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December 2, 2010

VIA HAND DELIVERY

Mike Larsen, Staff Director
Land Reclamation Program
Department of Natural Resources
1101 Riverside Drive
PO Box 176
Jefferson City, MO 65102-0176

RECEIVED
MO. LAND RECLAMATION COMM.
DEC 02 2010

Re: Comments - Heartland Materials, LLC Permit Application for Industrial Mineral Mines, New Permit – Open Pit Operation—Heartland Quarry, SUR-799 & 2102, T-32N, R-13E, Cape Girardeau County, Missouri

Dear Mr. Larsen:

This firm represents Saxony Lutheran High School located at 2004 Saxony Drive, Jackson, Missouri and Save Our Children's Health, Inc., a citizen advocacy group located in Cape Girardeau County, Missouri.

Saxony Lutheran High School is a thriving regional high school supported by 25 separate associated churches in Ste. Genevieve, Perry, Scott, and Cape Girardeau Counties. Built in 2004 at a cost of \$6 million and expanded due to growth in 2009 at an additional cost of \$1 million, Saxony Lutheran provides secondary education to 187 students. The high school provides a typical daily schedule commencing around 6:00 a.m. through well in to the evening hours. In addition to outdoor physical education classes, the school provides a full range of Missouri State High School Athletic Association varsity sports including outdoor sports such as soccer, baseball, softball, cross-country and track. Because students make use of the property for such an extended period of time every day, there is ample opportunity for students to be exposed to ambient air and noise of a quarry while on school property during and after classroom hours, as well as ample opportunity for the students to be exposed to heavy machinery and large equipment traffic while traveling to and from school during heavy traffic flow hours.

The properties surrounding Saxony Lutheran High School have been of great interest to the limestone quarry industry this past year. On July 29, 2010, the Missouri

Department of Natural Resources (the “Department”) received a construction permit application for a proposed rock crushing plant in Jackson, Missouri by Strack Excavating (“Strack”). On October 4, 2010, the Department received a 161-acre (long-term mine plan boundary) limestone open pit mining application by Heartland Materials, LLC (“Heartland”) for the property immediately south of Saxony Lutheran (the “Heartland application”). Just two weeks later, on October 19, 2010, the Department received a 76-acre (long-term mine plan boundary) limestone open pit mining application from Strack for the property immediately north of Saxony (the “Strack application”). Attached hereto as Exhibit 1 is a map and graphic showing the location of the proposed Heartland and Strack sites immediately adjacent to Saxony. The two permit applications are working through the same administrative processes at the same time, raising the same issues for Saxony Lutheran and for the Department. Because the two proposed sites are so similarly situated, and because the Department cannot realistically determine the burden that these proposed quarries will have on the health, safety, and livelihood of the Saxony students, administrators and teachers by assessing them separately, we believe that the effects of the two permit applications should be assessed comprehensively and in tandem.¹

GENERAL COMMENTS AND ISSUES

There are serious deficiencies to the Heartland application submitted on October 4, 2010, despite the additional supplements and revisions supplied by Heartland on October 6th and 14th. Because of these deficiencies, we believe the Heartland application does not meet the statutory or regulatory requirements for an open mine permit under Missouri law. *See generally* R.S.Mo. § 444.772 *et seq.*; 10 CSR 40-10.010 *et seq.*

Further, the unique circumstances surrounding the Heartland application to construct a limestone quarry to the immediate south of a thriving high school, which is bordered immediately to the north by the site of the proposed Strack limestone quarry, requires a review of the comprehensive effect of the two proposed quarries on the health, safety, and livelihood of Saxony Lutheran High School, its students and families, as well as the administrators and teachers on its campus. We 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 the students, teachers, administrators, and families at Saxony Lutheran High School to require a formal hearing by the Land

¹ As the comment period for the Heartland application closes only four days after the Strack application was complete and posted to the Department’s website on November 29, 2010, this comment letter will focus on the Heartland application. We plan to provide a second comment letter specific to the Strack application in advance of January 2, 2011. However, a review of either application in isolation is an incomplete review and cannot accurately assess whether the proposed permitted activities will unduly impair the health, safety or livelihood of the Saxony students, teachers, and administrators.

Reclamation Commission. *See Lake Ozark/Osage Beach Joint Sewer Bd. v. Missouri Dep't of Natural Resources Land Reclamation Comm'n*, 2010 WL 3394730 *1, *6 (Mo. Ct. App. W.D. Aug. 31, 2010) (overturning the Land Reclamation Commission's decision and holding that the petitioners only bear the burden of producing sufficient scientific evidence to establish an issue of fact that the permitted quarrying operations would impact their health, safety, or livelihood). Because there are many issues of fact that the health, safety, and livelihood of the Saxony students, teachers, and administrators will be unduly burdened by the proposed permitted activity, the Land Reclamation Commission should grant a hearing on these issues where the burden of persuasion will be on Heartland to prove, by comprehensive and substantial scientific evidence, that the health, safety, or livelihood of the students, teachers, and administrators would not be unduly impaired by the impact from the permitted activity. *Id.*

1. Heartland Materials, LLC does not have sufficient legal authority to mine the land in the proposed permitted area.

While it is the operator, and not the owner, of a proposed mine who is the applicant for an industrial mineral mine permit, Missouri law requires the operator to show the source of its *legal* right to mine the land affected by the permit. R.S.Mo. § 444.772.1, 2(2) (2010). The Heartland application indicates a proposed permitted area on two parcels: the Joe Hoffmeister Farms parcel and the Hoffmeister Real Estate parcel. In Heartland's original application, the forms for each separate disturbance area listed only "Verbal" as the basis for its authority to mine both parcels. Upon request by the Department, Heartland revised its application to at least provide the date of the agreement as April 10, 2010. However, none of the application materials provide for Heartland's actual legal interest in the permitted sites, nor do the materials provide further proof that such an agreement exists.

A verbal agreement is not sufficient legal authority to provide the basis for a mining permit, as such an agreement is not enforceable under the Missouri statute of frauds, which requires that all contracts for the sale of interest in real property (including the extraction of minerals) or contracts that cannot be performed within one year, be in writing and meet the requirements of the statute. R.S.Mo. § 432.010 (2010). Under Missouri law, the lease of a mineral interest in land falls within the statute of frauds, and a verbal agreement that does not meet the statute of frauds for such mineral interest is unenforceable. *See Norden v. Friedman*, 756 S.W.2d 158, 162 (Mo. 1988). Heartland Materials, LLC does not even have an option to purchase the property, a mineral lease to mine the land, or a surface easement to access those minerals, any one of which would be required for sufficient legal basis to mine the properties.

Further, unless the contract is capable of being fully and completely performed by April 10, 2011, the contract falls within the statute of frauds regardless of whether it is for an interest in real property. In this case, it is clear that neither contract can be performed

within one year, as each parcel owner will retain ownership of the land itself, but simply permit Heartland to use the land for mining. In order to fully and completely perform the contract, the landowner must continue to give Heartland access to the land to continue the open pit mining. Since the permit application is for a Long Term mine plan that would run for a 100-year period through December 21, 2110, the landowners cannot grant Heartland access for the term of the permit and also perform the contract within one year. Thus the verbal agreements between Heartland and Hoffmeister Real Estate and Heartland and Joe Hoffmeister Family Farms are not capable of being fully or completely performed within one year, and are subject to the statute of frauds.

Whether subject to the statute of frauds as the sale of an interest in land or because the contract cannot be performed within one year, the agreements between Heartland and Hoffmeister Real Estate and Heartland and Joe Hoffmeister Family Farms are not memorialized in writing, and thus fail to meet the requirements of the statute of frauds set out in R.S. Mo. § 432.010, and are unenforceable by Missouri courts. Even if there was part performance of the contract, neither party has committed actions that would materially change their positions based on the alleged contract, so the agreement cannot be taken out of the statute of frauds based on partial performance.

If the contracts on which Heartland relies for its legal authority to mine the proposed permitted sites are unenforceable under Missouri law, then the statutory requirement that an applicant show “the source of the applicant’s *legal* right to mine the land affected by the permit” is not met. R.S. Mo. § 444.772 (2010) (emphasis added). Because Heartland has no legally enforceable right to mine the proposed permitted site based solely on the assertion that a verbal contract exists, the application is incomplete and should be denied.

- 2. The proposed quarry by Heartland is only nominally separate from the proposed quarry by Strack Excavating, as the two quarries are proposed for permitting immediately to the south and north of Saxony Lutheran High School and have associated landowners to the east and west of the School.**

The current proposed mine plan covers the Joe Hoffmeister Farms parcel, owned by Joe Hoffmeister and located to the immediate southwest of Saxony, and the Hoffmeister Real Estate parcel, owned by Lloyd Hoffmeister and located to the immediate southeast of Saxony Lutheran. However, in addition to being an insufficient legal basis for Heartland’s authority to mine the proposed site, the fact that the contracts between Heartland and Joe Hoffmeister Farms and Heartland and Hoffmeister Real Estate are verbal contracts makes them an insufficient description of the property Heartland intends to mine. The extent of these verbal contracts is unknown, giving reason to believe that Heartland plans to expand the quarry mine from the current 161-acre proposed mine plan immediately south of Saxony Lutheran High School, as shown

in Exhibit 1, to also include the parcels located to the immediate east and west of the High School—which are owned by Hoffmeister Stake and Handle and Joe Hoffmeister Farms, respectively. The Joe Hoffmeister Farms parcel to the west of Saxony is part of the same parcel that is already proposed for permitting, and is just across County Road 601 from the Joe Hoffmeister Farms parcel that is the site of the proposed Heartland mine. The Hoffmeister Stake and Handle parcel to the east of Saxony is owned by Hoffmeister Stake and Handle LLC, which was incorporated by Lloyd Hoffmeister in 2005. Lloyd Hoffmeister is the same person who owns the Hoffmeister Real Estate parcel that is currently part of the Heartland application directly south of Hoffmeister Stake and Handle.

Further, the owners of the properties currently proposed for permitting and the additional properties of Hoffmeister Stake and Handle and Joe Hoffmeister Farms are sufficiently “associated” as to trigger the statutory requirement that the Commission consider their own permits, if any, when determining the effect of the proposed permit upon the health, safety, or livelihood Saxony Lutheran students, teachers, and staff. Because the owners of these additional two parcels are the same owners of the parcels Heartland proposes for permitting, and because there is no written contract indicating which parcels the Hoffmeister family has agreed to let Heartland use for its open mine quarry, there is reason to believe that Heartland plans to expand the quarry mines to these additional parcels. Should Heartland succeed in permitting these additional parcels, this would make the Strack and Heartland sites only nominally separate, and would turn Saxony Lutheran High School in to an island surrounded on all sides by quarry operations. The potential for expansion of the current proposed mine plan to effectively surround Saxony Lutheran High School should give the Department pause as to whether or not this first permit should be granted.

Further the verbal contract between Heartland and Joe Hoffmeister Family Farms and Hoffmeister Real estate does not explain the relationship between Joe Hoffmeister, Lloyd Hoffmeister, Hoffmeister Stake and Handle and Heartland. Because there is no clarity in the relationship between these parties, and the landowners have allegedly permitted Heartland to mine on their land, the parties are sufficiently “associated” with Heartland to trigger the statutory requirement that the Commission consider their own permit and past compliance history with state environmental laws. *See Lincoln County Stone Co., Inc. v. Koenig*, 21 S.W.3d 142, (Mo. Ct. App. E.D. 2000) (requiring the Commission to consider “associated” sister companies based on common officers and ownership between the two companies). In its current form, the Heartland Application lists only the permits issued to Richard Hurst, a Heartland Shareholder, through his companies, Perry County Stone Company and Farmers Limestone Company, Inc. Because the application fails to address any permits issued to the landowners, who may be considered silent partners, the application is deficient.

Finally, the potential to expand the Heartland proposed mine plan to both the east and the west of Saxony Lutheran High School and reach all the way to the Strack proposed mine plan is an additional basis for reviewing the Strack and Heartland applications in tandem and assessing the effects of the proposed permitted activities on Saxony students, faculty and staff comprehensively and in tandem.

3. A comprehensive review of the proposed Heartland application and Strack application reveals that the two quarries will exceed the national ambient air quality standards, as well as the maximum allowable particulate matter emissions increase, putting the health of the students, teachers and administrators at risk.

Both Strack Excavating and Heartland Materials have filed applications for MDNR air pollution control program construction permits under 10 CSR 10-6.060 sections (5) and (6), and based upon an online review of the applications we believe that both quarries, when operational, will have PM_{10} ambient impacts in excess of $126 \mu g/m^3$. 10 CSR 10-6.060(5), (6) (2009). In addition to the close connectedness of these two quarries, the fact that a high school with a sensitive population is located between them, provides an additional basis for a comprehensive review of these two applications in tandem based upon the criteria set forth in 10 CSR 10-6.060(6)(A)2-3, which provides that a permit shall only be issued under section (6)(A)2. if the proposed source operation does not interfere with the attainment or maintenance of ambient air quality standards; and section (6)(A)3, that the proposed source operation not cause or contribute to ambient air concentrations in excess of any applicable maximum allowable increase listed in subsection (11)(A). 10 CSR 10-6.060(11)(A) (2009) ("Table 1").

As outlined in our November 23, 2010 letter to Jim Kavanaugh of the Air Pollution Control Program, attached hereto as Exhibit 2, we have great concerns that when the ambient impact of the nominally separated quarries are viewed together, there will not only be an exceedance of the national ambient air quality standards for PM_{10} , but also the combined particulate matter emissions will exceed the maximum allowable increase authorized in Table 1.

In addition, while limestone itself is not generally listed as a carcinogen, because limestone dust contains crystalline silica, which is classified as a known human carcinogen by IARC, NIOSH, and NTP, and regulated by California's Proposition 65 (Safe Drinking Water and Toxic Enforcement Act of 1986), exposure to dust at this level by a sensitive population is cause for great concern. We urge the Department to require that Strack and Heartland perform comprehensive dispersion modeling to verify that the ambient concentration of PM_{10} in the vicinity of the school will not exceed the ambient air quality standard and place this sensitive population at ongoing pulmonary risk.

4. Though there are planned outfalls listed in its application, Heartland has failed to even apply for a necessary dredge permit under Section 404 of the Clean Water Act, as well as a National Pollutant Discharge Elimination System permit under Section 402 of the Act.

The Heartland application detail map shows the location of the unnamed creek tributary that flows through the proposed quarry site, as well as a proposed outfall to that tributary, Outfall #001. However, none of the application materials indicate that Heartland has applied for or intends to apply for a dredge and fill permit from the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act. A note on the detail map submitted with the application indicates that a "USACE 404 Permit Eligibility Determination currently in process." We believe that the unnamed creek tributary on the proposed site falls well within the jurisdiction of the U.S. Army Corps of Engineers. Even if the tributary is not a traditional navigable water, the U.S. Army Corps of Engineers exercises jurisdiction over non-navigable tributaries of traditional navigable waters that are relatively permanent where tributaries flow at least seasonally. *See* U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," (December 2, 2008). Based on the jurisdiction of the U.S. Army Corps of Engineers over the navigable waters of the United States, any dredge or fill material discharged to that tributary requires a permit under Section 404 of the Federal Water Pollution Control Act, or the Clean Water Act, 33 U.S.C. §§1344 *et seq.*

Further, if Heartland plans to discharge to the tributary, which is not addressed in the Heartland application, this constitutes a "discharge of pollutants" to the waters of the United States under the Clean Water Act, and Heartland must apply for and receive a National Pollutant Discharge Elimination System or "NPDES" permit. *See* 33 U.S.C. §§ 1342(a). The Clean Water Act prohibits discharge of a pollutant from a point source to a water of the United States without an NPDES permit. 33 U.S.C. § 1311(a). A "point source" is "any discernible, confined and discrete conveyance, including, but not limited to any pipe ditch, channel, tunnel, conduit . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). A "pollutant" is defined as "dredge spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). There is no doubt that an outfall to a tributary that is a water of the United States is a point source under the Statute. Thus, if Heartland plans to discharge any material that could be a pollutant in to the tributary through its planned outfalls, it is required to receive an NPDES permit to do so.

5. Based on the application materials, and despite the reclamation plan, the proposed bonding will not match the level of financial assurance required to reclaim the land.

The current Heartland application indicates a total bonding requirement of \$12,500 for the 17 acres of the site that are being permitted to be used in the next twelve months. However, as discussed in subsection 2, above, there is reason to believe that Heartland will in the future request an expansion of its permit to include the Joe Hoffmeister Family Farms parcel to the west of the High School and the Hoffmeister Stake and Handle parcel, owned by Lloyd Hoffmeister, to the east of the High School. Because of the current proposed permitted parcels and these two potential future parcels have the same ownership, and because there is no real distinction between the parcels, we request that the Land Reclamation Commission require bonding for more than the 17 acres as listed in the Heartland Application. Instead, we request that the Commission require additional bonding of additional acreage if Heartland plans to apply for additional acreage on the current mining plan or on parcels that Heartland plans to mine in the future that are adjacent to the current mine plan property.

6. While the profits of the proposed quarries will go to Heartland and Strack, the economic costs of the quarries will be born by the Saxony Lutheran students, the community that will lose its investment in the School, and the faculty and administrators at Saxony Lutheran whose livelihood is unduly impaired.

Saxony Lutheran High School built its current facility in 2004 at a cost of \$6 million. Funds were raised by the 25 association churches that support Saxony Lutheran throughout Ste. Genevieve, Perry, Scott, and Cape Girardeau Counties. In 2009, Saxony Lutheran completed construction of a \$1 million extension of the northwest and northeast wings to accommodate growth of the student body. Saxony Lutheran is home to 187 current students and has the capacity to grow to a student body of 300. In addition, Saxony Lutheran High School supports 13 full-time and 3 part-time faculty members, 3 administrators, and 7 staff members.

If the Heartland quarry is permitted as described in the Heartland application, it is likely that enrollment at Saxony Lutheran will not continue to grow, and may even drop, during the years the quarry is permitted to continue its open mining activities. A drop in enrollment could require significant cuts to the faculty or administration of the High School. This would significantly impair the livelihood of the faculty, administrators, and staff at Saxony Lutheran High School. In addition, as enrollment at the School drops, the value of the investment of the communities surrounding Saxony drops, as well, including property value and intrinsic value of the education received by students at this location.

7. Blasting within 100 yards of school property will undoubtedly impair the health and learning environment for Saxony students, faculty and staff.

Based on the detailed map submitted with the Heartland application, the mine plan boundary is within 100 yards of the Saxony Lutheran High School property, just across County Road 601. While the permitted mining area is within the mine plan boundary, and Heartland's application includes provision for a permitted berm between the permitted areas and the School property, such a limited barrier will have no effect on the level of noise from the blasting on the Saxony Lutheran students, faculty and administrators. Blasting during school hours will seriously impair the Saxony Lutheran students' ability to learn, and will unduly impair the value of their education. Based on this, we request that Heartland agree to follow the federal regulations for blasting parameters related to coal mining activities administered by the U.S. Department of the Interior, Office of Surface Mining Reclamation and Enforcement. *See* 30 C.F.R. §§ 816.61-68, 850.10-15 (2010). However, even if Heartland were willing to restrict blasting the federal regulatory parameters (e.g., setting up a blasting schedule to blast only during to non-classroom hours, restricting the amount of noise created by the blasts, etc.), because of the extended use of school property both before and after class for athletics and extracurricular activities, blasting will seriously impair the students ability to participate in these activities on their facility.

In addition to noise from blasting, the use of explosives on site so close to the High School property will unduly impair the safety of the students, faculty, and administrators at Saxony Lutheran, as the vibrations caused by such blasting could weaken the structural integrity of the High School facility, placing the students in further danger. Because of this danger alone, the Heartland application should be denied. At the very least, we request that Heartland conduct a blasting survey on the Saxony Lutheran High School facility, and any other structures in similar proximity to the mine plan boundary, to determine the effects of blasting on those structures and take any additional measures necessary to protect the students' safety. Further we request that Heartland be required to engage an independent blasting consultant to set up a seismograph to monitor the vibrations on the Saxony Lutheran property and any properties in similar proximity to the mine plan boundary to determine the effect of any blasting on these properties.

8. Based on the volume of mined materials outlined in the Heartland application, the volume of heavy duty traffic on the same roads as the Saxony students will impair the students' safety.

The Heartland application provides for at least 17 acres of permitted mining area in the next twelve-month period. Based on this large permitted acreage, and depending on the extent of the mineral reserves, there will be an overly burdensome increase in the volume of heavy equipment and heavy truck traffic on County Road 601 and Highway

61, the same road and highway traveled by students, on both ingress and egress during peak school traffic hours (before class begins and after classroom hours). This increase in traffic, particularly with heavy equipment and truck traffic will unduly impair the safety of these young drivers on the roads they must travel to get to and from school. Further, the possibility of trucks and heavy equipment carrying rocks and other debris that are improperly packed and could fall on other vehicles is greatly increased. Because of this undue impairment of student safety, we believe the Heartland application should be denied. At the very least, we request that the Department require a full transportation analysis, including points of ingress and egress, material safety data sheets for materials being hauled, and estimates on the number and size of loads to be hauled.

9. Because there are public and private water supply wells in the vicinity of the Heartland mine plan boundaries that may be compromised by the blasting and mining activities, the health of the Saxony Lutheran students, faculty, and administrators, as well as other landowners in the facility is unduly impaired.

Nowhere in the Heartland application does Heartland address the fact that there are public and private water supply wells in the vicinity of the mine plan boundary. Because this area is a karst geography, we have great concerns that the public and private water supply, including the aquifers and any existing or future wells, will be compromised due to the proposed permitted activity (including blasting and mining activities). Because the Heartland application has not adequately demonstrated that the public and private water supply in the area will not be impacted, nor has the application even addressed the impacts the proposed permitted activity would have on the local water supply, the Heartland application should be denied. At the very least, we request that the Department require Heartland to demonstrate that their activities, in a karst geography, will not impact the public and private water supply, and therefore, the health of the Saxony students, faculty, and administrators and landowners in the vicinity of the proposed mine plan boundary.

CONCLUSION

Because there are many questions of fact and law indicating that the issuance of the Heartland Materials, LLC permit will unduly impair the health, safety, and livelihood of Saxony Lutheran High School and its students, faculty, and administrators, we request an informal public meeting with Heartland Materials, LLC to discuss the permit application. If Heartland refuses to hold such a meeting, or if there is no resolution of these concerns at that meeting, we request a formal hearing with the Land Reclamation Commission to discuss these concerns. In addition, we request that you, as the Director of the Land Reclamation Program, make a formal recommendation to the Land Reclamation Commission that it deny the Heartland Materials Permit for Industrial

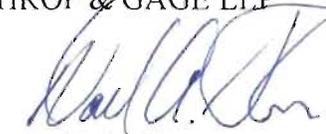
Mike Larsen, Staff Director
December 2, 2010
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Mineral Mines – New Open Pit Permit—Heartland Quarry, SUR-799 & 2102, T-32N, R-13E, Cape Girardeau County, Missouri.

Very truly yours,

LATHROP & GAGE LLP

By:

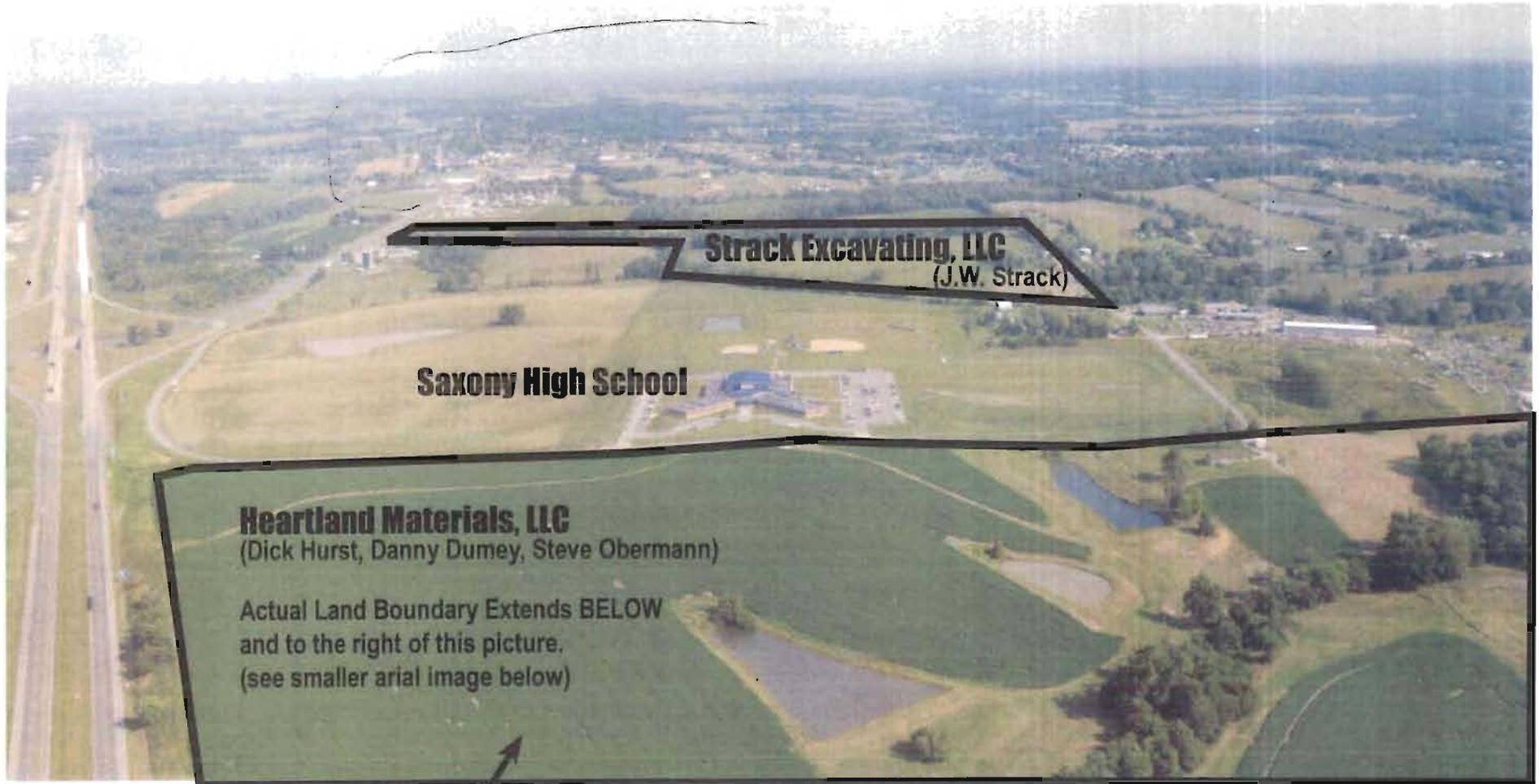


David A. Shorr

DAS/jf
Enclosures

cc: Leanne Tippett Mosby, MDNR, DEQ
Mark Smith, USEPA Region 7, APCO
Senator Jason Crowell, District 27
Representative Scott Lipke, District 157
Representative-Elect Donna Lichtenegger, District 157
Craig Ernstmeyer, Saxony Lutheran High School
Abby Petzoldt, Save Our Children's Health, Inc.

EXHIBIT 1



On Oct. 4, 2010 the Missouri Department of Natural Resources' Land Reclamation Program received an **161-acre** (long term mine plan boundary) limestone open pit mining application from **Heartland Materials, LLC**.

On Oct. 19, 2010 the Missouri Department of Natural Resources' Land Reclamation Program received a **76-acre** (long term mine plan boundary) limestone open pit mining application from **Strack Excavating, LLC**.

EXHIBIT 2

LATHROP & GAGE_{LLP}

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November 23, 2010

VIA E-MAIL AND U.S. MAIL

James Kavanaugh, Director
Air Pollution Control Program
Missouri Department of Natural Resources
PO Box 176
Jefferson City, MO 65102-0176

Re: Heartland Quarry and Strack Quarry -- Jackson, Missouri

Dear Mr. Kavanaugh:

This firm represents Saxony Lutheran High School located at 2004 Saxony Drive, Jackson, Missouri and Save Our Children's Health, Inc., a citizen advocacy group located in Cape Girardeau County, Missouri. Enclosed as Exhibit A is a map and a graphic showing the location of the Strack Excavating and Heartland Materials proposed quarries in reference to Saxony Lutheran High School.

Saxony Lutheran High School provides secondary education to 187 students. Built in 2004 at a cost of \$7 million and expanded due to growth in 2009, Saxony Lutheran is a regional high school owned and funded by over 25 separate associated churches in Ste. Genevieve, Perry, Scott, and Cape Girardeau Counties. The high school provides a typical daily schedule commencing around 6:00 a.m. through well into the evening hours, thereby providing ample opportunity for students to be exposed to ambient air while on school property. In addition to outdoor physical education classes, the school provides a full range of Missouri State High School Athletic Association varsity sports including outdoor sports such as soccer, baseball, softball, cross-country and track. Enclosed as Exhibit B is a brochure on the high school outlining its programs. The population of this school can be considered "sensitive" based on the age of the students attending.

As seen in Exhibit A, the two quarries are currently proposed for siting immediately adjacent to the north and south of Saxony Lutheran High School through application to the Missouri Department of Natural Resources' Land Reclamation Program. Both Strack Excavating and Heartland Materials have filed applications for MDNR air pollution control program construction permits under 10 CSR 10-6.060

CALIFORNIA

COLORADO

ILLINOIS

KANSAS

MISSOURI

NEW YORK

Mr. James Kavanaugh, Director
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sections (5) and (6), and based upon an online review of the applications we believe that both quarries, when operational, will have PM_{10} ambient impacts in excess of $126 \mu\text{g}/\text{m}^3$. 10 CSR 10-6.060(5), (6) (2009). Because of the close connectedness of these two quarries and the fact that a high school with a sensitive population is located between them, we are requesting that the Department comprehensively review these two applications in tandem based upon the criteria set forth in 10 CSR 10-6.060(6)(A)2-3, which provides that a permit shall only be issued under section (6)(A)2 if the proposed source operation does not interfere with the attainment or maintenance of ambient air quality standards; and section (6)(A)3 that the proposed source operation not cause or contribute to ambient air concentrations in excess of any applicable maximum allowable increase listed in subsection (11)(A). 10 CSR 10-6.060(11)(A) (2009) ("Table 1").

We have concerns that when the ambient impact of the nominally separated quarries are viewed in tandem, there will not only be an exceedance of the national ambient air quality standards for PM_{10} , but also the combined particulate matter emissions will exceed the maximum allowable increase authorized in Table 1. We urge the Department to require, before issuance of either construction permit, that Strack and Heartland perform comprehensive dispersion modeling to verify that the ambient concentration of PM_{10} in the vicinity of the school will not exceed the ambient air quality standard and place this sensitive population at ongoing pulmonary risk.

We note that at least one of the two applicants, Strack Excavating, has a history of noncompliance with conditions of its construction permits for the exact type of violations that concern us about its future operations—failure to prevent fugitive particulate matter emissions from traveling across its property boundaries—as evidenced in the notice of violation and letters of warning attached as Exhibit C. As a result of this history of noncompliance, a review of these permits and the effects of the proposed operations on this sensitive population require further scrutiny.

Because both the Strack and Heatland quarries will extensively utilize diesel powered earth moving equipment, we are also concerned about the effects of diesel particulate matter on the children attending Saxony Lutheran. We are aware of a reference Concentration ("RFC") that is used as a health benchmark protective of chronic noncarcinogenic health effects, but it is for diesel exhaust and not specifically set for diesel particulate matter, which is what was modeled in EPA's 2002 National Scale Air Toxics Assessment. The RFC for diesel exhaust, which includes diesel particulate matter, is $5 \mu\text{g}/\text{m}^3$ based on specific noncancer effects found in several animal studies that showed adverse changes in lungs such as inflammation and lesions.

The 2002 Air Toxics assessment revealed evidence for exacerbation of existing allergies and asthma symptoms due to diesel particulate matter. The 2002 Air Toxics

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Page 3

assessment recognizes that diesel exhaust emissions, as a mixture of many constituents, also contribute to ambient concentrations of several criteria air pollutants including nitrogen oxides and fine particles, as well as other air toxics. Based upon the results of this comprehensive study by EPA, our concerns about the welfare of this sensitive student population being exposed to these diesel emissions are only magnified. We therefore strongly believe that the impact of diesel particulate matter emissions must be fully evaluated as part of the dispersion modeling that we urge the Department require of the permit applicants, including the transportation impacts of diesel particulate from I-55 at the interchange of I-55 and Highway 61.

Should the dispersion modeling reveal that particulate matter emissions are approaching the national ambient air quality standard threshold and that diesel particulate matter emission concentrations will threaten the well being of the students, then we expect that the Department will deny these permits as detrimental to the public interest.

I look forward to your response and should you have any questions on my letter please do not hesitate to contact me.

Very truly yours,

LATHROP & GAGE LLP

By:


David A. Shorr

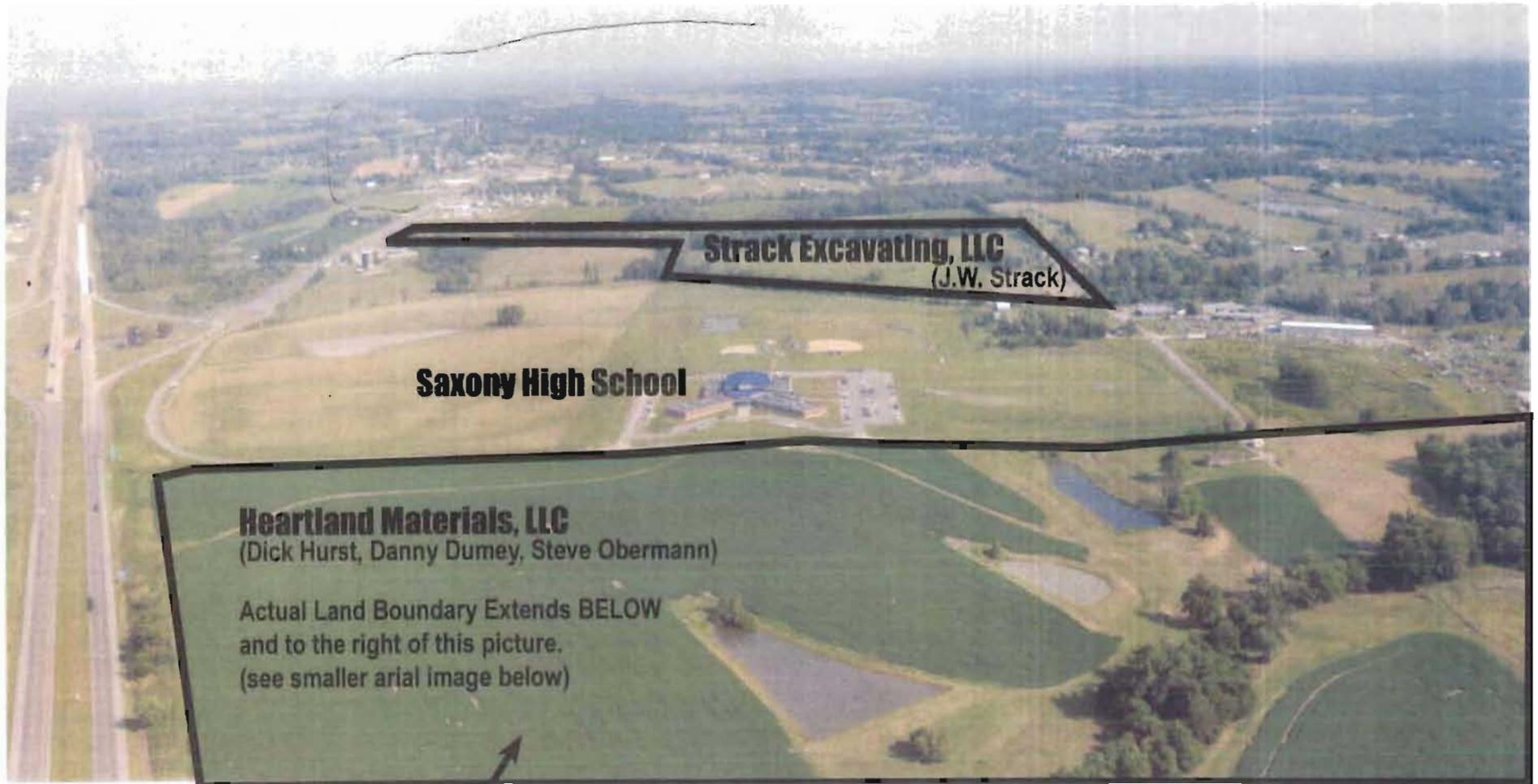
DAS/jf

Enclosures

cc w/enclosures via U. S. Mail:

Leanne Tippett Mosby, MDNR, DEQ
Mark Smith, U.S. EPA Region 7, APCO
Senator Jason Crowell, District 27
Representative Scott Lipke, District 157
Representative-Elect Donna Lichtenegger, District 157
Craig Ernstmeyer, Saxony Lutheran High School
Abby Petzoldt, Save Our Children's Health, Inc.

Exhibit A



On Oct. 4, 2010 the Missouri Department of Natural Resources' Land Reclamation Program received an **161-acre** (long term mine plan boundary) limestone open pit mining application from **Heartland Materials, LLC**.

On Oct. 19, 2010 the Missouri Department of Natural Resources' Land Reclamation Program received a **76-acre** (long term mine plan boundary) limestone open pit mining application from **Strack Excavating, LLC**.

Exhibit B

Mission Statement

Saxony Lutheran High School exists to center students on Christ and God's Word, to strive for excellence in all phases of education, and to prepare students for a life of Christian discipleship using God's Word as their Guide.

ASSOCIATION CHURCHES:

The following 25 Lutheran churches have pledged their financial and prayer support to Saxony Lutheran High School:

Christ, Gordonville	St. Andrew, Cape Girardeau
Concordia, Frohna	St. Paul, Chaffee
Concordia, Sikeston	St. Paul, Jackson
Eisleben, Scott City	Trinity, Altenburg
Good Shepherd, Cape Girardeau	Trinity, Cape Girardeau
Grace, Uniontown	Trinity, Egypt Mills
Hanover, Cape Girardeau	Trinity, Friedheim
Holy Cross, Ste. Genevieve	Trinity, Shawneetown
Immanuel, Altenburg	Zion, Crosstown
Immanuel, New Wells	Zion, Gordonville
Immanuel, Perryville	Zion, Longtown
Immanuel, Tilsit	Zion, Pochontas
Salem, Farrar	

LOCATION:

Saxony Lutheran High School is at the I-55 and Hwy. 61 interchange near Fruitland, Missouri. Our central location is easily accessible to students from the surrounding area.

Contact Us:

Saxony Lutheran High School 2004 Saxony Drive Jackson, Missouri 63755 573-204-7555 saxonylutheranhigh.org	Principal: Craig Ernstmeyer cernstmeyer@saxonylutheranhigh.org or office@saxonylutheranhigh.org
---	--



SAXONY LUTHERAN + HIGH SCHOOL



Academic Excellence

Saxony Lutheran High School strives to promote the academic and spiritual well-being of every student by offering challenging courses in academic subjects teamed with a strong theological foundation.

HIGHER EDUCATION PREPARATION:

77% of graduates have enrolled in four-year universities

18% of graduates have enrolled in two-year colleges or technical schools

5% of students have entered military service

DUAL CREDIT OFFERINGS:

Over 20 college credit hours are offered through our dual enrollment program.

Math: College Algebra, Trigonometry, Calculus

Science: Advanced Biology, Physics

English: Composition 101

Art: Art Appreciation



Faith in Action

SLHS provides purposeful opportunities for students to practice and show their Christian character and share their gifts with others. There is regular encouragement and motivation for students to use their gifts to the fullest and to the glory of God.

Each school day starts with 15 minutes of devotion time to center our day on Christ.



All students are enrolled in **THEOLOGY COURSES** each semester of attendance.

Each student is required to perform over **60 HOURS OF SERVICE** to the community in order to graduate.

DEVOTION TIME ACTIVITIES INCLUDE:

Traditional Chapel – A short uplifting message is given by a faculty member or a pastor of one of our member congregations.

Small Group Ministry – Student-led devotions integrate different grade levels and personalities.

Drama Ministry – This creative approach allows students to share their faith in an entertaining and engaging way with peers, adults and occasionally with students at area Lutheran elementary schools.



Extracurricular Activities

Saxony offers a wide variety of sports, music, drama and academic teams and activities in which students can participate. Over 85% of our student body is involved in at least one of these activities.

EXTRACURRICULAR ACTIVITIES AT SAXONY INCLUDE:

- Academic Team
- Art Competitions
- Baseball
- Basketball (Boys & Girls)
- Cheerleading
- Cross Country (Boys & Girls)
- Drama Club
- Music Competitions
- National Honor Society
- Soccer (Boys & Girls)
- Softball
- Student Council
- Track (Boys & Girls)
- Volleyball (Girls)
- Yearbook/Newspaper

Saxony Facts:

ACCREDITATION:

SLHS is accredited by the Missouri Non-Public Schools Accreditation Committee and by the National Lutheran Schools Accreditation Commission.

FACULTY:

A group of seasoned professionals, of whom over half hold master's degrees, our faculty is comprised of ten full-time and six part-time members.

Student/Teacher Ratio: **14:1**

Average Class Size: **18**

ENROLLMENT:

2008 - 2009: **172**

2009 - 2010: **195**

GRADUATION REQUIREMENTS:

English – 4.0 Credits

Mathematics – 3.0 Credits

Science – 3.0 Credits

Social Studies – 3.0 Credits

Fine Arts – 1.0 Credit

Physical Education – 1.0 Credit

Practical Arts – 1.0 Credit

Health – 0.5 Credit

Electives – 6.5 Credits

TUITION FOR 2009/2010:

Actual cost for a year at Saxony.....\$5,850

Mission discount extended to every student who attends Saxony.....\$925

Base tuition.....\$4,925

Tuition for members of our 25 association churches.....\$3,575

Core Values

The cornerstone of Saxony Lutheran High School is a firm belief in Jesus Christ as our Lord and Resurrected Savior. This belief establishes for Saxony Lutheran these core values:

CHRISTIAN CHARACTER

DISCIPLESHIP

ACADEMIC EXCELLENCE

COMMUNITY INVOLVEMENT



Saxony Lutheran High School is grounded in the teachings of the Lutheran Church Missouri Synod, but students of all faiths are welcome.

Exhibit C

051-0104



Jeremiah W. (Jay) Nixon, Governor • Mark N. Templeton, Director

DEPARTMENT OF NATURAL RESOURCES

RECEIVED

2010 MAY 27 PM 12:36

AIR POLLUTION
CONTROL PGM

www.dnr.mo.gov

May 25, 2010

Mr. J.W. Strack
Strack Excavating
5420 State Highway 74
Cape Girardeau, MO 63701

LETTER OF WARNING

Dear Mr. Strack:

This letter is in response to complaints received concerning fugitive emissions crossing your property boundary. Fugitive emissions must remain on your own property, if these emissions cross the property boundary it is a violation of *10 CSR 10-6.170 Restriction of Particulate Matter to the Ambient Air Beyond the Premises of Origin*.

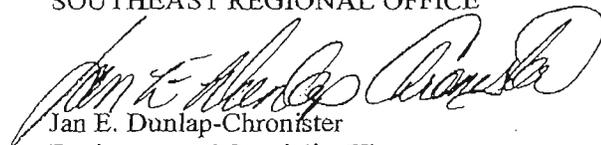
On May 6, 2010 I observed particulate matter leaving your property. I am sorry to inform you that this is a violation of the Federal and State Air Quality Laws and Regulations. This Letter of Warning is intended to officially notify you of these issues and persuade you to take action to avoid future violations.

A written response conveying your intent to comply with the regulation should be received at this office by June 18, 2010. The response should be mailed to Missouri Department of Natural Resources, Attn: Jan Dunlap-Chronister, 2155 North Westwood Blvd., Poplar Bluff, MO 63901. Failure to respond to this office by the above date will require us to issue a Notice of Violation (NOV) and further enforcement action will be at the discretion of the Department's Air Pollution Control Program (APCP).

Thank you for your time and cooperation during the investigation. Should you have any questions concerning this matter or other questions that may occur, please contact me by U.S. Postal Service at the above address, by telephone at (573) 840-9750 or through electronic mail at jan.chronister@dnr.mo.gov.

Sincerely,

SOUTHEAST REGIONAL OFFICE


Jan E. Dunlap-Chronister
Environmental Specialist III

JEDC:lm

Enclosure
c: Air Pollution Control Program





Jeremiah W. (Jay) Nixon, Governor • Mark N. Templeton, Director

DEPARTMENT OF NATURAL RESOURCES

www.dnr.mo.gov

August 20, 2009

CERTIFIED MAIL # 7008 1830 0002 6799 1463
RETURN RECEIPT REQUESTED

Mr. J.W. Strack
Strack Excavating
5420 State Highway 74
Cape Girardeau, MO 63701

RECEIVED
2009 AUG 31 PM 12:58
AIR POLLUTION
CONTROL PGM

LETTER OF WARNING

Dear Mr. Strack:

This letter is in response to complaints received concerning fugitive emissions crossing your property boundary during quarry blasts. Fugitive emissions must remain on your own property, if these emissions cross the property boundary it is a violation of *10 CSR 10-6.170 Restriction of Particulate Matter to the Ambient Air Beyond the Premises of Origin*.

On July 24, 2009 I observed particulate matter leaving your property following the blast. I am sorry to inform you that this is a violation of the Federal and State Air Quality Laws and Regulations. This Letter of Warning is intended to officially notify you of these issues and persuade you to take action to avoid future violations.

A written response conveying your intent to comply with the regulation should be received at this office by September 30, 2009. The response should be mailed to Missouri Department of Natural Resources, Attn: Jan Dunlap-Chronister, 2155 North Westwood Blvd., Poplar Bluff, MO 63901. Failure to respond to this office by the above date will require us to issue a Notice of Violation (NOV) and further enforcement action will be at the discretion of the Department's Air Pollution Control Program (APCP).

Thank you for your time and cooperation during the investigation. Should you have any questions concerning this matter or other questions that may occur, please contact me by U.S. Postal Service at the above address, by telephone at (573) 840-9750 or through electronic mail at jan.chronister@dnr.mo.gov.

Sincerely,

SOUTHEAST REGIONAL OFFICE

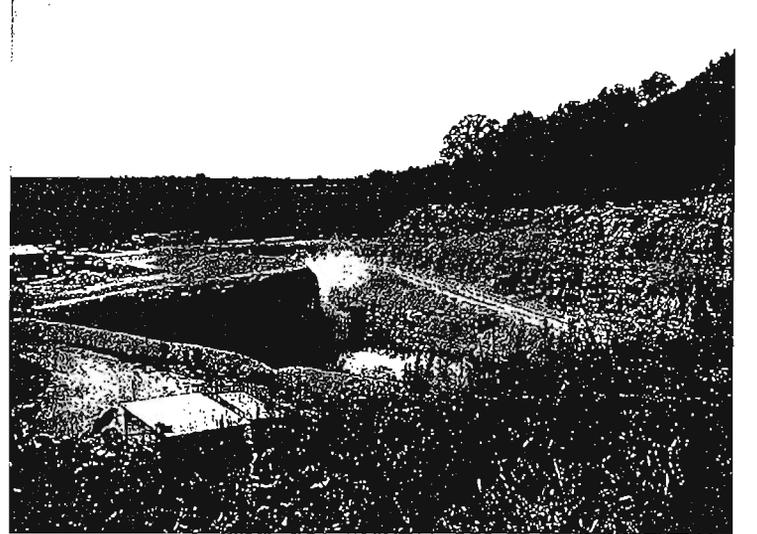
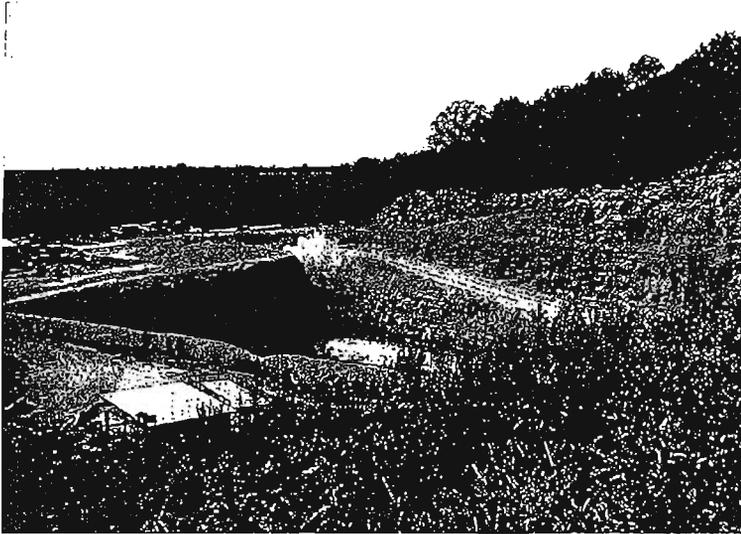
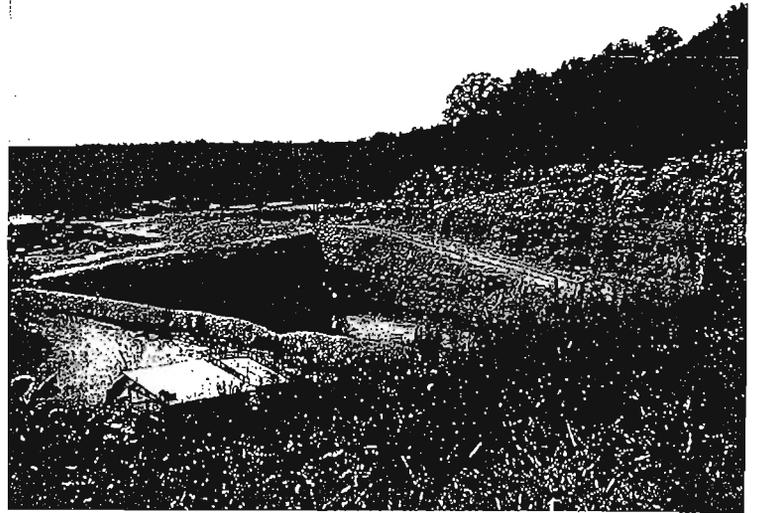
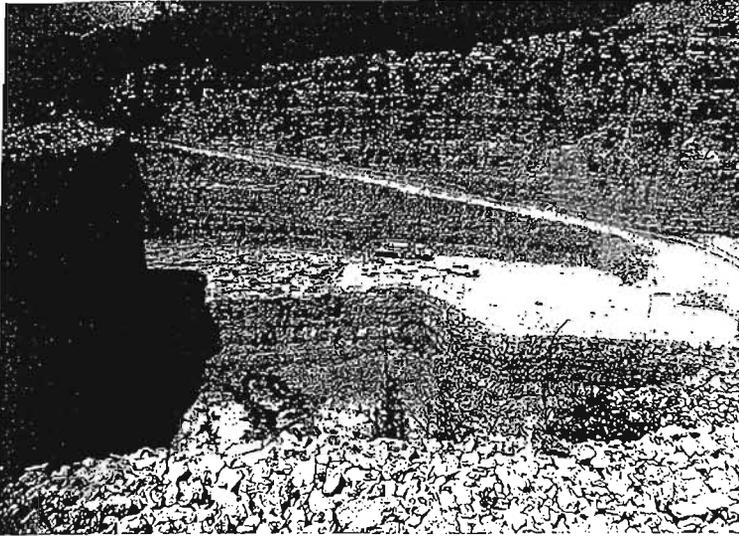
Jan E. Dunlap-Chronister
Environmental Specialist III

JEDC:lm

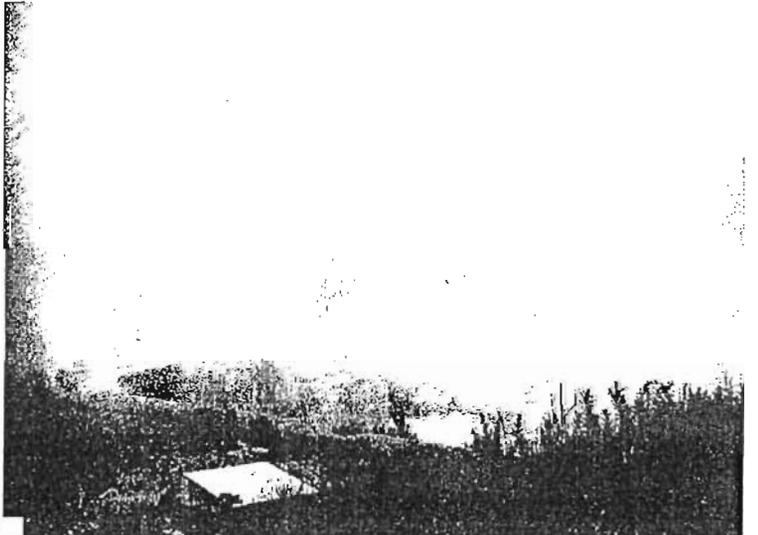
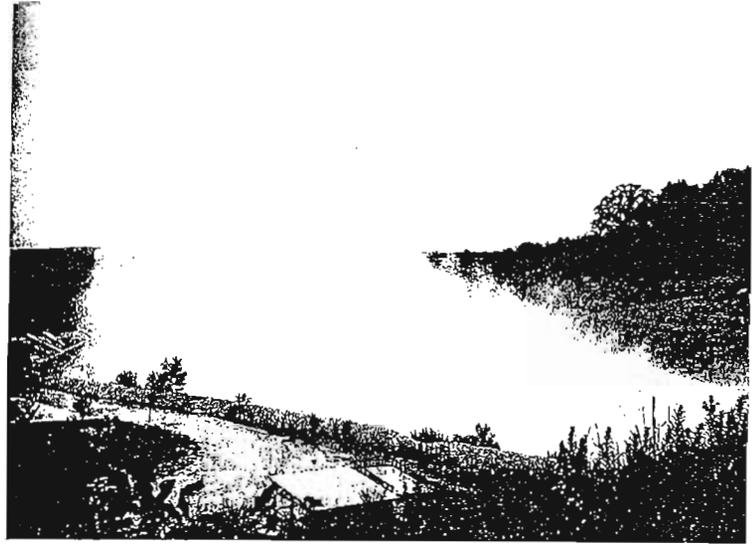
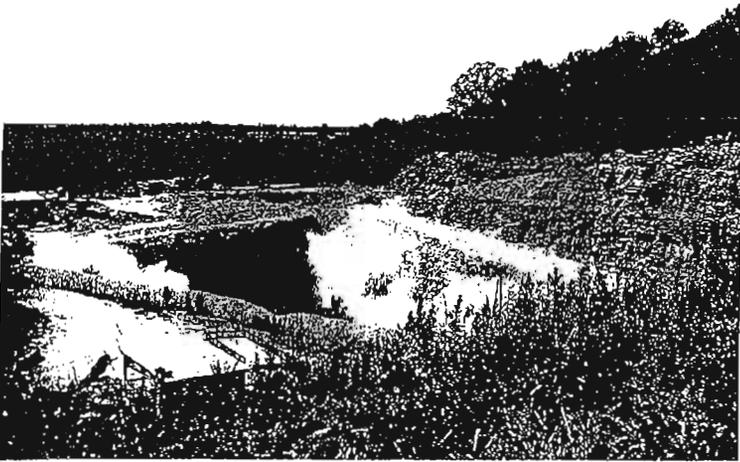
Enclosure
c: Air Pollution Control Program



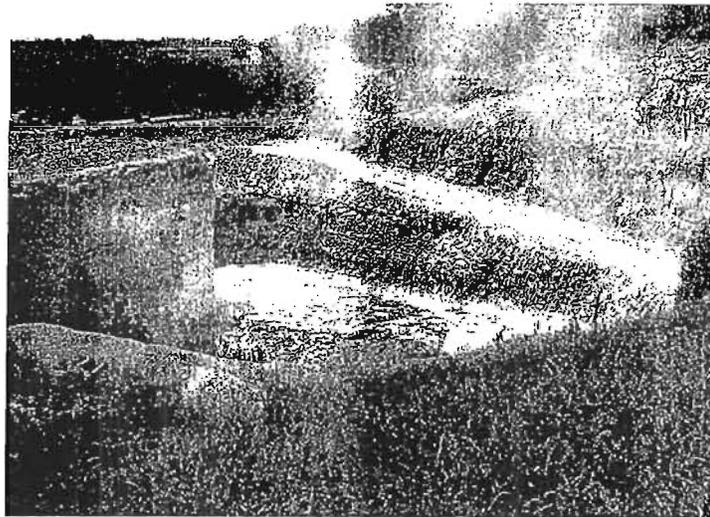
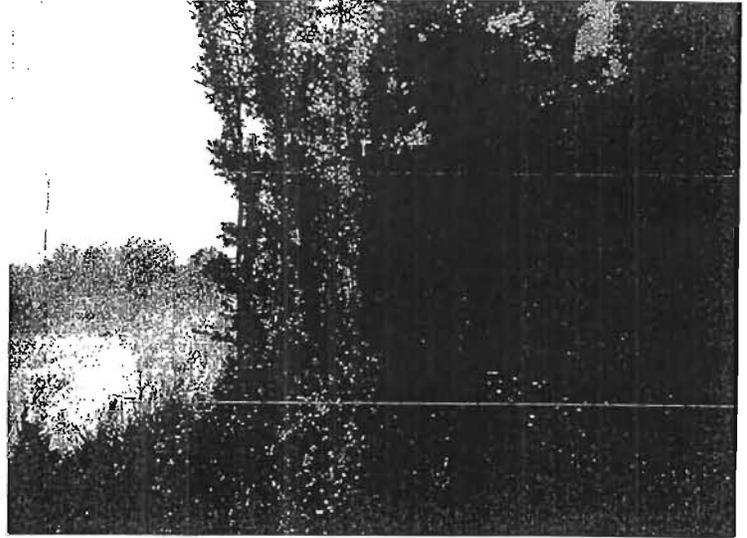
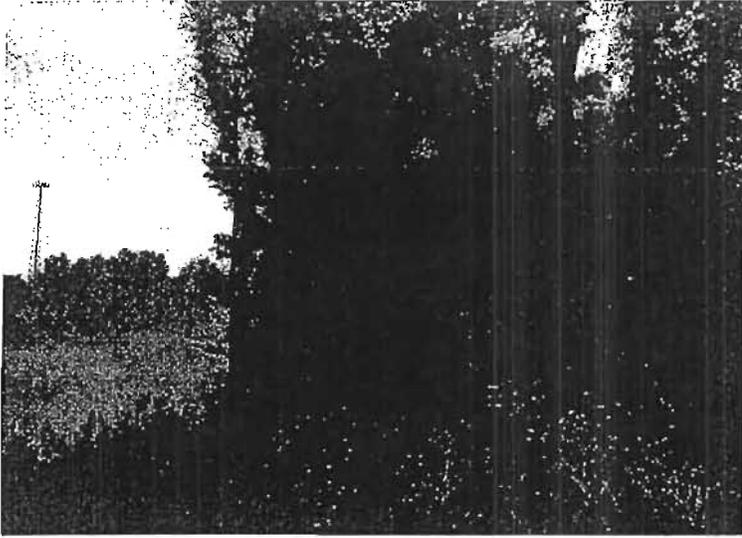
**Strack Excavating
5420 State Hwy 74
Cape Girardeau, MO 63701
031-0104
July 24, 2009
Quarry Blast**



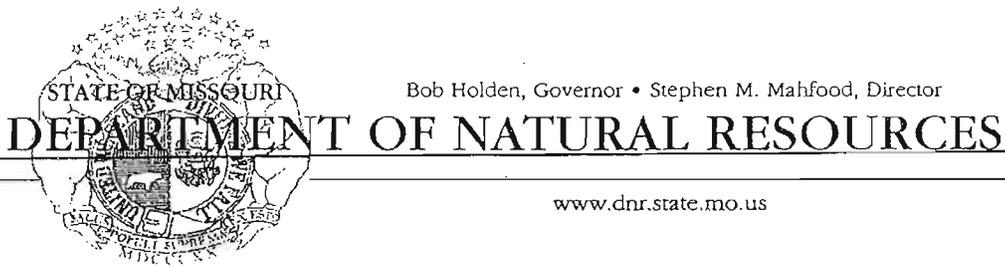
Strack Excavating
5420 State Hwy 74
Cape Girardeau, MO 63701
031-0104
July 24, 2009
Quarry Blast
Page 2



Strack Excavating
5420 State Hwy 74
Cape Girardeau, MO 63701
031-0104
July 24, 2009
Quarry Blast
Page 3



Bob



Bob Holden, Governor • Stephen M. Mahfood, Director

DEPARTMENT OF NATURAL RESOURCES

www.dnr.state.mo.us

APR 16 2004

**CERTIFIED MAIL: 7002 0860 0007 6965 1025
RETURN RECEIPT REQUESTED**

Mr. J.W. Strack
Strack Excavating, LLC
5420 State Highway 74
Cape Girardeau, MO 63701

RE: Resolution of Notice of Violation (NOV) #3104SE

Dear Mr. Strack:

I am writing to inform you that the Air Pollution Control Program (APCP) may pursue referral of Strack Excavating to the Attorney General's Office (AGO) for the initiation of civil action for violations of the Missouri Air Conservation Law, Chapter 643, RSMo. This proposed enforcement action is the result of failure to prevent fugitive particulate matter emissions from traveling across property boundaries, failure to submit an operating permit application and failure to conduct performance testing. These activities are violations of Strack Excavating's construction permit #062001-014 and Missouri State Air Regulations 10 CSR 10-6.170, "Restriction of Particulate Matter to the Ambient Air Beyond the Premises of Origin," 10 CSR 10-6.060, "Construction Permits Required," 10 CSR 10-6.065, "Operating Permits," and 10 CSR 10-6.070, "New Source Performance Regulations," incorporating by reference Code of Federal Regulations 40 CFR part 60 subpart OOO, "New Source Performance Standards (NSPS) for Nonmetallic Mineral Processing Plants". The department issued the above noted NOV to your facility on March 23, 2004.

I am writing this letter to notify you of your situation and to provide an opportunity for an out-of-court settlement prior to referral. This offer of settlement is in accordance with Section 643.151, RSMo., and the department bases the offer upon civil penalty amounts established therein. Accordingly, the APCP proposes that Strack Excavating pay an out-of-court settlement of \$8,000 to the Cape Girardeau County School Fund. If we can negotiate an agreement, the AGO will draft an appropriate settlement agreement.

If you wish to resolve this matter, you must submit a compliance plan that addresses each item listed in NOV #3104SE. Please submit the compliance plan by May 14, 2004.

Integrity and excellence in all we do



Mr. J.W. Strack
Page Two

You must also do one of the following:

1. Agree to the settlement offered in this letter ;
2. Negotiate a reasonable settlement prior to May 14, 2004; or
3. Schedule to meet in this office prior to May 14, 2004, to negotiate an appropriate penalty.

If the proposed settlement is unacceptable, I strongly encourage you to schedule a meeting.

If we are unable to reach an agreement or schedule a meeting by May 14, 2004, negotiations will cease and we will place this matter on the agenda of the Missouri Air Conservation Commission. At that meeting the APCP will request authorization to refer the outstanding violations to the AGO for appropriate legal action.

Thank you in advance for your prompt attention to this matter. Please contact me at the APCP, P.O. Box 176, Jefferson City, MO 65102-0176, or by telephone at (573) 751-4817 so we may discuss a resolution.

Sincerely,

AIR POLLUTION CONTROL PROGRAM



Bob Randolph
Environmental Engineer

BR:cmj

c: Ms. Jan Dunlap-Chronister, Southeast Regional Office
Source file 031 0104

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> ■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece or on the front if space permits. 	<p>A. Signature <input type="checkbox"/> Agent <input checked="" type="checkbox"/> Addressee</p>
<p>1. Article Addressed to:</p> <div style="border: 1px solid black; padding: 5px; margin: 5px 0;"> <p>Mr J W Strack Strack Excavating LLC 5420 State Highway 74 Cape Girardeau MO 63701</p> </div>	<p>B. Received by: (Printed Name) C. Date of Delivery 9-21-08</p>
	<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input checked="" type="checkbox"/> No</p>
<p>2. Article Number (Transfer from service label)</p>	<p>3. Service Type: <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p>
<p>7002 0860 0007 6965 1025</p>	<p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>
<p>PS Form 3811, August 2001 Domestic Return Receipt 102596-02-M-1540</p>	

STATE OF MISSOURI
DEPARTMENT OF NATURAL RESOURCES

Bob Holden, Governor • Stephen M. Mahfood, Director

www.dnr.state.mo.us

HIGH PRIORITY VIOLATION

April 2, 2004

Mr. J.W. Strack
Strack Excavating, LLC.
5420 State Highway 74
Cape Girardeau, MO 63701

CERTIFIED MAIL #: 7003 1010 0000 5582 6648
RETURN RECEIPT REQUESTED

Re: Notice of Violation # 3104 SE

Dear Mr. Strack:

On March 23, 2004, Ms. Jan Dunlap-Chronister representing the Southeast Regional Office of the Missouri Department of Natural Resources observed particulate matter in the ambient air beyond the property boundary of Strack Excavating, Inc. This is a violation of 10 CSR 10-6.170 *Restriction of Particulate Matter to the Ambient Air Beyond the Premises of Origin*, and Construction Permit Number 062001-014. During the file review violations of 10 CSR 10-6.065 Operating Permits Required and 10 CSR 10-6.070, Subpart "OOO" was also discovered. The enclosed Notice of Violation Number 3104SE is intended to officially notify you of these violations and persuade you to take action to avoid future violations. Further action on this matter will be at the discretion of the department's Air Pollution Control Program (APCP). You may contact the APCP at (573) 751-4817.

Should you have any questions regarding this letter, please contact Ms. Jan Dunlap-Chronister at (573) 840-9750 or by mail at 2155 North Westwood Boulevard, Poplar Bluff, MO 63901.

Sincerely,

SOUTHEAST REGIONAL OFFICE



Gary L. Gaines, P.E.
Regional Director

Enclosure

GAG/jedcm

c: APCP Enforcement
Source Code: 031-0104

Integrity and excellence in all we do



RECEIVED
2004 APR - 7 PM 2:04
SOUTHEAST REGIONAL
OFFICE



MISSOURI DEPARTMENT OF NATURAL RESOURCES
 DIVISION OF ENVIRONMENTAL QUALITY
 NOTICE OF VIOLATION/EXCESS EMISSIONS

P.O. BOX 176
 JEFFERSON CITY, MO 65102

RECEIVED
 2004 APR -7 PM 2:04
 AIR POLLUTION
 CONTROL PGH

VIOLATION NUMBER:
3104 SE

<input checked="" type="checkbox"/> Notice of Violation	<input type="checkbox"/> Notice of Excess Emissions	Date and Time: March 23, 2004 2.30 <input type="checkbox"/> AM <input checked="" type="checkbox"/> PM
--	--	---

SOURCE (NAME, ADDRESS, PERMIT NUMBER, LOCATION)		HIGH PRIORITY VIOLATION
Strack Excavating, LLC	031-0104	
5120 State Highway 74 Cape Girardeau, Missouri 63701		

MAILING ADDRESS	CITY	STATE	ZIP
5120 State Highway 74	Cape Girardeau	MO	63701

NAME OF OWNER OR MANAGER	TITLE OF OWNER OR MANAGER
J.W. Strack	Owner/Manager

LAW, REGULATION OR PERMIT VIOLATED
Missouri Air Conservation Commission Regulation
<ul style="list-style-type: none"> • 10 CSR 10-6.060 <i>Construction Permits</i> and Construction Permit 062001-014 • 10 CSR 10-6.065 <i>Operating Permits</i> • 10 CSR 10-6.070, Subpart "OOO"

N
E
A

NATURE OF VIOLATION	DATE(S): 03-23-04	TIME(S): 2:30 PM
<ul style="list-style-type: none"> • Failure to prevent visible emissions in the ambient air beyond the property line of origin • Failure to apply and/or obtain a operating permit as required in Construction Permit 062001-014. • Failure to execute Performance Testing as required in 10 CSR 10-6.070, Subpart "OOO". 		

SIGNATURE (PERSON RECEIVING NOTICE)	SIGNATURE (PERSON ISSUING NOTICE)
Sent Certified Mail #: 7003 1010 0000 5582 6648	<i>Jan Dunlap-Chronister</i> Jan Dunlap-Chronister

TITLE OR POSITION	TITLE OR POSITION/DNR REGION
	Environmental Specialist Southeast Regional Office

Strack Excavating, Inc.

031-0104

March 23, 2004

Notice of Violation # 3104 SE

Photographs by: Jan E. Dunlap-Chronister

RECEIVED
2004 MAR -7 10:04 AM
CITY OF CHARLOTTE
DEPARTMENT OF PERMITS
100 SOUTH TRYON STREET
CHARLOTTE, NC 28202



