

STATE OF MISSOURI
DEPARTMENT OF NATURAL RESOURCES

Bob Holden, Governor • Stephen M. Mahfood, Director

www.dnr.state.mo.us

November 8, 2002

Honorable Sarah Steelman
Missouri State Senate
State Capitol Building
Room 433
Jefferson City, Missouri 65101

Dear Senator Steelman:

Thank you for your continuing interest in the department's Sand and Gravel Workgroup reflected by your significant commitment of time attending the second workgroup meeting on October 22, 2002 in Jefferson City. I understand you posed a number of questions you believe had not been addressed by the workgroup. You raised fundamental questions about both the legal authority and technical basis for the department's regulatory activities. These fundamental questions deserve a prompt and complete response as a precondition for moving forward on any regulatory activity. Clearly, the department should not consider regulatory controls unless there is a legitimate technical need for regulation to protect human health or the environment and a legal mandate. Moreover, the regulatory activity must balance environmental protection with economic costs. Your questions are addressed below and in attached documents.

After considering your questions and the analytical basis for regulating sand and gravel mining, I am convinced that the department has established the legal mandate and the technical need for the regulations. Now, the task is to move ahead with our stakeholders and the Commission to develop regulations that satisfactorily balance environmental operations and economic costs.

In this letter I will respond to the questions that you raised, as I understand them. In all of the materials contained in this letter I emphasize that our purposed is to act in concert with those in the mining industry to protect the state's natural resources as they conduct their business. Similarly the resources of local governments and neighboring citizens are at risk. It behooves us all to learn ways that we can utilize our rich resource base while managing it for long term productivity.

1) *What is the department's basis for asserting legal authority for establishing rules on stream protection related to sand and gravel?*

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The department believes it has the legal authority to make rules that prevent pollution from sand and gravel operations. The department's authority for this activity is found in Chapter 444, Land Reclamation Act. Specifically, Section 444.767(1) authorizes the Land Reclamation Commission to adopt and promulgate rules and regulations to administer the act. Section 444.530.1(1) has similar language authorizing the Commission to promulgate regulations to administer the Land Reclamation Act. Section 444.770 applies to permits that are required. Section 444.770.1 specifically makes it unlawful for sand and gravel operations to operate without a permit. The protection of wildlife and aquatic resources is one of the factors the department is required to address under the policy statement of the law (section 444.762). By carrying out this section of the Land Reclamation Act, the department has the authority to regulate those impacts of sand and gravel operations that impact wildlife and aquatic resources through its administration of industrial minerals permits. For your information, a copy of the department's rulemaking concurrence form, which states general counsel finding that there is authority for the rulemaking, is provided as Attachment A.

2) *Why does the Land Reclamation Commission need to regulate stream protection? You asked for examples of how streams are not being protected by other rules and why the Land Reclamation Commission can fill this role.*

The Land Reclamation Commission is required by statute to regulate stream protection. Providing regulations could serve to improve a number of efforts. Regulation could provide both guidance or direction as well as a better ability to keep all the industries on a level playing field. There have been a number of documented stream problems associated with improper in-stream mining. Examples of stream problems that might have been avoided had the operation adhered to guidelines such as those being discussed are appended to this letter as Attachment B. There also has been significant citizen interest in addressing the problems related to in-stream sand and gravel mining. Samples of those comments are contained in Attachment C. In addition, many research studies have document the problems that stem from in-stream sand and gravel mining. Excerpts from some of those studies are shown in Attachment D.

The protection of water quality is also within the authority of the Missouri Clean Water Law, Chapter 644 RSMo. As was discussed in the Workgroup, the development and first uses of the sand and gravel excavation guidelines were in conjunction with Corps of Engineers permits and the department's water quality certifications of those permits. Certifications are issued under the authority of the federal Clean Water Act. In addition, the Missouri water quality standards, state regulation 10 CSR 20-7.031 specifies conditions that must be met in state waters, and the guidelines provide management practices that will meet those standards. We agree the guidelines could be promulgated under the clean water law, and the department may pursue that at some point. However, the major operations that would be subject to the guidelines hold land reclamation permits. Proceeding through the land reclamation authority allows a significant level of protection for the resource while at the same time ensuring the guidelines are suitable before they are applied as general requirements across the state.

3) *What references in the Land Reclamation Act tie back to these proposed rules? In other words, where are the specific citations for our authority?*

References in the Land Reclamation Act are listed in Attachment E.

4) *Why do we need to transition from the current guidelines to rules? You indicated you feel that the guidelines are working fine, and we do not need to move to more formal rules.*

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Ms. Valentine explained during the meeting the department is often challenged and encouraged to turn guidelines into rules. There is a general expectation that the department's requirements be established through a public process that allows for input from regulated parties as well as from the public at large, and the rulemaking process accomplishes this. There is also, however a recognition that rules lack the flexibility of guidance. This is desired in certain situations, especially detailed technical issues or those that may change frequently in comparison to times required to modify rules.

Under section 536.021.9 of the Administrative Procedure Act, the mandate to promulgate regulations is triggered when dealing with a "statement of general applicability." An agency rule or regulations is defined at 536.010(4) to include an agency statement of general applicability that implements, interprets, or prescribes law or policy. Because these proposed rules will reflect the Land Reclamation Commission's practice on how sand and gravel operations are regulated, and this will have a future effect on unnamed and unspecified persons, specifically various sand and gravel operators, rulemaking is necessary. *Missouri Department of Social Services v. NME Hospital, Inc. 11 SW3d776 (Mo. App. 1999)*. Case law is clear that implicit in the concept of "rule" is an agency declaration that has a potential, however slight, of impacting the substantive or procedural rights of some member of the public. *Bangus v. Director of Revenue, 878 SW.2d 39, 42 (Mo banc 1994)*. Here, a proposed regulation, which would require the operator to meet certain conditions before a permit is issued, affects the substantive rights of operators who will need to apply for a permit. That is why we're doing this by rule rather than policy.

I understand that there may be more than one approach that results in the protection of streams. The work group is asked to consider how this protection can be provided in a way that is cost-effective, appropriate, effective, predictable and timely. In our opinion the establishment of specific performance criteria within permits for sand and gravel mining in a publicly developed and readily available rule meets this objective.

I trust that the information in this letter provides answers to the concerns you have raised. If you need additional information or have other questions, please let me know and we will do our best to provide what you need.

Again, we appreciate your willingness to participate in these discussions and to assist the department in reaching solutions that protect our resources for generations to come while conducting our business today.

Thank you.

Sincerely,

AIR AND LAND PROTECTION DIVISION

Original signed by Dan Schuette, Deputy Director

James D. Werner
Director

Enclosures

c: Mr. Steve Mahfood, Director