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IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

LAKE OZARK/OSAGE BEACH JOINT SEWER BOARD, LINDA WEEKS, LARRY and VICKY STOCKMAN, ANDREW ZAWISLAK, CLINTON and TAMIRA SHEPPARD, JERRY VINCENT, JOSEPH M. BAX, MARY W. DENTON, DENNIS and LINDA CROXTON, TODD and REBECCA REINECKE, JOHN M. and MARLINE ZAWISLAK, JACK and BARBARA FARRIS, ROBERT ZAWISLAK, STEVE and TERESA BEENY, DONALD BAKER, MICHAEL C. and JACQUELINE ATKISSON, JUDY TAYLOR, MR. and MRS. WILLIAM MOORE, KEVIN and JUDITH MEYER, STEVE TERVIEL, JOHN and CARL WILLIAMS, AND JOYCE MACE.

Petitioner-Respondents,

v.

MISSOURI DEPARTMENT OF NATURAL RESOURCES,
LAND RECLAMATION COMMISSION AND
MAGRUDER LIMESTONE CO., INC.

Respondent-Appellants.

Appeal from the Circuit Court of Miller County
Case No. 08ML-CC00106
Division 1

BRIEF OF RESPONDENT LAKE OZARK/OSAGE BEACH JOINT SEWER BOARD, ET AL.

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JURISDICTIONAL STATEMENT

This action is an appeal by Appellant[1], Land Reclamation Commission, from an April 3, 2009 judgment entered by the Circuit Court of Miller County, Missouri, the Honorable Sanford F. Conley presiding, which reversed the Land Reclamation Commission's previous decision to grant Magruder Limestone Company, Inc. a quarry permit under the Land Reclamation Act Sections, Mo. Rev. Stat. §§ 444.760 – 444.789. Pursuant to Missouri law, Appeals may be taken from judicial reviews of administrative decisions. Mo. Rev. Stat. § 536.140.2(6).

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1 Since this is an appeal of the Circuit Court's reversal of an administrative agency's decision, Respondents, Lake Ozark/Osage Beach Joint Sewer Board and the Individual Citizens, are required to file the opening brief normally filed by Appellant.

STATEMENT OF FACTS

The following statement of record facts, presented in accordance with Mo. R. Civ. Proc. 84.04(c), is both relevant to, and determinative of, the Circuit Court of Miller County's decision to reverse the Land Reclamation Commission's decision.

Respondent, Lake Ozark/Osage Beach Joint Sewer Board (the "Sewer Board"), is a public utility board comprised of public officials from the cities of Lake Ozark and Osage Beach, Missouri. Respondents Linda Weeks, Larry & Vicky Stockman, Andrew Zawislak, Clinton & Tamira Sheppard, Jerry Vincent, Joseph M. Bax, Mary W. Denton, Dennis & Linda Croxton, Todd & Rebecca Reinecke, John M. & Marline Zawislak, Jack & Barbara Farris, Robert Zawislak, Steve & Teresa Beeny, Donald Baker, Michael C. & Jacqueline Atkisson, Judy Taylor, Mr. & Mrs. William Moore, Kevin & Judith Meyer, Steve Terviel, John & Carl Williams, and Joyce Mace are individual citizens and/or representatives of businesses residing in Miller County, Missouri (collectively the "Individual Citizens"). The Sewer Board and the Individual Citizens (collectively "Respondents[2]") challenged the application of Magruder Limestone Company, Inc ("Magruder") for a permit to operate a quarry adjacent to a sewer treatment facility owned by the Sewer Board.

Appellant, Missouri Department of Natural Resources, is a state agency established pursuant to Mo. Rev. Stat. § 640.010. Appellant, Missouri Land Reclamation Commission (the "Commission"), is an environmental commission established pursuant

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[2] Because they were challenging the proposed quarry, Respondents were identified as the Petitioners in the administrative and circuit court actions below.

to Mo. Rev. Stat. § 444.520. Appellant, Magruder, is a Missouri Corporation with its registered office located at 255 Watson Rd., Troy, Missouri.

On April 18, 2007, Magruder submitted a permit application to the Land Reclamation Program[3] to engage in surface mining on 205 acres in Miller County. *Legal File-Volume I*, at 106-116. Magruder's proposed quarry is located directly adjacent to a sewage treatment facility owned by the Sewer Board. Further, two force main sewer lines (lines that serve the City of Osage Beach, Missouri) run directly through the center of the proposed quarry to the sewer plant. Thousands of gallons of raw sewage run through these sewer lines every day. A rupture in either of the lines would cause an environmental and economic catastrophe to the entire Lake of the Ozarks region. In addition, numerous homeowners and businesses surround the proposed quarry area.

Given the importance of the treatment facility and the force main lines to the cities of Osage Beach and Lake Ozark and to the economy of the entire lake community, Magruder knew there would be opposition to the proposed quarry. In order to avoid any resistance, Magruder went out of its way to avoid giving full notice to the future neighbors of the proposed quarry and the community. For example, Missouri law requires permit applicants to give all record landowners of contiguous real property or real property located adjacent to the proposed mine plan area actual notice via certified letter. Magruder avoided this requirement by creating a fifty foot "setback" of its quarry

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3 The Land Reclamation Program is the name of the program that carries out the day to day activities of the Land Reclamation Commission. Both shall be referred to as the Land Reclamation Commission for purposes of this Brief.

boundary within the entire perimeter of its land. *Legal File-Volume I*, at 607. As such, none of the neighboring land owners received written notification of Magruder's planned quarry. Similarly, Magruder published its "public notice" in the *Miller County Autogram Sentinel*, a small newspaper distributed in the opposite side of Miller County that is barely circulated in Osage Beach and Lake Ozark. *Legal File-Volume III*, at 378.

Unfortunately, Magruder's covert efforts did prevent some local, interested citizens and businesses from learning of the quarry application. Once these parties learned of the proposed quarry, they petitioned the Land Reclamation Program for inclusion in the hearing process. *Legal File-Volume II*, at 288-297; *Legal File-Volume IV*, at 551-570. Both the Commission and Magruder opposed inclusion of the citizens and business in the hearing. *Legal File-Volume IV*, at 572-619. Despite being in the early stages of the administrative review, the hearing officer denied the request of said interested parties' to join the administrative hearing. *Legal File-Volume II*, at 321-322.

The exclusion of these interested parties takes on additional significance because at the time of their exclusion, Magruder's Application (as filed with the Land Reclamation Program) was incomplete and incorrect. It did not contain the information required by Mo. Code Regs. Ann. tit. 10 § 40-10.020 and Mo. Rev. Stat. § 444.772. This departure from Missouri law forms the basis of one of Respondents argument

s (and one of the Circuit Courts three separate reasons) to deny Magruder's application. Further the Original Application included incorrect information regarding Magruder's source of its right to mine the land. Magruder did not correct those errors by amending its Original Application until February 8, 2008. This date was well after the

administrative review process had begun and after interested parties had been precluded from participating in the review. The Sewer Board and Individual Citizens raised their concerns regarding the improper and incomplete application before any formal hearings were held, but the Land Reclamation Commission did not see fit to require Magruder to comply with Missouri law. Interested parties were excluded while the application was incomplete and Magruder never fully corrected its application.

On or around July 9, 2007, pursuant to Mo. Rev. Stat. § 444.773, the Sewer Board filed a request for a hearing before the Land Reclamation Commission in which they challenged the issuance of the permit. On or about September 26, 2007, a formal public meeting was conducted by the Commission wherein Petitioners were granted standing to proceed to a formal public hearing before the Commission pursuant to Mo. Code Regs. Ann. Tit. 10 § 40-10.050(2). After conclusion of the public meeting, Director Coen[4] recommended, and the Land Reclamation Commission granted, the request of the Sewer Board and Individual Citizen's for a public hearing on the proposed quarry.

Pursuant to Mo. Code. Ann. tit. 10 § 40-10.080(3) and Mo. Rev. Stat. §§ 444.760 – 444.790 RSMo, formal hearings on this matter were conducted on March 24, 2008, April 28, 29 & 30, 2008, May 23, 2008 and June 4 & 6, 2008. The hearing officer was Mr. W.B. Tichenor. *Legal File-Volume II*, at 193-194. On July 24, 2008, the Land Reclamation Commission granted Magruder's application with "special conditions" which were proposed by Magruder and on which the Sewer Board and individual citizens

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4 Director Coen was the director of the Land Reclamation Program at the time of Magruder's application and during the course of the administrative review.

were prevented from providing input. *Legal File-Volume VI,* at 948 -951. One such condition was that the Commission's Final Order granting Magruder's permit limited blasting to the approximately 52 acres west of the sewer line easement. *Legal File-Volume VI*, at 868-951.

In limiting Magruder's permit to 52 acres, the Commission purportedly exercised its discretion to protect the integrity of the sewer treatment facility and sewer lines traversing the middle of Magruder's proposed site. However, the Land Reclamation Commission's order did not go far enough and only vaguely addressed permitted activities around the lines.

On August 15, 2008 the Sewer Board filed its petition for judicial review in the Circuit Court of Miller County, Missouri. Three different judges in Circuit Court of Miller County, heard substantive arguments on four different occasions in this matter and every time, the Circuit Court found in favor of Respondents. *Legal File-Volume I*, at 1-9. On August 15, 2008 Respondents filed their Petition for Review and Application for Expedited Review. *Legal File-Volume I*, at 10-131. In connection with Respondents' request for an expedited review, Judge Kenneth Oswald, of the Circuit Court, heard arguments and entered a September 15, 2008 Order staying the Land Reclamation Commission's Order regarding Expansion of Permit #0086. *Legal File-Volume I*, at 4. Despite the court's order staying their proposed quarry permit, Magruder began blasting at the proposed quarry site.

In order to protect the sewer plant and sewer lines, Respondents were forced to file a Motion for Order to Show Cause why Magruder should Not be Held in Contempt on

September 22, 2008. *Legal File-Volume I*, at 5. A hearing was scheduled for September 25, 2008 at which time Judge Byron Kinder heard arguments of the parties regarding the blasting. *Legal File-Volume I*, at 5. At that hearing, Magruder "argued" that it was blasting to clear the land for activities purportedly "unrelated" to the proposed quarry and therefore did not violate the Circuit Court's previous order. Respondents introduced evidence that the "unrelated" blasting it sent rocks up to 50 feet in the air and damaged the sewer treatment facility's UV disinfecting system. Significantly, these are some of the very same concerns the Sewer Board raised with the Land Reclamation Commission during the administrative hearings. *April 30, 2008 Hearing Transcript, at 48:8-50:17; 54:10-56:17.* Judge Kinder entered an order on September 25, 2008 finding that Magruder's blasting violated the previous order staying the permit and that no blasting could occur on the proposed quarry site. *Legal File-Volume I*, at 5.

Later, on April 3, 2009, Judge Conley of the Circuit Court of Miller County entered a final judgment in this matter finding that the Commission's decision was made upon unlawful procedure and unauthorized by law. *Legal File-Volume I*, at 139-145. Specifically, Judge Conley's order focused on three separate and distinct reasons for overturning the Commissions order. *Id.*

- First, Judge Conley Order found that the Commission misapplied the burden of proof during the administrative hearing. *Id.* at 140-141.
- Next, Judge Conley found that the Commission's reliance on unscientific not in the record was improper. *Id.* at 141-143.

- Finally, Judge Conley found that: Magruder's April 18, 2007 application was incomplete and improper; Magruder should have been required to republish notice pursuant to Missouri law; and that potential petitioners were improperly denied participation in this matter. *Id.* at 143-144.

Significantly, all three of these issues were raised with the Commission on numerous occasions including at the July 23 & 24, 2009 hearing at which they issued their order approving Magruder's application. *Legal File-Volume VI*, at 853-855.

On July 30, 2009, the Commission, not Magruder, filed this appeal seeking additional review of the Commission's decision to grant Magruder a quarry permit. *Legal File-Volume I*, at 162. It is very important to note that after the Circuit Court of Miller County rejected Magruder's improper application, Magruder acknowledged its deficiencies in the process and filed a new application with the Land Reclamation Program. **Exhibit A,** *Letter regarding Magruder's New Application.* Inexplicably, the Commission rejected Magruder's new application, choosing instead to pursue this appeal. Respondents are unsure of the Commission's goal in pursuing an appeal where the applicant has already acknowledged the deficiencies and filed a new application. Despite this peculiarity, Respondents maintain that Commission's decision to grant Magruder a permit for a quarry should be reversed and the lower court's order affirmed.

POINTS RELIED ON

I. The Land Reclamation Commission Erred in Misapplying the Burden of Proof because, Pursuant to the Land Reclamation Act, Magruder Limestone Company, Inc. Bore the Burden of Proof at the Administrative Hearing.

Mo. Rev. Stat § 444.773.4.

Mo. Code Regs. Ann. Tit. 10 § 40-10.080(3)(B).

Lanning v. Heckler, 777 F.2d 1316, 1317 (8th Cir. 1985)

Knapp v. Missouri Local Government Employees Retirement System, 738 S.W.2d 903, 912 (App. Ct. 1987)

Fazior v. Heckler, 760 F.2d 187, 188 (8th Cir. 1985)

II. The Land Reclamation Commission Erred When it Based its Order on Unscientific Evidence that was Not Contained in the Record.

Mo. Rev. Stat § 444.773(4)

Mo. Code Regs. Ann. Tit. 10 § 40-10.080(3)(D).

Badasa v. Mukasey, 540 F.3d 909, 909 (8th Cir. 2008)

III. The Land Reclamation Commission Order was Improper and Violated Missouri Law Because Magruder Limestone Company Inc.'s Application was Improper and Incomplete as Originally Filed.

Mo. Rev. Stat §§ 444.772.2(1); 444.772.3; 444.772.10

Mo. Rev. Stat § 444.773

Mo. Code Regs. Ann. Tit. 10 § 40-10.020(2)(E)(2)(A).

ARGUMENT

Standard of Review

In an appeal of an circuit courts reversal of an administrative agency decision, the Court of Appeals must determine whether the agency's decision is "supported by competent and substantial evidence on the record as a whole; whether the decision is arbitrary, capricious, unreasonable or involves an abuse of discretion; or whether the decision is unauthorized by law." *Vivona v. Zobrist*, 290 S.W.3d 167, 171 (Mo. App. 2009) citing *Coffer v. Wasson-Hunt*, 281 S.W.3d 308, 310 (Mo. banc 2009); Mo. Rev. Stat. § 536.140(2). In making this determination, the Court of Appeals must review the entire record and not just the evidence that supports the agency's decision. *Id.* Further, the appellate court must not defer to the agency on questions of law. *Id.* (citations omitted).

I. The Land Reclamation Commission Erred in Misapplying the Burden of Proof because, Pursuant to the Land Reclamation Act, Magruder Limestone Company, Inc. Bore the Burden of Proof at the Administrative Hearing.

The most perplexing and blatant error committed by the Land Reclamation Commission during the entire course of the administrative hearing is the inexplicable and continual misapplication of the burden of proof. Missouri law is clear, in any hearing held under the Land Reclamation Act, the burden of proof "shall be on the applicant for a permit." Mo. Rev. Stat. § 444.773.4. As such, Magruder had the burden of proof in this administrative hearing. *Id.* Despite the unambiguous statute, the Hearing Officer and

Land Reclamation Commission continuously misapplied the burden of proof. *Legal File-Volume VI*, at 868-951.

This misapplication is made more puzzling because the Missouri Department of Natural Resources' regulations are consistent with the Land Reclamation Act. Those regulations state that: petitioners merely have a burden of establishing "an issue of fact" regarding the impact of a permitted activity; and, the "the burden of proof for those issues is on the applicant for the permit." Mo. Code. Regs. Ann. tit. 10 § 40-10.080(3)(B).

Despite the clear unambiguous language in the Land Reclamation Act and applicable regulations, the Commission and the Hearing Officer applied the improper burden of proof. The Hearing Officer's Order continually reiterates a misapplication of the burden of proof. *Legal File-Volume VI*, at 914-917; 923; 927. In fact, the Order contains a section titled **"PETITIONERS" BURDEN OF PROOF** *Legal File-Volume VI*, at 915-916. The Order further states:

> The burden of proof as it relates to the issues raised and the relief sought by Petitioners is on the Petitioners. The general principle is that the burden rests on the party bringing the action, the Petitioners in the present case.

Legal File-Volume VI, at 915. This is a clear misinterpretation of the burden of proof in hearings held under the Land Reclamation Act. In support of this proposition, the Hearing Officer cites Mo. Rev. Stat. § 444.773.4. However, the **first** sentence of the cited section clearly states that "the burden of proof shall be on the applicant for a permit." Mo. Rev. Stat. § 444.773.4. Despite this clear and unambiguous language placing the burden of proof on the "applicant for a permit"(Magruder in this instance) the

Commission and the Hearing Officer placed the burden of proof on Respondents. Placing the burden of proof on Respondents in this action was improper and contrary to Missouri law. As such, the Court should reverse LRC's Order.

To "explain" this plain error which merited reversal, he Commission and Magruder are likely to argue that the Hearing Officer applied the correct burden of proof in this matter or that the misapplication amounted to harmless error. However, these arguments are flawed and easily countered.

First, as stated in the regulations, Respondents only needed to establish "an issue of fact regarding the impact, if any, of the permitted activity on a hearing petitioner's health, safety or livelihood." Mo. Code Regs. Ann. tit. 10 § 40-10.080(3)(B). Throughout its Order, the Land Reclamation Commission, stated the Sewer Board failed to meet its burden of **proof**, not once did it cite a failure to "establish an issue of fact." *Legal File-Volume VI*, at 914-917; 923; 927. The law is clear that when an agency does not properly indicate the burden of proof, a court can not assume it has been applied correctly. *Lanning v. Heckler*, 777 F.2d 1316, 1317 (8th Cir. 1985).

Further, it is undisputed that the Petitioners established "facts" to support an impact on their health safety and/or livelihood. For example, the Sewer Board's expert witness, Mr. Donald Dressler, testified that the sewer treatment plant and force main lines would be damaged if Magruder was permitted to operate a quarry at the proposed site. *June 6, 2008 Hearing Transcript, at 113:3-114:9.* Mr. Dressler, the only Missouri licensed engineer to testify in this matter, has 45 years of experience in both blasting and pipes. *June 6, 2008 Hearing Transcript, at 16:19-18:24.* Mr. Dressler testified that

blasting would cause damage to the treatment plan and sewer lines. Additionally, Mr. Dressler addressed how quarrying activities beside blasting, like stock piling and driving over the lines with heavy machinery would damage them. This testimony establishes a fact regarding health, safety and livelihood.

In addition, the Individual Citizens presented sufficient evidence to establish an issue of fact regarding a potential quarry's impact on their health safety and livelihood. Mrs. Vicki Stockman owns an RV park near the proposed quarry site with her husband. Their RV park is rated by various directory services. *March 24, 2003 Public Hearing Transcript, at pg. 85:2-4.* Mrs. Stockman testified that her RV park's rating was affected by the operation of a previous quarry and that the proposed quarry would have a similar impact on her livelihood. *March 24, 2003 Public Hearing Transcript, at pg. 88:24-89:8.* Lower ratings would equal less customers and less customers would equal less income for the Stockman's. Undeniably, Mrs. Stockman established an issue of fact regarding the impact quarry operations would have on her livelihood.

Petitioner Mary Denton, also testified in this matter. Ms. Denton lives close to the proposed quarry and has been under treatment for chronic allergies and asthma for a number of years. *March 24, 2003 Public Hearing Transcript, at pg. 138:10-13.* Because of her condition, Ms. Denton is unable to tolerate dust, fumes and other chemical smells that would originate from a quarry. *March 24, 2003 Public Hearing Transcript, at pg. 138:13-17.* Ms. Denton's health was adversely affected by the operation of a previous quarry near the same area. *March 24, 2003 Public Hearing Transcript, at pg. 141:24-15.* After that quarry went out of operation, Ms. Denton's condition has improved. *March*

24, 2003 Public Hearing Transcript, at pg. 142:23-143; 157:18-20. At the hearing evidence from Ms. Denton's doctor explained,

> Exposure to both dust and diesel or other exhaust fumes are known triggers for this patient. A rock quarry in close proximity will certainly cause exacerbation and long-term worsening of her disease.

March 24, 2003 Public Hearing Transcript, at pg. 157:13-17.

As with Mr. Dressler and Mrs. Stockton, Ms. Denton established an issue of fact regarding the quarry's impact on her health, safety and livelihood. *Knapp v. Missouri Local Government Employees Retirement System*, 738 S.W.2d 903, 912 (App. Ct. 1987) (finding that letters and reports from doctors or experts in a particular area is sufficient evidence to establish an issue of fact). However, this evidence was ignored and/or "shrugged off" because the Commission incorrectly applied the burden of proof in this matter. *Legal File-Volume VI*, at 914-917; 923; 927. As such, the Order must be reversed.

Final proof that the Respondents established "issues of fact" is that the Hearing Officer's Order states "if a break in any part of the miles of sewer line, or a disruption of service at the sewage plant were to occur and result in raw sewage being dumped in the Lake of the Ozarks it would certainly be a negative impact." *Legal File-Volume VI*, at 925. This is an acknowledgment that the Sewer Board and the Individual Citizens met their burden to of establishing an issue of fact. Additionally, during the course of the hearing, the Hearing Officer indicated that Petitioners had established "an issue of fact" regarding the impact of quarrying. He stated:

> Mr. Mauer, the Hearing Officer is well-aware that if the 24 or the 18-inch mains break or if the plant itself suffers an event and discharges raw sewage into the Osage River that's not anything that DNR wants. And I don't think we need to find out whatever the standards would be. I think basic common knowledge of anyone would understand that.

4/30/08 Hearing Transcript p. 68, 2-9.

Once Respondents established issues of fact, Magruder had the burden of proof. Despite this statutory requirement, the Commission improperly and affirmatively placed the burden of proof on Respondents. *Legal File-Volume VI*, at 914-917; 923; 927. The Commission's failure to recognize the proper shifting of burdens is reversible error. *Fazior v. Heckler*, 760 F.2d 187, 188 (8th Cir. 1985). The wrong burden was stated throughout the Commission's order, and this Court cannot assume the Commission applied it correctly. *Lanning*, 777 F.2d at 1317. The Commission's order must be reversed.

Most perplexing of all is that Respondents raised the misapplication of the burden of proof to the Commission at its July 23 & 24, 2008 meeting. *Legal File-Volume VI*, at 853-854. The Commission did nothing. *Id.* At that meeting the LRC questioned the Hearing Officer regarding the burden of proof and the Hearing Officer confirmed his misinterpretation of Missouri law. The Hearing Officer stated "that he's read the Statute and the regulations regarding this issue and <u>he reads that the burden of proof is upon the persons bringing the action</u>. *Legal File-Volume VI*, at 855. The Hearing Officer's interpretation is against the unambiguous language of the Land Reclamation Act. As

such, the Land Reclamation's Order is not authorized by Missouri law and must be reversed.

II. The Land Reclamation Commission Erred When it Based its Order on Unscientific Evidence that was Not Contained in the Record.

Under Missouri law, the Land Reclamation Commission must only rely on substantial, scientific evidence contained in the record when making decisions to grant or deny a permit. Mo. Rev. Stat. § 444.773(4); Mo. Code Regs. Ann. tit. § 10 CSR 40-10.080(3)(D). In this case, the Land Reclamation Commission improperly based its Order on evidence which was neither in the record nor scientific. As such, the Order and Land Reclamation Commission's decision are contrary to Missouri law.

One of the main "questions" in the administrative hearing below, was whether Magruder could safely operate a quarry in close proximity to sewer lines. As such, testimony regarding blasting, quarrying and the impact on the sewer plant and sewer lines was crucial in making the determination. The Sewer Board offered evidence on both issues through the testimony of Mr. King and Mr. Dressler. *April 28, 2008 Hearing Transcript, at 250:23-282:14; April 30, 2008 Hearing Transcript, at 141:10-158:4; .June 6, 2008 Hearing Transcript, at 6:23-137:2.* Both of those witnesses stated that a quarry could not operate at the proposed location without damaging the sewer treatment plant and the two sewer lines. *Id.* On the other hand, Magruder's three expert witnesses[5] could

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5 All three of Magruder's experts have a potential financial stake in the quarry as two have been promised consulting jobs at the proposed quarry and the other will

only offer opinions with respect to blasting. Magruder failed to introduce any evidence regarding the ability of the sewer plant itself, or the two force main lines (ductile iron pipe and pvc pipe) to withstand quarry operations. In fact, all three of Magruder's expert witnesses went so far as to testify they were not experts in sewer treatment plants or pipes and could not provide testimony on the issue. One of Magruder's Experts, Dr. Worsey, testified that to attain evidence related to the specific pipes you would have to go to a pipe expert. *May 23, 2008 Hearing Transcript, at 269:3-13.* Two other Magruder experts, Mr. Henderson and Mr. Mirabelli, also confirmed that they had no knowledge and/expertise related to pipes. *June 4, 2008 Hearing Transcript, at 252:19-253:20; 125:8-9.* The Sewer Board proffered two witnesses that were qualified to testify about the pipe's ability to withstand blasts and other quarry activities. Magruder offered no any evidence in response.

Given the lack of evidence proffered by Magruder, the Commission went outside of the record to "address" the issues raised by Petitioners' witnesses to "fill in" Magruder's missing evidence on the ability of the plant and pipes' ability to withstand quarry operations. For this "argument" the Hearing Officer cited *Wikipedia* to provide additional evidence intimating that the ductile iron and pvc pipes would be able to withstand the strain placed on them by quarrying. *Legal File-Volume VI*, at 889. Specifically, he Hearing Officer wrote:

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be selling the explosives and providing blasting services to Magruder for the proposed quarry.

> *Ductile iron*, also called ductile cast iron or nodular cast iron, is a type of cast iron invented in 1943 by Keith Millis. While most varieties of cast iron are brittle, ductile iron is much more ductile (*easily molded, pliant*), due to its nodular graphite inclusions. Much of the annual production of ductile iron is in the form of ductile cast iron pipe, used for water and sewer lines. Ductile iron pipe is stronger and easier to tap, requires less support and provides greater flow area compared to pipe made from other materials. In difficult terrain it can be a better choice than PVC, concrete, polyethylene or steel pipe. *Wikipedia – Ductile Iron.*
>
> *Polyvinyl chloride* commonly abbreviated PVC, is a widely used thermoplastic polymer. It is used in a variety of applications. As a hard plastic, it is used as ... pipe, plumbing and conduit fixtures. The material is often used in Plastic Pressure Pipe Systems for pipelines in the water and sewer industries because of its inexpensive nature and flexibility. Its light weight, high strength, and low reactivity make it particularly well-suited to water distribution and sanitary sewer pipe applications. *Wikipedia – Polyvinyl chloride. 7/13/08*

Legal File-Volume VI, at 889. Not only are the citations to *Wikipedia* not on the record, *Wikipedia* is also an unscientific and unreliable source.

Of all potential resources, the Hearing Officer chose to cite Wikipedia, a source that "can be edited by anyone with access to the Internet." *Wikipedia About: http://en.wikipedia.org/wiki/Wikipedia:About (last visited January 25, 2010).* In fact, *Wikipedia* warns that "users should be aware that not all articles are of encyclopedic quality from the start: they may contain false or debatable information." *Wikipedia About: http:// en.wikipedia.org/wiki/Wikipedia:About (last visited January 25, 2010).* Since *Wikipedia* can be edited by any internet user, "it is more easily vandalized or

susceptible to unchecked information." *Wikipedia About: http://en.wikipedia.org/wiki/Wikipedia:About (last visited January 25, 2010).*

The 8th Circuit recently acknowledged *Wikipedia's* unreliability in *Badasa v. Mukasey.*, 540 F.3d 909, 909 (8th Cir. 2008). In *Badasa*, the petitioner moved the Board of Immigration Appeals ("BIA") to reopen her case based on new evidence regarding her alleged submission of fraudulent documents. *Id.* at 909. At the administrative hearing, the Department of Homeland Security, submitted evidence, including information from *Wikipedia*. *Id.* Based on that evidence, the Immigration Judge ("IJ") concluded that the new documents did not change its prior decision and the BIA dismissed the petitioner's appeal. *Id.* at 909-910. The BIA did not condone the use of Wikipedia, but believed that even without the inclusion of *Wikipedia*, the IJ's decision was supported by enough evidence to find no clear error. *Id.* at 910. The 8th Circuit reversed BIA's decision for further proceedings finding neither the court nor BIA could determine whether the IJ would have reached the same conclusion without *Wikipedia*, or whether the BIA believed consideration of *Wikipedia* was harmless error. *Id.*

Like *Badasa*, the Hearing Officer in this matter was faced with a lack of evidence on a key issue. Similar to *Badasa*, the Hearing Officer relied on *Wikipedia* in order to "fill in" the missing evidence. However, this case is more egregious than *Badasa* because in this case the *Wikipedia* evidence was not introduced on the record by a party, but was independently researched by the Hearing Officer who was statutorily obligated to consider only evidence in the record. Furthermore, unlike *Badasa*, where the intent of the evidence was unclear, the Hearing Officer affirmatively stated that he included the

evidence to help the Commission because it was an area in which the experts "provided little." *Legal File-Volume VI*, at 857. As such, the Order is based on unscientific evidence not in the record and must be reversed.

Magruder and the Commission are expected to argue that the Commission's citation to *Wikipedia* is tantamount to referring to a dictionary and amounts to harmless error. However, such an argument contains no merit. As the Eighth Circuit held in *Badasa,* this Court cannot determine whether the Commission would have reached the same conclusion without the reference to *Wikipedia.* The Commission's order must be reversed

III. The Land Reclamation Commission's Order was Improper and Violated Missouri Law Because Magruder Limestone Company Inc.'s Application was Improper and Incomplete as Originally Filed.

The Land Reclamation Commission's Order should also be reversed, because Magruder's application was incomplete as originally filed. Under the Land Reclamation Act, an "[a]pplication for permit shall be made on a form prescribed by the commission and shall include the name of all persons with **any interest** in the land to be mined." Mo. Rev. Stat. § 444.772.2(1) (emphasis added). Missouri law further requires an application for a permit be accompanied by a map in a scale and form specified by the commission. Mo. Rev. Stat. § 444.772.3. The Code of State Regulations specifies the requirements for the maps accompanying Land Reclamation applications. Each application must be accompanied by a map of sufficient scale and detail to illustrate "the names of any persons or businesses having **any surface or subsurface interests in the lands** to be

mined, including owners and leaseholders of the land and **utilities**." Mo. Code. Regs. Ann. tit. 10 § 40-10.020(2)(E)(2)(A) (emphasis added).

It is undisputed that Magruder's original application, filed on April 18, 2007 did not include all of the statutorily required information. Both the Sewer Board and Ameren UE ("Ameren") have easements and utility lines running through the proposed quarry site. Neither the Sewer Board nor Ameren were identified on the map as required by Missouri law. Additionally, Magruder failed to indicate the post mining land use on its detailed map as required by the regulations. Land Reclamation Program staff members agree that Magruder's original application was incomplete as filed. *April 28, 2008 Hearing Transcript, at pg. 66: 13-16; 73:5-8; 73: 24-25; 74:1-6; 145: 20-25; 158:6-15.* In fact, Magruder did not file an application that included the statutorily required map until February 5, 2008.

Permit completeness is a significant requirement and can not be categorized as a "hyper technicality." In fact, an application needs to be complete before the Commission can authorize an applicant to publish notice. Mo. Rev. Stat. § 444.772.10. The date of public notice is important because it triggers the time period for the public to request a hearing with the Land Reclamation Program. Mo. Rev. Stat. § 444.773.3. In fact, the Commission believes an application must be complete in order to start the "clock" on the public's time to request a public hearing. *April 28, 2008 Hearing Transcript, pg. 117:23-118:7.*

Magruder's incomplete application required a denial of the permit. The Hearing Officer's Order stated: the "regulations do not require simply because there is some

omission or error in an application that the Director must recommend denial..." *Legal File-Volume VI*, at 900. In reality, the unambiguous language of the statute requires the permits denial. Mo. Rev. Stat. § 444.773.1 states "if the director determines that the application has not fully complied with the provisions of section 444.772 or any rule or regulation promulgated pursuant to that section, the director **shall** recommend denial of the permit." (emphasis added). The original application filed by Magruder did not comply with Missouri law. At the time the errors and omissions were discovered, Director Coen should have recommended denial of the permit.

To make matters worse, the Hearing Officer, in a January 28, 2008 Order, rejected the request of the additional petitioners to join the hearing. *Legal File-Volume II*, at 321-322. The potential petitioners who were refused access to the hearing process included:

- citizens with special needs - the Miller County Board for Services for Developmentally Disabled;
- school children - Lakeview Christian Academy;
- senior citizens - Golden Age Activity Center;
- a citizen group - Concerned Citizens of Miller County; and
- an individual - Ted Bax.

These are not extreme activist groups attempting to harass Magruder or delay the hearing process. Rather, all of these prejudiced petitioners represent people whose health, safety and/or livelihood would be severely impacted by the operation of a quarry. Ironically, despite Magruder's application being incomplete, the Hearing Officer denied these petitioners access to a hearing based on being too late with their requests for a public

hearing. *Legal File-Volume II*, at 321-322. It is significant that these potential petitioners' were wrongly excluded, because Magruder's application was incomplete and in error. Thus the requests were timely. This exclusion was against the clear intent of Missouri law and the Land Reclamation Program.

To be clear, Respondents are not arguing that Missouri law prevents applicants from supplementing their application or that the Land Reclamation Commission should be prevented from working with applicants during the application process. To the contrary, working with applicants is an important and necessary step in the Land Reclamation Commission application process. However, Missouri law requires that applications be complete prior to publishing public notice and before interested persons are precluded from participating in the review process. Mo. Rev. Stat. § 444.772.10. Fairness and common sense in the application process demands that Magruder, or any applicant, not be able to amend their incomplete application after the time for public comment has ended.

Likewise, it should go without saying that affected citizens should not be excluded from the hearing process before a complete application is filed with the Land Reclamation Commission. If there is no deterrent for filing incomplete and/or erroneous applications, there is no incentive for applicants to timely provide the statutorily required information and/or notice. Rather, under this scenario, the incentive is for applicants to file an application as quickly as possible, without regard to its accuracy or completeness. This starts the "clock" for public comment as soon as possible and there is no penalty for incorrect or incomplete information. Mo. Rev. Stat. § 444.773.3. Such an interpretation

defeats the very purpose of the Land Reclamation Commission's application and notification process. *April 28, 2008 Hearing Transcript, pg. 117:23-118:7.* Thus, the Land Reclamation Commission's Order granting Magruder's permit should be reversed and this matter sent back for rehearing.

It is anticipated that Appellant's will attempt to district the Court from these undisputed facts, by presenting ineffective and irrelevant arguments. For instance, the Appellants previously argued that Magruder's incomplete application is of no consequence because the published notice does not include detail maps, easements on the proposed mine site, or post-mining land use. This argument cannot stand when read in context of the entire statute. An application needs to be complete in order for an applicant to publish notice. Mo. Rev. Stat. § 444.772.10. To be complete under the Land Reclamation Act, an "[a]pplication for permit shall be made on a form prescribed by the commission and shall include the name of all persons with **any interest** in the land to be mined." Mo. Rev. Stat. § 444.772.2(1) (emphasis added). Furthermore, an application must be accompanied by a **map in a scale and form specified by the commission by regulation**. Mo. Rev. Stat. § 444.772.3 (emphasis added). The corresponding regulations require a map of sufficient scale and detail to illustrate "the names of any persons or businesses having **any surface or subsurface interests in the lands** to be mined, including owners and leaseholders of the land and **utilities**." Mo. Code Regs. Ann. tit. 10 § 40-10.020(2)(E)(2)(A) (emphasis added). Because detail maps, easements, and post-mining land use are required for a complete application, and a complete

application is a condition precedent to publishing notice, then the detail maps, easements, and post-mining land use are required to publish notice.

Appellant's also tried to convince the lower court that the potential petitioners failed to follow proper procedure or were somehow late in their hearing requests. As with the previous argument, this is easily dismissed. It is undisputed that these potential petitioners were excluded at a time when Magruder's application was incomplete. *Legal File-Volume II*, at 321-322. Further, the Commission itself states the exclusion of these potential petitioners is against the clear intent of Missouri law and the Land Reclamation Program. *April 28, 2008 Hearing Transcript, pg. 117:23-118:7.* Fairness and common sense in the application process demands that Magruder, or any applicant, not be allowed to prematurely exclude interested parties before having satisfied statutorily imposed application requirements. If there is no deterrent for filing incomplete and/or erroneous applications, there is no incentive for applicants to provide the statutorily required information.[6] Such an interpretation defeats the very purpose of the Land Reclamation application and notification process. The Commission's Order granting Magruder's permit should be reversed and this matter sent back for consideration of a proper, complete application.

Until a complete application was submitted by Magruder the Director was required to recommend denial of the permit. In this case, the Commission should have

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6 In fact, Magruder has admitted that deficiency of its first application and filed a new application. However, the Commission would not accept the corrected application.

required Magruder to republish their public notice after all of the required information was submitted. Under the Land Reclamation Act, only after an application is deemed complete by the Director, shall the applicant publish notice of intent to operate a surface mine in any newspaper qualified to pursuant to Mo. Rev. Stat. § 493.050. Magruder's Original Application was discovered to be incomplete. Only after Magruder supplemented their Original Application in February 2008 could the Land Reclamation Program deem Magruder's application complete. *April 28, 2008 Hearing Transcript, at pg. 104:3-7.* Only after its application was deemed complete could Magruder properly publish notice.

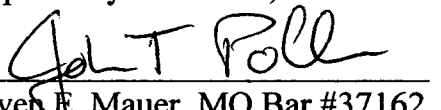
Once Magruder corrected its application's deficiencies and the Land Reclamation Program deemed the application complete in February 2008, Magruder should have been required to republish notice of intent to operate a surface mine. At that time, the improperly excluded petitioners would have had an opportunity to join this action. In an attempt to justify their refusal to recommend denial or force republication, the Hearing Officer stated that such steps were unnecessary because the omissions in the application were "hyper technicalities" and because Petitioners' due process rights were not impacted by the incompleteness. *Legal File-Volume VI*, at 900, 907. These contentions are incorrect and ignore the record in this case. These alleged "hyper technicalities" are required by Mo. Rev. Stat. § 444.772.2(2) and required by Mo. Code Regs. Ann. tit. 10 § 40-10.020(2)(E)(2)(A). They are also considered important by the Land Reclamation program. *April 28, 2008 Hearing Transcript, at pg. 171:20-172:3; 179:1-5.* Furthermore, potential petitioners were denied due process and a chance to be heard

based on an incomplete application. Excluding potential petitioners from participating in an administrative hearing based on the filing of an application that failed to comply with Missouri law defies all common sense and logic. The Commission's Order granting Magruder's permit should be reversed.

CONCLUSION

For the foregoing reasons, the Land Reclamation Commission's order granting Magruder Limestone Company, Inc.'s application for a quarry permit in Miller County, Missouri should be reversed and the decision of the Circuit Court affirmed.

Respectfully submitted,

By 

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been mailed postage prepaid on this 27th day of January, 2010, to:

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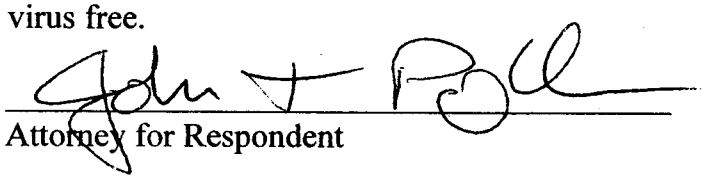
CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that pursuant to Rule 84.06(c), the foregoing Brief: (1) contains the information required by Rule 55.03; (2) the Brief complies with the limitations in Rule 84.06(b); and (3) contains 7,232 words from the Table of Contents through the Conclusion, as determined using the word-count program of Microsoft Word 2003. The undersigned counsel further certifies that the accompanying compact disk has been scanned and was found to be virus free.



Attorney for Respondent

STATE OF MISSOURI
Jeremiah W. (Jay) Nixon, Governor • Mark N. Templeton, Director
DEPARTMENT OF NATURAL RESOURCES
www.dnr.mo.gov

CERTIFIED MAIL # 7007 3020 0003 2220 4183
RETURN RECEIPT REQUESTED

November 12, 2009

Mr. Dean McDonald
Magruder Limestone, Inc.
255 Watson Road
Troy, MO 63379

Dear Mr. McDonald:

On October 30, 2009, the Missouri Department of Natural Resources, Land Reclamation Program received a second application for Lake Ozark Quarry submitted by Magruder Limestone Company, Inc. On the afternoon of August 27, 2009, Mike Larsen and I made contact with you and you mentioned to the effect that "Magruder intends to withdraw the current mining application at the Lake of the Ozarks and resubmit a new application for the same site and the original acreage of 200+ acres within the next week or so".

We are not concerned about the timeframe aspect; rather the fact that the department's Land Reclamation Program never received a letter withdrawing the original application. We essentially now have two Lake Ozark Quarry applications. The initial 2007 submittal is still in the court system waiting a decision and the second application we received on October 30, 2009.

Since we never received a letter withdrawing the original application, we are returning the second application stamped received on October 30, 2009. Magruder Limestone Company does have two options. One option is to wait until a decision is reached on the outcome of the latest appeal process for the original application. Or, Magruder may write a letter to the Land Reclamation Commission withdrawing the original application and then submit a new application for Lake Ozark Quarry.

I am also returning check number 8639 in the amount of $1,100.00 submitted in fees. The check is marked VOID.

If you have any questions regarding this letter, please do not hesitate to contact me. I may be reached by telephone at (573) 751-1312.

Sincerely,

LAND RECLAMATION COMMISSION

William S. Zeaman, Chief
Non-Coal Unit

WZ:tb

Enclosures: Permit application material submitted on October 30, 2009 for the Lake Ozark Quarry; and
Voided check # 8639 in the amount of $1,100.00

c: Land Reclamation Commission
Jenny Frazier, AGO
Brian E. McGovern
Steven E. Mauer
Timothy P. Duggan, AGO
Richard S. Brownlee III & Adam Troutwine
W.B. Tichenor