

IN THE CIRCUIT COURT OF CAPE GIRARDEAU COUNTY  
STATE OF MISSOURI

SAXONY LUTHERAN )  
HIGH SCHOOL, INC., )  
 )  
Petitioner, )  
 ) Cause No. 11CG-CC00272  
v. )  
 ) Div. 1  
MISSOURI DEPARTMENT OF )  
NATURAL RESOURCES, et al. )  
 )  
Respondents. )

**RESPONDENT MISSOURI DEPARTMENT OF NATURAL  
RESOURCES' RESPONSE BRIEF**

**I. Introduction**

The Missouri Land Reclamation Commission's decision to impose a 1,000 foot buffer in the industrial minerals permit issued to Strack Excavating, LLC was consistent with House Bill 89, signed by the Governor during the hearing on the permit application. Because the imposition of the 1,000 foot buffer reduced the amount of acreage in the mine plan, the Commission properly issued the permit without requiring a second public notice. For these reasons, the Commission's actions were lawful and must be upheld.

**II. Statement of Facts**

On November 4, 2010, Strack Excavating, LLC ("Strack") submitted to the Missouri Land Reclamation Commission ("Commission") an application to

expand Permit No. 0832 to operate a new limestone quarry location (Strack Quarry # 2) in Cape Girardeau County. (*RECORD ON APPEAL, Vol. II, Permit Application for Industrial Mineral Mines, Petitioner's Exhibit B, Respondent's Exhibit 1.*) On November 22, 2010, the Staff Director of the Land Reclamation Program deemed the permit application complete and directed Strack to advertise a notice of intent to operate a surface mine, in accordance with the public notice requirements of the Land Reclamation Act. (*RECORD ON APPEAL, Vol. II, November 22, 2010 Letter from DNR to J.W. Strack, Respondent's Exhibit 2.*) Strack complied with the public notice requirements of § 444.772.10 RSMo. (*RECORD ON APPEAL, Vol II, Public Notice of Surface Mining Application, Respondent's Exhibit 3.*) Strack's public notice identifies the acreage of the proposed limestone quarry as 76 acres. (*Id.*)

On January 11, 2011, the Staff Director recommended to the Commission that it approve the permit application. (*RECORD ON APPEAL, Vol. II, Memorandum from Mike Larsen to Land Reclamation Commission, Respondent's Exhibit 4.*) On January 27, 2011, the Commission conducted a public hearing to allow various parties, including Saxony Lutheran High School, Inc, the opportunity to establish standing, as defined by § 444.773 RSMo Supp. 2011, for an evidentiary hearing on the issue of whether the permit would unduly impair their health, safety or livelihood. (*RECORD ON*

*APPEAL Vol. II, Petitioner's Exhibit C.*) On February 7, 2011, the Commission decided that Saxony had established standing for an evidentiary hearing on the issue of whether the permit would unduly impair Saxony's health or livelihood, and the matter was referred to a Hearing Officer. (*RECORD ON APPEAL, Vol. I, Order Upon Assignment of Matter to Hearing Officer.*)

The evidentiary hearing was conducted on July 5, 6, 7 and 12, 2012. (*RECORD ON APPEAL, Vol. II, Transcript of Proceedings, Vols. I-IV.*) In the middle of the hearing, on July 11, 2011, the Governor signed into law Senate Substitute #2, for Senate Committee Substitute for House Committee Substitute for House Bill 89 ("House Bill 89"). House Bill 89 enacted § 444.771, which became effective immediately upon the Governor's signature. *House Bill 89, Section. B.* Section 444.771 RSMo provides:

444.771. Notwithstanding any other provision of law to the contrary, the commission and the department **shall not issue any permits under this chapter or under chapters 643 or 644 to any person whose mine plan boundary is within one thousand feet of any real property when an accredited school has been located for at least five years prior to such application for permits made under these provisions**, except that the provisions of this section shall not apply to any request for an expansion to an existing mine or to any underground mining operation. [emphasis added.]

Saxony Lutheran High School is an accredited school, operating at that location for at least five years prior to Strack's permit application. (*RECORD*

*ON APPEAL, Vol. II, Transcript of Proceedings, Vol. II, Testimony of Jim Maevers, p. 254, 267-268.)* The mine plan boundary in Strack's permit application ran along the Strack – Saxony boundary, with the “approximate limits of mining” as extending to within 55 feet from Saxony's property boundary. (*RECORD ON APPEAL, Vol. II, Permit Application for Industrial Mineral Mines, Petitioner's Exhibit B, Respondent's Exhibit 1, 5<sup>th</sup> page through 13<sup>th</sup> page.*)

On July 12, 2011, Saxony rested its case on the substantive issues being heard under § 444.773 RSMo. (*RECORD ON APPEAL, Vol. II, Transcript of Proceedings, Vol. IV, p. 696.*) Consequently, Saxony was provided with a full and complete hearing on its concerns. Petitioner Saxony then moved for accelerated determination based on House Bill 89 and Respondent Strack moved for a directed verdict. (*RECORD ON APPEAL, Vol. I, Petitioner's Request for Hearing Officer to Take Official Notice of House Bill 89 and Petitioner's Motion for Accelerated Determination, and RECORD ON APPEAL, Vol. II, Transcript of Proceedings, pp. 697-704.*) On July 12, 2011, the Hearing Officer issued an Order denying Saxony's motion for accelerated determination. (*RECORD ON APPEAL, Vol. I, Order Denying Motion for Accelerated Determination.*) The Hearing Officer found that because the tract of land on which the proposed quarry would be located “is of such a size and configuration that the quarry could be outside the one

thousand foot barrier established by legislature,” the Commission could still act on the pending application and satisfy the mandate of § 444.771 RSMo.

*(Id. at 2.)*

On July 18, 2011, the Hearing Officer issued an Order granting Strack’s motion for directed verdict. (*RECORD ON APPEAL, Vol. I, Order Granting Motion for Directed Verdict.*) A Recommended Order was issued on August 24, 2011, in which the Hearing Officer held that the Petitioner Saxony had failed to establish by substantial and competent scientific evidence that its health and livelihood would be unduly impaired by the issuance of Strack’s permit application. (*RECORD ON APPEAL, Vol. I, Hearing Officer’s Recommended Order.*) The Commission adopted and approved the Hearing Officer’s Recommended Order in full on September 22, 2011. (*RECORD ON APPEAL, Vol. I, Final Order.*) The Commission approved the issuance of Strack’s permit “with the mine plan boundary (*exclusive of underground mining*) to be located one thousand feet from the Strack – Saxony property line.” (*RECORD ON APPEAL, Vol. I, Final Order, p. 2. [emphasis in original.]*) Saxony does not appeal the Commission’s findings with respect to Saxony’s failure to establish undue impairment by the permit issuance. Saxony’s appeal is directed at the Commission’s application of House Bill 89 to Strack’s permit application.

### III. Standard of Review

Judicial review of an administrative agency decision may extend to whether the agency acted in violation of constitutional provisions; is in excess of statutory authority or jurisdiction; is unsupported by competent and substantial evidence upon the whole record; is unauthorized by law, is made upon unlawful procedure or without a fair trial; is arbitrary, capricious or unreasonable; or involves an abuse of discretion. § 536.140.2 RSMo. If the evidence supports two opposing findings of fact, deference must be given to the administrative agency. *Coffer v. Wasson-Hunt*, 281 S.W.3d 308, 310 (Mo. banc 2009). Deference is not afforded to the agency on questions of law. *Vivona v. Zobrist*, 290 S.W.3d 167, 171 (Mo. App. 2009).

### IV. Argument

- a. The Commission's imposition of the 1,000 foot buffer contained in House Bill 89 to Strack's permit was an application of the law to a pending permit application and was not arbitrary, capricious or an abuse of discretion.**

On July 5, 6, 7, and 12, 2011, the Commission held an evidentiary hearing pursuant to § 444.773.3 RSMo on the issue of whether Strack's industrial minerals permit would unduly impair Petitioner's health or livelihood. On July 11, 2011, the Governor signed House Bill 89 into law, which enacted § 444.771 RSMo, as described above. Because of the

immediate effect of this legislation, the Commission issued Strack's permit with the provision that the mine plan boundary be located 1,000 feet from the Strack-Saxony property line.

Petitioner asserts that the Commission does not have statutory authority to impose any condition in a mining permit that changes the mine plan boundary. As explained in the *Recommended Order*, adopted by the Commission in its *Final Order*, the Commission did not impose a condition in this matter. It applied the law existing at the time of its decision, incorporating a condition imposed by the legislature. The legislature determined that a mine plan boundary is not to be located within 1,000 feet of the Petitioner's accredited school property boundary, not the Commission. (*RECORD ON APPEAL VOL. I, Recommended Order, p 21*).

The circumstances here are unique. At the time House Bill 89 became effective, Strack's permit application had already been submitted and deemed complete and compliant with the Land Reclamation Act. (*RECORD ON APPEAL VOL. I, Respondent's Exhibit 2.*) The public had been notified of the permit application and been given an opportunity to comment. (*RECORD ON APPEAL VOL. I, Respondent's Exhibit 3.*) The Petitioner had requested and been granted a hearing on the issue of whether the permit will unduly impact their health or livelihood. (*RECORD ON APPEAL VOL. I,*

*Recommended Decision, p. 5.)* Three of the four days of hearing had already occurred. (*Id. at 7.*) But for House Bill 89, the permit would have been issued without a change in the mine plan boundary, since the Petitioner failed to establish undue impairment during the hearing.

The Commission was required to apply the law enacted by legislature. Petitioner argues that the Commission should have rejected Strack's permit application as non-compliant with House Bill 89 and required Strack to start the entire permitting process over, giving Petitioner a second opportunity to challenge the permit. Petitioner advocated for this outcome, even though the 1,000 foot buffer was to its benefit. The Commission exercised its discretion to reach a more reasonable outcome, finding that Strack's property was of sufficient size that the legislative intent of creating a 1,000 foot buffer between the mine plan boundary and the school property could be accomplished. (*RECORD ON APPEAL VOL. I, Recommended Decision, pp. 11 and 22.*)

Even without House Bill 89, the Commission has the authority to impose permit terms and conditions in a land reclamation permit. In stark contrast to other environmental statutes, the Land Reclamation Act allows the public to petition the Commission for a hearing *prior to the issuance of a permit* on the issue of whether the permit will unduly impair their health,

safety or livelihood, and directs the Commission to “resolve concerns of the public.” § 444.773.3 RSMo Supp. 2011. Section 444.789 RSMo, which establishes the procedure for the public hearing, provides that the designated hearing officer shall “hold the hearing and make *recommendations* to the commission, but the commission shall make the final decision thereon.” § 444.789 RSMo [emphasis added]. Because the legislature authorized the hearing officer to make more than one recommendation, it clearly authorizes more than an “approve or deny” recommendation on the permit and envisions recommendations that will resolve the public’s concerns.

These statutes authorize the Commission to impose terms and conditions to resolve the public’s concerns raised during a public hearing. Without this authority, §§ 444.773.3 and 444.789 RSMo are rendered meaningless. *Hadlock v. Director of Revenue*, 860 S.W.2d 335, 337 (Mo. banc 1993) (each word, clause, sentence and section of a statute should be given meaning). Because Petitioners raised several concerns related to the close proximity of Strack’s mine plan boundary, the Commission would have been authorized to impose a buffer to address these concerns under the authority of § 444.773.3 RSMo.

Petitioner relies upon *Mueller v. Missouri Hazardous Waste Management Commission*, 904 S.W.2d 552 (Mo. App. S.D. 1995). *Mueller*

involved an appeal of a hazardous waste permit under the Missouri Hazardous Management Law, Chapter 260, where the petitioners were challenging modifications made by Hazardous Waste Commission as the result of an appeal of a permit issued by the Department of Natural Resources. *Mueller* did not involve a situation such as the present, where the General Assembly enacted a new statutory condition on a permit and the Commission was required to apply the condition to a pending permit application. Nor did *Mueller* involve a comparable permitting scheme. The Missouri hazardous waste management law contains no process to allow the public to petition for a hearing *prior to* the issuance of the permit and authorizing the Hazardous Waste Commission to resolve the public's concerns through that pre-permit issuance process. *Compare* § 444.773.3 *and* § 260.395.11 RSMo (*after* a hazardous waste permit is issued, any aggrieved person may appeal that permit to the hazardous waste commission). Consequently, *Mueller* does not apply.

**b. Since the Commission reduced the acreage subject to mining by its application of House Bill 89, it was not arbitrary, capricious or an abuse of discretion to not require Strack to reissue the public notice required by § 444.772.10 RSMo.**

Section 444.772.10 RSMo of the Land Reclamation Act requires permit applications to be put on public notice, which is to include the name and

address of the operator, a legal description, the number of acres and a statement regarding the operator's plan to mine a specific mineral during a specific time. Strack complied with the public notice requirement of § 444.772.10 RSMo, when it published notice of its intent to operate a 76 acre quarry. (*RECORD ON APPEAL, VOL. I, Respondent's Ex. 3, Public Notice of Surface Mine Application.*) Petitioner argues that the issuance of Strack's permit with the 1,000 condition is unlawful because there was no public notice of the reduction in acreage resulting from this change in the mine plan boundary. The imposition of a 1,000 foot buffer effectively reduced the quarry to 53 acres. (*RECORD ON APPEAL, VOL. I, Recommended Order, p. 24.*) This reduction was not a result of any error or omission on behalf of the permit applicant or the Respondent. It was the result of the legislative enactment.

The Commission acknowledged that the only item in the required notice that would have been changed if the 1,000 foot buffer had been in place when Strack filed its permit application, would have been that the acreage would have been reduced. (*Id.*) The Commission found that the reduction in acreage to be mined is not a change that is significant or even material:

The import and intent of the notice is to permit interest person[s] to request a public meeting, a public hearing or to file written comments to the director. Nothing in a change in the mining

acreage would have in any manner compromised or restricted the rights of interested persons under the notice. It is illogical to suggest that persons who did not challenge the original mine plan of 76 acres, would have petitioned for a hearing for a mine plan of only 53 acres and buffered from Saxony by one thousand feet. Furthermore, there is no reasonable basis to conclude that persons who were denied standing as to the original application would have been granted standing if the statutory buffer had been in place and been a part of the original application.

*(RECORD ON APPEAL, VOL. I, Recommended Decision, p. 24.)*

The Commission's decision to not require a second public notice is consistent with *Lake Ozark / Osage Beach Joint Sewer Board v. Missouri Department of Natural Resources*, 326 S.W.3d 38 (Mo. App. W.D. 2010). In *Lake Ozark*, the petitioners were similarly appealing a Land Reclamation Commission decision to issue an industrial minerals permit after a hearing under § 444.773.3 RSMo. Petitioners argued that the public notice under § 444.772.10 RSMo was inadequate because the original application packet did not include a map showing utility easements and identifying easement holders, as required by § 444.772.3 RSMo. *Lake Ozark*, 326 S.W.3d at 41-42. The court of appeals found that the failure to include this information in the public notice did not render the public notice inadequate where the petitioners "failed to demonstrate prejudice" because "only prejudicial error is

reversible error.” *Id.* citing *Campbell v. Dir. of Revenue*, 297 S.W.3d 656, 659 (Mo. App. 2009).

Likewise, in this case there is no prejudice to the Petitioner or any other person from a *reduction* in the acreage to be mined, particularly where that reduction is caused by a 1,000 foot buffer between Petitioner’s property and the area to be mined. The original public notice informed the public that the quarry acreage was to be 76 acres. This public notice already covered the 53 acres that are to be mined pursuant to the permit condition required by the Legislature and imposed by the Commission. Because a second public notice covering the same 53 acres would have been duplicative and would not prejudice Petitioner or any other potentially interested party, the Commission’s decision was reasonable and lawful and should be upheld.

**c. Petitioner lacks standing to challenge the validity of the permit or the public notice based upon House Bill 89.**

The provisions of House 89 benefited the Saxony because it imposed a 1,000 foot buffer between Strack’s mine plan boundary and the Saxony’s property, where such buffer would not otherwise have been imposed. Petitioner is not harmed by the Commission’s actions to

impose the 1,000 foot buffer in Strack's permit. Nor is Petitioner harmed by there not being a second public notice of the reduced acreage of Strack's mine plan. Petitioner had already requested and received a hearing on the 76 acre mine plan. Because Petitioner has not been harmed, and in fact has benefited, by the Commission's decision that it has appealed, Petitioner lacks standing and this appeal should be dismissed on that basis. *Missouri State Medical Association, et al. v. State of Missouri, et al.*, 256 S.W.3d 85 (Mo. 2008).

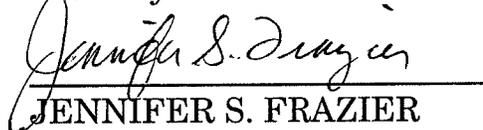
## **V. Conclusion**

The Commission's decision to issue Strack's permit conditioned upon compliance with the newly enacted provisions of § 444.771 RSMo was proper and lawful. Consequently, the Commission's decision must be upheld by this court by entry of judgment in favor of Respondent and against Petitioner.

Respectfully submitted,

**CHRIS KOSTER**

Attorney General



**JENNIFER S. FRAZIER**

Deputy Chief Counsel

Agriculture & Environmental Division

P.O. Box 899

Jefferson City, Missouri 65102

Bar No. 39127

573-751-8803

573-751-8796 (fax)  
Jenny.frazier@ago.mo.gov

**Attorney for Missouri Department of  
Natural Resources**

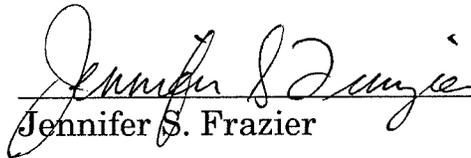
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 10<sup>th</sup> day of May, 2012, a true and correct copy of the foregoing was served via U. S. Mail postage paid to the following:

Brian E. McGovern  
Robert A. Miller  
McCARTHY, LEONARD, KAEMMERER, L.C.  
400 South Woods Mill Road, Suite 250  
Chesterfield, MO 63017  
Attorneys for Respondent- Intervenor Strack Excavating , LLC

Stephen G. Jeffery  
Jeffery Law Group  
20 S. Central Avenue, Suite 306  
Clayton, MO 63105  
Attorneys for Petitioners

Bruce Morrison  
20 S. Central Avenue, Suite 306  
Clayton, MO 63105  
Attorney for Petitioners

  
\_\_\_\_\_  
Jennifer S. Frazier