

**PETITIONERS' GROUNDS IN OPPOSITION TO
APPLICANT'S PERMIT EXPANSION APPLICATION #0387**

Pursuant to the Hearing Officer's Order of January 12, 2009, Petitioners submitted their Grounds in Opposition to the granting of Applicant's Permit Expansion Application. In their Grounds in Opposition, Petitioners cited dust and air pollution and environmental concerns, including damage to Highway 371 and surface water runoff into Bee Creek, as their reasons for opposing Applicant's permit. In support thereof, Petitioners attached 7 exhibits to their Grounds in Opposition including a PowerPoint presentation presented to the Land Reclamation Commission at its November 20, 2008 meeting and several photos of Applicant's existing site in New Market, Missouri.

However, Petitioners have not presented any other evidence to support denial of Applicant's Permit Expansion Application. As set out above, Petitioners have dismissed their action opposing Applicant's Permit Expansion Application #0387, are not opposed to the six special permit conditions, and agree to the issuance of the expansion permit to Applicant modified by the six special permit conditions.

SPECIAL PERMIT CONDITIONS AGREED TO BY THE PARTIES

Applicant and Respondent engaged in lengthy negotiations during the course of this matter in order to come to an agreement on controls Applicant could exercise to alleviate Petitioners' concerns with ambient dust. The parties agreed to the following six special permit conditions as a result thereof:

1. Front end loaders or similar equipment along with haul trucks will transport shale from the quarry to the shale hopper.
2. The conveyor systems will be covered to a point located below the conveyor belt.
3. There will be an enclosure for all conveyor transfer points.

4. When raw shale is transported to the existing site, it will be done so via covered conveyor and either processed or stored in an enclosed shale storage building.
5. Blasting may be used only when Buildex encounters a subsurface obstacle requiring blasting. If blasting is required, Buildex will give the Land Reclamation Program three (3) days notice before detonating explosives.
6. Buildex shall use its best efforts to periodically water, wash and/or otherwise clean the paved portions of roads from debris resulting from Buildex equipment as necessary to achieve control of fugitive emissions from these roads.

The parties agree it is in the public interest to focus Buildex's resources on installing controls as set out in the special conditions rather than ambient monitoring, with the goal of reducing dust emissions from production activities at the plant, including any crystalline silica dust.

ORDER

As Petitioners have voluntarily dismissed their action challenging approval of Applicant's Permit Expansion Application #0387, as Petitioners, Applicant and Respondent have agreed to six special permit conditions that address the Petitioners' concerns regarding Applicant's Permit Expansion Application, and as Petitioners have agreed to the issuance of the Permit Expansion with the six special permit conditions, it is recommended by the undersigned Hearing Officer that Permit Expansion Application #0387 be granted to Applicant Buildex, Inc. with the following special conditions:

1. Front end loaders or similar equipment along with haul trucks will transport shale from the quarry to the shale hopper.
2. The conveyor systems will be covered to a point located below the conveyor belt.
3. There will be an enclosure for all conveyor transfer points.

4. When raw shale is transported to the existing site, it will be done so via covered conveyor and either processed or stored in an enclosed shale storage building.
5. Blasting may be used only when Buildex encounters a subsurface obstacle requiring blasting. If blasting is required, Buildex will give the Land Reclamation Program three (3) days notice before detonating explosives.
6. Buildex shall use its best efforts to periodically water, wash and/or otherwise clean the paved portions of roads from debris resulting from Buildex equipment as necessary to achieve control of fugitive emissions from these roads.

Any Finding of Fact which is a Conclusion of Law or Decision shall be so deemed. Any Decision which is a Finding of Fact or Conclusion of Law shall be so deemed.

SO ORDERED this 8th day of November, 2009.

MISSOURI DEPARTMENT OF NATURAL RESOURCES



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