

CIRCUIT COURT OF COLE COUNTY, MISSOURI

SAXONY LUTHERAN HIGH SCHOOL, INC. ,)
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)
 SAVE OUR CHILDREN'S HEALTH, INC.,)
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 Petitioners)
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 v.)
)
 MISSOURI LAND RECLAMATION COMMISSION,)
)
)
 Respondent)
)
 HEARTLAND MATERIALS, LLC,)
)
)
 Intervener)

Case No. 11AC-CC00133

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
JUDGMENT AND ORDER**

Having read the motions and briefs submitted by the parties, and being fully advised in these premises, the Court enters this Judgment in favor of Petitioners and against the Respondent Missouri Land Reclamation Commission and Intervener Heartland Materials, LLC in accordance with the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Petitioner Saxony Lutheran High School is an accredited, private Lutheran high school, located at 2004 Saxony Lane, along County Road 601 in Jackson, Missouri.
2. Petitioner Save Our Children's Health, Inc. is a not-for-profit corporation in good standing in Missouri, with its principal place of business located at 431 Eli Drive, Jackson, Missouri.

3. Respondent Missouri Land Reclamation Commission is a state agency created by § 444.520, RSMo., and is domiciled within the Missouri Department of Natural Resources (“DNR”), which supervises the Commission pursuant to § 640.010.6, RSMo.

4. In 2001, the General Assembly amended § 444.773.3, RSMo. As a result of that amendment, the statute stated:

If the recommendation of the director is for issuance of the permit, the director shall issue the permit without a public meeting or a hearing except that upon petition, received prior to the date of the notice of recommendation, from any person whose health, safety or livelihood will be unduly impaired by the issuance of this permit, a public meeting or a hearing may be held. If a public meeting is requested pursuant to this chapter and the applicant agrees, the director shall, within thirty days after the time for such request has passed, order that a public meeting be held. The meeting shall be held in a reasonably convenient location for all interested parties. The applicant shall cooperate with the director in making all necessary arrangements for the public meeting. Within thirty days after the close of the public meeting, the director shall recommend to the commission approval or denial of the permit. If the public meeting does not resolve the concerns expressed by the public, any person whose health, safety or livelihood will be unduly impaired by the issuance of such permit may make a written request to the land reclamation commission for a formal public hearing. The land reclamation commission may grant a public hearing to formally resolve concerns of the public. Any public hearing before the commission shall address one or more of the factors set forth in this section.

5. In order to implement § 444.773.3, the Land Reclamation Commission promulgated 10 CSR 40-10.080, which states, in pertinent part:

(2) Establishing Standing for a Formal Public Hearing.

(A) For a formal public hearing to be granted by the Land Reclamation Commission, the petitioner must first establish standing.

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

...

(3) Application Hearings

...

(B) The burden of establishing an issue of fact regarding the impact, if any, of the permitted activity on a hearing petitioner's health, safety or livelihood shall be on that petitioner by competent and substantial scientific evidence on the record. Furthermore, the burden of establishing an issue of fact whether past noncompliance of the applicant is cause for denial of the permit application shall be upon a hearing petitioner and/or the director by competent and substantial scientific evidence on the record. Once such issues of fact have been established, the burden of proof for those issues is upon the applicant for the permit.

6. On October 4, 2010, Intervener Heartland Materials, LLC submitted an application to the Land Reclamation Commission for a proposed 161-acre limestone quarry to be located on property directly south of Saxony Lutheran High School across County Road 601 just south of Fruitland, Missouri.

7. During its January 27, 2011 meeting, the Land Reclamation Commission afforded the Petitioners the opportunity to show they have "standing" to request the Land Reclamation Commission to conduct a full evidentiary hearing on whether the Heartland permit should be issued.

8. On February 7, 2011, the Land Reclamation Commission decided that the Petitioners did not present good faith evidence that of how their health, safety or livelihood will be unduly impaired by the issuance of the surface mining permit to Heartland Materials.

9. On February 7, 2011, the Land Reclamation Commission issued a surface mining permit to Heartland Materials.

10. On March 7, 2011, Petitioners timely filed their Petition for Judicial Review and Declaratory Judgment.

11. In the 2011 session, the General Assembly amended § 444.773.3, and such amendment became effective on July 11, 2011. The 2011 amendment affects which party bears the burden of proof at a formal public hearing conducted under § 444.773.3 and does not concern the issue of a petitioner's standing to request such a hearing.

12. Petitioners filed separate motions for summary judgment on Count I and Count IV, respectively, asserting that the February 7, 2011 decision of the Land Reclamation Commission is arbitrary and capricious and that Petitioners have standing.

13. Heartland Materials filed a motion for summary judgment based on its assertions that "Petitioners' health, safety or livelihood will not be unduly impaired by the issuance of a land reclamation permit to Heartland," and "Petitioners' requested relief . . . is not authorized because § 444.773, RSMo, confers discretion on the Commission to decide whether to hold a hearing and a reviewing court cannot substitute its discretion for the agency's discretion under § 536.150, RSMo."

14. In the "Response to Petitioners' Statements of Uncontroverted Material Facts as to Counts I and IV (hereinafter "LRC Response")," the Land Reclamation Commission admits the following uncontroverted material facts:

A. The Heartland quarry is located south of and adjacent to Saxony Lutheran High School. (LRC Response ¶ 2, pp. 1-2);

B. Save Our Childrens' Health, Inc. ("SOCH") is a not-for-profit corporation in good standing, and its Articles of Incorporation state it exists to enhance and protect the health, safety and livelihood of the members of the community from the impact of open quarrying activities, and has members that live all around the Heartland quarry. (LRC Response ¶¶ 3 and 4, pp. 2-3);

C. Petitioners believe they will suffer adverse health effects from air and dust emissions from the quarry operations. (LRC Response ¶¶ 6 and 7, pp. 3-4);

D. Saxony is concerned about the effects of the quarry on its livelihood and traffic safety. (LRC Response, ¶¶ 9, 10, 22, 23, 24, pp. 5, 10, 11)

E. Lauren Niederstadt is a senior at Saxony, is allergic to dust and pollen, has asthma attacks, and is concerned about dust emissions from the quarry. (LRC Response ¶ 18, p. 8);

F. A. J. Garms is a junior at Saxony, has respiratory distress syndrome, uses an inhaled corticosteroid inhaler, and believes he will suffer harm from the quarry. (LRC Response ¶ 19, p. 9);

G. Nick Johnson is a senior at Saxony, is allergic to dust, receives allergy shots, and is concerned about the effects of the quarry. (LRC Response ¶ 20, p. 10);

H. Tyler Hanson is a junior at Saxony, has asthma, uses an Albuterol inhaler, has asthma triggered by dust, and believes he will be harmed by the quarry. (LRC Response, ¶ 21, p. 10);

I. Brenda Luttrull lives ½ mile northeast of the quarry, has chronic obstructive pulmonary disease, uses an oxygen machine at night, believes she will be harmed by the quarry, and is a member of SOCH. (LRC Response, ¶ 27, pp. 12-13);

J. Jackie Wortmann has asthma-like allergies, is concerned about the effects of air and dust emissions from the quarry, and is a member of SOCH (LRC Response ¶ 28, pp. 13-14);

K. Michael Berry has dust allergies, lives northwest of the quarry, believes he will be harmed by air emissions from the quarry, and is a member of SOCH (LRC Response ¶ 29, pp. 14-15);

L. Nancy Berry has a chronic sinus problem, takes Lodrane for her condition, believes she will be harmed by dust and released particles from the quarry, and is a member of SOCH (LRC Response ¶ 30, p. 15);

M. Abby Petzoldt lives less than a mile from the quarry, she has a four-year old daughter and a 20-month old son both of whom have respiratory health and allergy issues, her daughter has asthma and seasonal allergies and uses an inhaler on a daily basis, her son takes Zyrtec and receives breathing treatments, she has concerns about her childrens' health, and she is a member of SOCH (LRC Response ¶¶ 4, 6 and 31, pp. 2-3 and 15-16);

N. Heartland's haul roads, stockpile area, conveyor system, rock screening plant and primary rock crushing plant are sources of air and dust emissions and are located closer than 1,100 feet to Heartland's northern property line and Mine Plan Boundary. (LRC Response ¶ 8, pp. 22-23); and

O. The distance between the Heartland Mine Plan Boundary and Saxony's southern property line is approximately 60 feet (LRC Response ¶ 12, p. 24).

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this matter under §§ 527.010-527.130 and 536.150, RSMo.

2. The Court reviews the February 7, 2011 decision of the Land Reclamation Commission to determine whether the Land Reclamation Commission's decision is

unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion and the Court shall render judgment accordingly. *See* § 536.150, RSMo. The Court may order the Land Reclamation Commission to take such further action as it may be proper to require, but the Court cannot substitute its discretion for discretion legally vested in the Land Reclamation Commission provided that such discretion is lawfully exercised. *Id.*

3. The issue of whether a party established standing before an administrative agency is a question of law. *See Christian Health Care v. Department of Health and Senior Services*, 229 S.W.3d 270, 276 (Mo. App. W.D. 2007) (“Whether a particular person has status to contest the administrative action is a question of law”). Because the issue of Petitioners’ standing is a question of law, and because under § 536.150, RSMo the Court conducts a *de novo* review of legal conclusions made by the Land Reclamation Commission, the Court in this case determines whether or not the Petitioners have standing.

4. Standing refers to a party's right to seek relief and requires that a party seeking relief have a threatened or actual injury to a legally cognizable interest in the subject matter. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992); *Eastern Missouri Laborers Dist. Council v. St. Louis County*, 781 S.W.2d 4, 463 (Mo. en banc 1989); and *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 622 (Mo. App. E.D. 2009).

5. To have standing, the party seeking relief "must have some personal interest at stake in the dispute, even if that interest is attenuated, slight or remote." *Ste. Genevieve Sch. Dist. R II v. Bd. of Aldermen*, 66 S.W.3d 6, 10 (Mo. banc 2002).

6. Under § 444.773, RSMo., “. . . any person whose health, safety or livelihood will be unduly impaired by the issuance of such permit may make a written request to the land reclamation commission for a formal public hearing.”

7. The Land Reclamation Commission interpreted the standing requirement in § 444.773.3 in the case of *In Re Holcim, Inc.*, Case No. 02-0001 LRC, a case which occurred after the 2001 amendment to § 444.773.3.

8. In *In Re Holcim, Inc.*, the permit applicant asserted that to establish standing under § 444.773.3, a party requesting a formal public hearing must show evidence of an actual undue impairment to their health, safety or livelihood. In other words, the permit applicant suggested there is an elevated or heightened standing requirement in § 444.773.3 that requires a party to affirmatively prove the proposed activity will cause the alleged harms just in order to have standing to request a hearing.

9. The Land Reclamation Commission expressly rejected the elevated or heightened standing requirement: “The Hearing Officer will not require any person or organization to prove the ultimate issue in their case under the guise of a challenge to their standing” *In Re Holcim, Inc.*, Order, dated September 16, 2002, p. 1.

10. The Land Reclamation Commission’s Hearing Officer stated, “However, the law requires anyone seeking a hearing to at least allege certain facts.” *Id.*, pp. 1-2. The nature of the facts that are required must “... state that a person’s or organization’s health, safety or livelihood would be affected in some specific way by activities that could result from granting the surface mining permit (including, for example, well water contamination, dust, and blasting noise)” *Id.*, pp. 4-5.

11. In its final decision, the Land Reclamation Commission adopted the Hearing Officer’s prior Order rejecting the elevated or heightened standing requirement: “The LRC denies Holcim’s motion for the reasons stated in the Hearing Officer’s previous orders.” *In Re Holcim, Inc.*, Findings of Fact, Conclusions of Law and Order, dated August 12, 2003, p. 12.

12. The Land Reclamation Commission's interpretation of the standing requirement in § 444.773.3 in the case of *In Re Holcim, Inc.* is consistent with the traditional views of standing as set forth in *Lujan v. Defenders of Wildlife, supra*; *Ste. Genevieve Sch. Dist. R II v. Bd. of Aldermen, supra*; and *Eastern Missouri Laborers Dist. Council v. St. Louis County, supra*.

13. The Land Reclamation Commission's interpretation of the standing requirement in § 444.773.3 in the case of *In Re Holcim, Inc.* is entitled to deference. See *State ex rel. Webster v. Missouri Resource Recovery, Inc.*, 825 S.W.2d 916, 931 (Mo. App. S.D. 1992) ("If the agency's interpretation of a statute is reasonable and consistent with the language of the statute, it is entitled to considerable deference").

14. Petitioners have legally protectable interests in their health, safety and livelihood.

15. The uncontroverted material facts, as set forth in ¶ 15, A - O, *infra*, show that Petitioners have alleged threatened injuries, however attenuated, remote or slight such alleged injuries may be, to their health, safety and livelihood as a result of the issuance of a surface mining permit to Heartland Materials. As a result, Petitioners have met the traditional test for standing in accordance with *Lujan v. Defenders of Wildlife, supra*; *Ste. Genevieve Sch. Dist. R II v. Bd. of Aldermen, supra*; and *Eastern Missouri Laborers Dist. Council v. St. Louis County, supra*.

16. In its "Response and Suggestions in Opposition to Petitioners' Motions for Summary Judgment on Counts I and IV," the Land Reclamation Commission asserts that Petitioners do not have standing because § 444.773.3 imposes an elevated or heightened requirement for standing:

Petitioners ignore the statutory and regulatory language of the Land Reclamation Act and try to apply the traditional definition of standing as set forth by the Supreme Court in *Lujan v. Defenders of Wildlife*, as having a "threatened or actual injury to a legally cognizable interest in the subject matter." . . . While

the standards are similar, both § 444.773.3, RSMo and 10 CSR 40-10.080(2)(B) place an additional burden upon the Petitioners to present good faith evidence of how their health, safety, or livelihood will be unduly impaired by the issuance of the permit.

17. This argument advanced by the Land Reclamation Commission concerning § 444.773.3 is directly contrary to its prior position in *In Re Holcim, Inc., supra*.

18. In its “Legal Memorandum in Opposition to Petitioners’ Motion for Summary Judgment on Count IV,” at p. 17, Heartland Materials asserts that Petitioners do not have standing because § 444.773.3 imposes an elevated or heightened standing requirement:

Unlike other standing statutes, § 444.773 does not confer standing on any individual who is aggrieved, is affected, or claims that he or she may be aggrieved or affected. . . Rather, § 443.773 establishes a heightened standing requirement. Petitioners must establish that their health, safety or livelihood:

- (1) will be
- (2) unduly impaired
- (3) as a result of the issuance of the land reclamation permit.

19. The Court finds that § 444.773.3, RSMo and 10 CSR 40-10.080(2) do not impose an elevated or heightened requirement for a party to establish standing. In order to establish standing under the statute and rule, a party requesting a formal public hearing must allege facts showing that its health, safety or livelihood would be affected in some specific way by activities that could result from granting the surface mining permit. This conclusion is consistent with the Land Reclamation Commission’s prior decision in *In Re Holcim, Inc.*, as well as the traditional test for standing as set forth in *Lujan v. Defenders of Wildlife, supra*; *Ste. Genevieve Sch. Dist. R II v. Bd. of Aldermen, supra*; and *Eastern Missouri Laborers Dist. Council v. St. Louis County, supra*.

20. When read together, 10 CSR 40-10.080(2) and (3) provide that a party is only required to establish, i.e. prove, its alleged facts during a formal public hearing. Unlike

subsection (3) which concerns hearings, there is no similar language in subsection (2) requiring a party to prove its alleged facts in order to establish standing. This conclusion is consistent with the Land Reclamation Commission's earlier decision in *In Re Holcim, Inc., supra*.

21. Further, 10 CSR 40-10.080(2)(A) states "For a formal public hearing to be granted by the Land Reclamation Commission, the petitioner must first establish standing (emphasis added)." This language is not conditional. In order to give this provision any effect, the only reasonable interpretation is if a party first establishes standing, then the Land Reclamation Commission will conduct a formal public hearing.

22. Although § 444.773.3 states, in part, "The land reclamation commission may grant a public hearing to formally resolve concerns of the public," the Court construes the word "may" in such a way as to impose a mandatory obligation upon the Land Reclamation Commission to conduct a formal public hearing in the event a party first establishes standing. In this context, the Missouri Supreme Court has held that the word "may" can be construed to mean "shall" and to impose a mandatory obligation. *See City of Moline Acres v. Heidbreder*, 367 S.W.2d 568, 573 (Mo., 1963) ("We do note, however, that the courts sometimes construe the word 'may' as meaning 'shall' when justice and good sense require").

23. The interpretation suggested by the Land Reclamation Commission and Heartland Materials that even if a party establishes standing, the Land Reclamation Commission may still decide not conduct a formal public hearing is unreasonable because such decision is inconsistent with the spirit and intent in 10 CSR 40-10.080(2)(A) (" For a formal public hearing to be granted by the Land Reclamation Commission, the petitioner must first establish standing"). *See Department of Social Services v. Senior Citizens Nursing*, 224 S.W.3d 1, 9 (Mo. App., 2007)

("Regulations should be interpreted reasonably, and absurd interpretations should not be adopted").

24. When analyzing an organization's legal standing to sue on behalf of its members, Missouri courts adhere to three criteria used by the United States Supreme Court when analyzing organizational standing. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *Mo. Bankers Ass'n v. Dir. of Mo. Div. of Credit Unions*, 126 S.W.3d 360, 363 (Mo. banc 2003). In Missouri, an entity has "associational standing" to bring a challenge on behalf of its members if: (1) its members would otherwise have standing to bring suit in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested by the organization requires the participation of individual members. *Id.*, citing *Missouri Health Care Assn. v. Attorney General of the State of Missouri*, 953 S.W. 2d 617, 620 (Mo. banc 1997). An organization must meet all three factors necessary for associational standing, regardless of the nature of the claim. *See Sanner v. Bd. of Trade of the City of Chicago*, 62 F.3d 918, 922 (7th Cir. 1995).

25. Petitioner Saxony Lutheran High School has standing in its own right with respect to the alleged adverse impacts on its livelihood and has organizational standing on behalf of its students, faculty and staff with respect to the alleged adverse health and safety impacts as a result of the issuance of a surface mining permit to Heartland Materials.

26. Petitioner SOCH has organizational standing on behalf of its members with respect to the alleged adverse health and safety impacts resulting from the issuance of the surface mining permit to Heartland Materials.

27. The Land Reclamation Commission's February 7, 2011 decision that Petitioners did not have standing and a formal public hearing would not be conducted regarding the issuance

of the surface mining permit to Heartland Materials is unlawful and an abuse of its discretion because such decision is arbitrary, capricious, unreasonable, and not substantially justified in that:

A. Such decision is unreasonable given the plain language of § 444.773.3 and 10 CSR 40-10.080, particularly in light of the Land Reclamation Commission's previous interpretation in *In Re Holcim, Inc.* interpreting the standing requirement under § 444.773.3;

B. Section 444.773.3, RSMo and 10 CSR 40-10.080(2)(A) do not impose an elevated or heightened requirement for standing;

C. Petitioners have alleged sufficient facts showing they have legally cognizable interests in their health, safety and livelihood which they believe are threatened by the issuance of the surface mining permit to Heartland Materials, and thereby meet the test for standing as set forth in § 444.773.3, RSMo., *Lujan v. Defenders of Wildlife, supra*; *Ste. Genevieve Sch. Dist. R II v. Bd. of Aldermen, supra*; and *Eastern Missouri Laborers Dist. Council v. St. Louis County, supra*; and

D. In accordance with 10 CSR 40-10.080(2)(A), because Petitioners have established standing, the Land Reclamation Commission is required to conduct a formal public hearing.

28. Under § 527.010, RSMo, a trial court has the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed," and the trial court is afforded wide discretion in using this power. *See Van Dyke v. Lvs Building Corp.*, 174 S.W.3d 689, 692 (Mo. App. W.D. 2005). As a result, the Court has discretion to fashion appropriate relief based upon the facts of the case. The circumstances here show that Petitioners have legally cognizable interests in their health, safety and livelihood which they believe are threatened by

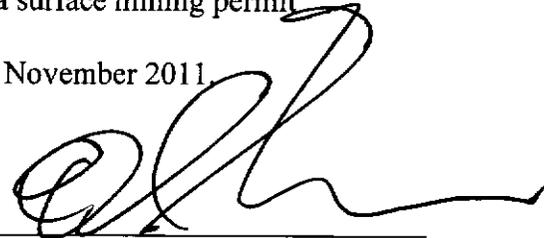
the issuance of the surface mining permit to Heartland Materials. On the other hand, Heartland Materials has acted upon and relied on the surface mining permit that was issued by the Land Reclamation Commission. In balancing the interests of the parties, the Court declines to vacate the permit issued to Heartland Materials.

JUDGMENT AND ORDER

For the foregoing reasons, the Court sustains Petitioners' motions for summary judgment on Count I and Count IV, respectively; denies Heartland Material's motion for summary judgment; and denies all other pending motions.

The Court hereby enters JUDGMENT in favor of Petitioners on Counts I and IV. The Land Reclamation Commission is directed to approve Petitioners' request for a formal public hearing and to conduct such a formal public hearing in accordance with 10 CSR 40-10.080 concerning the Heartland Materials' application for a surface mining permit

JUDGMENT SO ENTERED this 4 day of November 2011.



Daniel R. Green
Circuit Judge