

**MISSOURI DEPARTMENT OF NATURAL RESOURCES
LAND RECLAMATION COMMISSION**

| | | |
|------------------------------------|---|----------------------------|
| In the Matter of: |) | |
| AA QUARRY LLC, |) | |
| AA Quarry Site #2462 |) | |
| Johnson County, Missouri, |) | Proceeding Under |
| New Site Permit Application |) | The Land Reclamation Act |
| |) | §§ 444.760 – 444.789, RSMo |
| DAVID EARLS, <i>et al</i> , |) | |
| |) | |
| <i>Petitioners,</i> |) | Permit #1094 |
| |) | |
| v. |) | |
| |) | |
| DEPT. OF NATURAL RESOURCES, |) | |
| KEVIN MOHAMMADI, |) | |
| Staff Director, |) | |
| Land Reclamation Program, |) | |
| Division of Environmental Quality, |) | |
| |) | |
| <i>Respondent,</i> |) | |
| |) | |
| AA QUARRY LLC, |) | |
| |) | |
| <i>Applicant.</i> |) | |

**PETITIONERS' BRIEF IN SUPPORT OF THEIR REQUEST THAT THE LAND
RECLAMATION COMMISSION DENY APPLICANT A PERMIT TO
CONSTRUCT A LIMESTONE QUARRY IN JOHNSON COUNTY, MISSOURI**

BRIEF OF PETITIONERS DAVID EARLS, *ET AL.*

DAVID L. ZEILER MO #46806
Zeiler Law Firm, LC
2012 NW South Outer Road
Blue Springs, Missouri 64014
Telephone: (816) 721-4691
Fax: (816) 517.2615
E-mail: dzeiler@zeilerlawfirm.net

ATTORNEYS FOR PETITIONERS

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....iii

STATEMENT OF FACTS.....1

 A. Nature of the case.....1

 B. Procedural History.....1

 C. Summary of the Argument.....2

ARGUMENT.....3

 I. **THE LAND RECLAMATION COMMISSION MUST DENY THE PERMIT FOR AA QUARRY BECAUSE OF ITS PERSISTENT NON-COMPLIANCE TO DATE, AND LIKELIHOOD OF FUTURE NON-COMPLIANCE UNDER R.S. Mo. § 444.773.**

 A. Standard of Review

 B. Evidence of Non-compliance under R.S. Mo. § 444.773.4.

 II. **AA QUARRY’S PERMIT MUST BE DENIED AS THE COMPANY HAS FAILED TO COMPLY WITH THE CLEAN WATER ACT AND HAS CONTINUALLY ENGAGED IN ACTS DETRIMENTAL TO THE ENVIRONMENT.**

 III. **SAFETY ISSUES AND HAZARDOUS CONDITIONS ALONG AA HIGHWAY RENDER IT UNFIT FOR QUARRY-RELATED ACTIVITIES.**

 A. Impairment to the Health and Safety of Drivers and Pedestrians Along AA Highway.

 B. The Condition of AA Highway Cannot Support the Quarry’s Added Traffic and the State Should Not Bear the Increased Maintenance Costs for the Benefit of a Single Business.

 IV. **THE QUARRY WILL RESULT IN DECREASED PROPERTY VALUES THAT IMPACT THE LIVELIHOOD OF THE COUNTY AND ITS RESIDENTS.**

 A. Proximity to Established Quarries.

 B. Sales Tax Revenue.

 C. Aggregate Decline in Property Values.

 V. **AA QUARRY’S PERMIT REQUEST MUST BE DENIED BECAUSE THE QUARRY NEGATIVELY IMPACTS THE HEALTH, SAFETY, AND LIVELIHOOD OF SURROUNDING RESIDENTS.**

 A. Mr. Edward Earls.

 B. Mr. William Gard.

 C. Horse Riders.

 VI. **THE QUARRY ACTIVITIES WILL IMPACT THE LIVELIHOOD OF RESIDENT BUSINESS OWNERS.**

 A. Solutions 4 Fundraising

 B. Chiropractic Practice/Alliance of Divine Love Ministry

 C. M&D Motorsports

CONCLUSION.....26

TABLE OF AUTHORITIES

| CASE LAW | PAGE NUMBER |
|---|--------------------|
| <i>Lake Ozark et al. v. Mo. Dep't of Natural Res.</i> , 326 S.W.3d 38 (Mo. Ct. App. 2010)..... | 3 |
| <i>Martin Marietta Minerals, Inc. v. Bd. Of Zoning Adjustment</i> , 246 S.W.3d 9 (Mo. Ap. W.D. 2007)..... | 16 |
| STATUTES AND CONSTITUTIONAL AUTHORITY | |
| 444.773, RSMo (2012)..... | 1, 2, 3, 5, 24 |
| 644.051, RSMo (2012)..... | 6 |
| 644.056, RSMo (2012)..... | 7 |
| 644.082, RSMo (2012)..... | 6 |
| SECONDARY AUTHORITY | |
| 10 CSR 40-10.020..... | 11 |
| 10 CSR 40-10.040..... | 1 |
| 10 CSR40-10.050..... | 4, 8, 9, 10 |
| 10 CSR 40-10.080..... | 1 |
| 10 CSR 22-2.050..... | 9 |
| 10 CSR 22-1.020..... | 9 |
| Kevin Mohammadi, <i>Memorandum To Land Reclamation Commission</i> , April 2, 2013..... | 1, 12, 14 |
| Minutes of the Land Reclamation Commission Meeting, May 23, 2013..... | 4, 15 |
| Missouri Department of Natural Resources, Section 401 Water Quality Certification: Protecting Missouri's Wetlands: Water Protection Program Fact Sheet..... | 6 |
| Missouri Department of Natural Resources, Compliance and Enforcement Water Protection Program..... | 7 |
| The Compliance Manual for the Missouri Department of Natural Resources (2007)..... | 8 |
| National Library of Medicine, Down Syndrome, www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001992/#adam_000997.disease.symptoms , June 16, 2012..... | 17 |
| National Institute of Mental Health, http://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml , last visited August 2, 2013..... | 19 |

STATEMENT OF FACTS

A. NATURE OF THE CASE

When dealing with the issuance of an applicant's general permit, The Land Reclamation Act requires that a director make a formal recommendation. *See* R.S. Mo. § 444.773.3. The director must base his recommendation on: 1) the application's compliance with R.S. Mo, § 444.772; 2) the application's compliance with 10 CSR 40-10.020; 3) consideration of any written comments received during the public notice period from persons who have a direct personal interest in one or more of the factors the commission is required to consider in issuing a permit; 4) whether the operator has had a permit revoked or a bond forfeited; and 5) if a petition is filed and a hearing held, the commission shall make the decision on permit issuance or denial. *See* 10 CSR 40-10.040(1)(A) and *Memorandum To Land Reclamation Commission*, dated April 2, 2013, page 2 (hereinafter "**Memorandum**").

For a formal public hearing under the Land Reclamation Commission, petitioners must establish standing by providing "good faith evidence of how their health, safety, or livelihood will be unduly impaired by the issuance of a permit." *See* 10 CSR 40-10.080 (2). The health, safety, or livelihood must be within the umbrella of the Missouri Department of Natural Resources and their environmental laws or regulations. *Id.*

B. PROCEDURAL HISTORY

On March 7, 2013, and following the Army Corps of Engineers issuing a Section 404 violation to AA Quarry, LLC ("**Applicant**" or "**AA Quarry**"), an informal public meeting was held with Applicant's representative, the Missouri Department of Natural Resources and the Missouri Department of Transportation ("**MoDOT**"). Following this meeting, Kevin Mohammadi, Staff Director of the Land Reclamation Program, issued a memorandum recommending a permit be issued to Applicant, but stated that his staff did not feel the

public's concerns were fully addressed. According, he recommended a public hearing be held. On May 23, 2013, Petitioners attended a meeting of the Land Reclamation Commission and asked to be granted standing. Petitioners sought the denial of a permit granting Applicant the right to mine limestone at the proposed quarry on the basis that the quarry activities would affect the health, safety and livelihood of residents who live in proximity to the proposed quarry and that Applicant's non-compliance with applicable statutes and regulations, including, without limitation, Applicant's land disturbance to construct the quarry prior to seeking the required permits, together with damage to the environment, should bar the issuance of a permit for fear of future non-compliance.

C. SUMMARY OF THE ARGUMENT

Pursuant to R.S. Mo. § 444.773, Petitioners seek denial of a mining permit for AA Quarry based on the Applicant's persistent non-compliance with statutes and regulations, including but not limited to not posting public notices, beginning land disturbance before a permit was issued, going outside the land disturbance permitted area to quarry in violation of the permit, a Section 404 Clean Water Act violation, and on-going investigation by the Army Corps of Engineers. Additionally, it is the Petitioners' contention that the quarry has, and will continue to, impair the health, safety, and livelihood of the residents surrounding the quarry due to the repeated blasting activities, the vulnerability of vehicle operators and pedestrians on AA Highway with the increased gravel truck traffic, the noise from the AA Quarry activities, and the deterioration of the property values of the homes surrounding the quarry site.

ARGUMENT

This brief focuses on Applicant's numerous, continuous incidents of non-compliance with both State and Federal laws, together with the threat of future non-compliance, and the impact to the health, safety, and livelihood that the quarry will have on the residents living near the quarry. The Commission must not, and should not, grant the permit to Applicant because even if any of the below impairments are not currently visible, they will, without question, exist once the quarry is up and running. Furthermore, the Petitioners stand to gain nothing through the denial of the permit. The best the Petitioners can hope for is maintaining the status quo.

This is the conundrum that the Petitioners face. They have an uphill battle to defeat the requested permit because some of the impairments to the public's health, safety, and livelihood will occur only after the Commission, if it so decides, grants the Applicant its permit and the quarry opens for business on a regular basis. At that point, the Petitioners are left without a remedy. Once the permit is issued, the Missouri Department of Natural Resources (the "DNR") has no authority to revoke the permit if any of the below listed impairments to health, safety, and livelihood actually occur.

Thus, the Commission must consider these impairments prior to deciding whether to grant Applicant's permit request. These future impairments are as important as any of the existing violations that are cited below. Waiting for these impairments to occur in the future is too late for the Petitioners. Although they can establish today the future impairments that will occur once the quarry is open, the Petitioners are not members of the Commission. The Coalition has had to hire counsel to represent the citizens' rights through this process. The Coalition has had to take its case to the citizens to raise money for this cause and manage very scant resources. This pales in comparison to an applicant who runs a prosperous

business and considers these proceedings just the cost of doing business. The Coalition needs someone to protect its interests. And, to that end, it is relying on the Commission.

I. THE LAND RECLAMATION COMMISSION MUST DENY THE PERMIT FOR AA QUARRY BECAUSE OF ITS PERSISTENT NON-COMPLIANCE AND LIKELIHOOD OF FUTURE NON-COMPLIANCE UNDER R.S. Mo. § 444.773.

A. Standard of Review

Under Missouri Statute, the Land Reclamation Commission (the “**Commission**”) may deny a permit upon the showing by competent, scientific evidence that such issuance would harm the health, safety or livelihood of an interested party, or upon a showing of on the part of the applicant. *See* R.S. Mo. § 444.773.4. It is Petitioners’ contention that Applicant’s actions to date reveal numerous instances of non-compliance, and caused harm to the health, safety and livelihood of interested parties. Petitioners bear only the burden of producing scientific evidence sufficient to establish an issue of fact, then the burden shifts to Applicant who bears the burden of persuasion. *Lake Ozark et al. v. Mo. Dep’t of Natural Res.*, 326 S.W.3d 38 (Mo. Ct. App. 2010).

B. Evidence of Noncompliance under R.S. Mo. § 444.773.4.

Applicant has blatantly engaged in non-compliance with regard to several duties assigned to the company as a result of their permit application status. Applicant was secretly developing operations prior to obtaining a proper permit, all while unsuspecting residents were building and purchasing homes in the area. Applicant did complete an ePermitting Certification and Signature on July 6, 2012. However, photographs taken prior to that date establish the presence of tracks made by heavy equipment and other quarrying machinery upon Applicant’s land. The photographs also show several large limestone blocks stacked together. Additionally, the photographs establish that Applicant was mining limestone prior

to obtaining its Land Disturbance Permit (the “**Permit**”). It is Applicant’s position that because this is personal property it can operate as it wishes, flying under the radar of the Commission by using the guise that this land is farmland. But, as the photographs and other evidence establish, Applicant violated various State statutes and regulations that prohibit quarrying without a permit, which Applicant did not apply for, or receive, until after it began the quarrying land disturbance.

Further, Applicant has taken great measures to keep the neighboring residents in the dark about its intended use of the property, specifically by failing to post signs identifying the mine area at the primary entrance to the mine permit area. This is in direct conflict with 10 CSR 40-10.050(11), which requires signage to be properly posted, clearly visible to the public, and maintained until the release of all permit bonds. Mrs. Liesl Snyder spoke during the May 23, 2013, Commission meeting (the “**Meeting**”) regarding her belief that AA Quarry intentionally set back the mine plan boundary in order to make the sign posting invisible to those residents looking from the public road, so that adjacent land owners would not receive written notification about the mine plan, and to keep neighbors in the dark about the intended purpose of the land. *See Minutes of the Land Reclamation Commission Meeting, May 23, 2013, page 4* (hereinafter “**Minutes**”). Mr. Robert Snyder also brought up at the Meeting that Applicant violated 10 CSR 40-10.050(11) in that no public notification was posted at the entrance of AA Quarry from AA Highway, which is the primary point of access to the permit area. *See Minutes, page 5*. The Department of Natural Resources personnel reported the notices were posted on a board several hundred feet back from the public access point, where citizens would have to trespass on private property in order to view the notices.

In addition to Applicant's instances of non-compliance with regard to land disturbance prior to obtaining the Permit and posting notices, Applicant's land disturbance outside of the 9.15 acres allotted to AA Quarry under the Permit also violates the Permit's terms and conditions. Aerial photographs taken in February 2013, by the AA Quarry Health and Safety Coalition (the "**Coalition**") establish that Applicant has disturbed an estimated 40 acres of land with regards to soil and stone movement and the construction of a dam for quarry operations. As set forth, *infra*, Applicant's construction of a dam without having an Army Corps of Engineers' permit is further evidence of Applicant's pattern and practice of non-compliance.

Based on the above stated violations, together with others that the Petitioners will present at the Hearing, Applicant has demonstrated in a convincing manner its complete disregard of the rules and regulations governing its activities related to constructing and operating a quarry.

If a hearing petitioner or the commission demonstrates either present acts of non-compliance or a reasonable likelihood that the permit seeker or the operations of associated persons or corporations in Missouri will be in non-compliance in the future, such a showing will satisfy the non-compliance requirement in this subsection. In addition, such basis must be developed by multiple non-compliances of any environmental law administered by the Missouri department of natural resources at any single facility in Missouri that resulted in harm to the environment or impaired the health, safety or livelihood of persons outside the facility.

See R.S. Mo. § 444.773.4.

In this case, the Applicant's willful non-compliance with the law shows a pattern of disregarding public notice, disturbing the land and building a dam without a permit, and not following directions, all lead to injury on behalf of the

public and unduly risk health, safety, and livelihood of those persons surrounding the proposed quarry site.

II. AA QUARRY'S PERMIT MUST BE DENIED AS THE COMPANY HAS FAILED TO COMPLY WITH THE CLEAN WATER ACT AND HAS CONTINUALLY ENGAGED IN ACTS DETRIMENTAL TO THE ENVIRONMENT.

Applicant failed to comply with the Clean Water Act by constructing a dam to create a pond without first obtaining a permit from the Army Corps of Engineers and then modified the dam without obtaining a permit to modify, resulting in another Section 404 violation. Through its actions, the Applicant willfully contaminated a protected wetlands area.

According to Missouri's Clean Water Law, the general operating permit does not authorize water discharges within 300 feet of wetlands or waters that have been identified as losing streams. It is against Missouri law for any person to pollute any waters of the State, or cause contaminants to be put in a location where it is reasonably certain to pollute said waters, or to discharge any contaminants that reduce the quality of said waters. *See* R.S. Mo. § 644.051 (1)-(2), According to the Missouri Department of Natural Resources, "wetlands are among the most productive ecosystems in the world, comparable to rain forests and coral reefs." *See* Missouri Department of Natural Resources, Water Protection Program Fact Sheet. The Clean Water Act is one way the federal government protects wetlands. "Any activity that involves dumping dredged or fill material into water (including wetlands) must have 401 Certification." *Id.* Without a permit for commission of such water contamination, a person found in violation shall be found guilty of a misdemeanor and fined at least \$100.00. *See* R.S. Mo. § 644.082.

Due to the fact that Applicant purposefully moved back the boundaries of the mine 100 feet in an effort to conceal from residents its intended purpose of the land, residents were

unaware of how much land disturbance Applicant was undertaking. In February 2013, Coalition commissioned aerial photos to be taken to view the extent of the disturbance. Even though Applicant's Permit authorized only a 9 ½ acre quarry, the resulting photos show nearly a 40 acre area of land disturbance and a large dam. Applicant built the dam to construct a pond, which could be used as a retention basin for the mining area.

Mr. Snyder, of the Coalition, contacted the regional office of the DNR regarding the expanded area of land disturbance and the dam, but was told the land was farm land, and, therefore, not regulated by the Permit. The DNR never conducted an investigation regarding this complaint, even though it is the "primary role" of the DNR "to achieve regulatory compliance with environmental laws" and "Department staff are expected to work cooperatively with anyone who has an environmental problem or concern." *See Missouri Department of Natural Resources, Compliance and Enforcement Water Protection Program.*

Petitioners later learned that Applicant's construction of the dam blocked the Waters of America. The Army Corps of Engineers visited the site and found it to be in violation of Section 404 of The Clean Water Act. Before constructing the dam, Applicant was required to contact the Army Corps of Engineers to obtain a permit, which Applicant did not do. On the ePermitting application, filed on July 6, 2012, Applicant answered "No" to the question of whether its activities would disturb the Waters of America. Currently, the status of the Army Corps of Engineers investigation is stated to be in "mitigation."

Once a violation is discovered, the DNR may terminate a permit to protect the waters of the state. *See R.S. Mo. § 644.056(4).* In this instance, and through the entire quarry construction process to date, the Applicant has shown a complete and utter disregard for the

environment. By Applicant's past actions of non-compliance, it is fathomable and likely that Applicant will be non-compliant in the future.

This non-compliance should be dealt with swiftly before any more damage is done to the wetlands located on the proposed quarry site. "If a problem persist[s], the department must resort to stronger means to address it. Any problem that is not solved must be quickly elevated to the next stage so that threats to citizen's health and Missouri resources are eliminated properly." *See* The Compliance Manual for the Missouri Department of Natural Resources, Forward. While the Army Corps of Engineers may issue an after-the-fact permit, the DNR has a duty to ensure compliance remains in effect. "[P]enalties may be used to ensure future compliance by removing the economic benefit of continued non-compliance." *Id.* In this case, by denying the Permit, the Commission would be removing the economic benefit that Applicant has received, and will continue to receive, through its damage to the environment.

The DNR also has enforcement powers to ensure dam safety. "Erosion control structures shall be constructed to United States Department of Natural Resources Conservation Service standards." *See* 10 CSR 40-10.050(4)(B)(3). According to the Dam Safety Division, any time a dam will be constructed in excess of 35 feet tall, the property owner is required to submit engineering drawings as part of the application process. Upon approval of the application, and following construction of the dam, the Dam Safety Division is to conduct regular inspections of the dam. Mr. Snyder, believing the AA Quarry dam already violated The Clean Water Act, also believed that the dam violated the 35 feet height requirement.

Shortly after contacting the DNR that the Applicant's dam exceeded the 35 feet height requirement, Mr. Snyder noted that AA Quarry was attempting to lower the height of the dam by bulldozing soil to remove it from the top of the dam. However, no alterations to dams over 35 feet tall are permitted without notification to and approval by the Dam Safety Division. *See* 10 CSR 40-10.050. "Significant Modification" is defined in 10 CSR 22-1.020 as "changes, alteration or modifications to an existing dam...changes in the height of the dam or structure..." Any significant modifications require the operator to obtain a new permit for the dam. *See* 10 CSR 22-2.050 (4). The Applicant failed to obtain a new permit for the dam prior to lowering the dam's height.

A DNR representative admitted to Mr. Snyder that he told the Applicant that the DNR was going to investigate the height complaint in a couple of weeks. It was during this time that the Applicant began lowering the height of the dam without a new permit. Upon information and belief, the DNR never conducted an on-site investigation of Mr. Snyder's complaint.

In addition to lowering the dam without a new permit, and as photographs show, Applicant simply dumped the soil at the heel of the dam near the outfall. The soil was swept away shortly thereafter in heavy rains and fed into other water sources. The Dam Safety Division has specific requirements to deal with storm water run-off, and procedures in place to deal with such issues. Regulations of the Dam Safety Division require that the material removed from the dam be placed in the catch basin side of the dam. "Erosion and siltation are considered damaging if it causes the approved post-mining land use not to be met or excess silt is deposited on or outside the affected area." *See* 10 CSR 40-10.050(4)(B). Controlling erosion requires "diverting runoff away from the permitted area, straw dikes, riprap, check

dams, mulch, vegetative cover, chemical treatment and limited livestock grazing.” *See* 10 CSR 40-10.050(4)(B)(1).

Besides not filing an application to construct the dam on the property, Applicant built a dam that exceeded 35 feet in height, and after being notified by DNR of a complaint, Applicant quickly bulldozed the dam to reach a compliant height, again without obtaining a proper permit. Applicant further failed to make sure the topsoil taken off the dam was handled in the way prescribed in 10 CSR 40-10.050(9)(B)-(C). When Applicant removed the soil from the non-compliant dam, it did not stockpile the material in a stable area within the permit area where it would not be disturbed by factors such as water erosion or contamination. Rather, Applicant simply spread the soil out at the heel of the dam. The Missouri Department of Natural Resources Code of State Regulations requires that topsoil be redistributed to prevent excess compaction, achieve uniform thickness, and protect the slope from erosion. *See* 10 CSR 40-10.050(9)(C).

Petitioners believe that they could establish further instances of non-compliance in addition to the examples set forth above in Sections I and II. Unfortunately, these can only be proven through the discovery process. However, Petitioners, through the above examples of Applicant’s continued acts of non-compliance with State and Federal laws, have proven that AA Quarry cannot be trusted to comply with the law and regulations on its own, and the DNR does not have the additional resources needed to continually bring Applicant back into compliance throughout the life of the permit. The secret land disturbance prior to obtaining a permit, the lack of notice to the public with regard to the posted sign violation, Applicant’s intentional setback of the written public notice 100 feet to prevent neighbors from receiving the required notification, the violation regarding the dam height, Applicant’s violation of the

permit requirements to lower the height of the dam, not protecting the public from water pollution by moving the soil to an unprotected area, and the continuing harm to the environment during this process, as documented through the 404 violation, all show a pattern of continued non-compliance and disregard for the environment and those citizens living around or near the AA Quarry. It is the responsibility of the quarry operator to remain compliant with the statutes and regulations, and not the Commission or private citizens to force AA Quarry into compliance.

III. SAFETY ISSUES AND HAZARDOUS CONDITIONS ALONG AA HIGHWAY RENDER IT UNFIT FOR QUARRY-RELATED ACTIVITIES.

The location of AA Quarry relative to AA Highway impairs the health and safety of drivers due to the condition of the highway, the sudden drop offs, lack of shoulders on the roadway, and the visual obstructions along AA Highway. According to The Land Reclamation Act, anyone whose “health, safety, and livelihood will be unduly impaired by the issuance of a permit” may request a hearing due to “items such as permitting and reclamation requirements, erosion and siltation control, excavations posing a threat to public safety, or protection of rights-of-way.” *See* 10 CSR 40-10.020(2)(H)(5). The following points will establish that the conditions of AA Highway are ill-suited to the needs of the proposed quarry site. Should the quarry site become operational, the excavations pose a threat to public safety and protection of rights-of-ways.

A. Impairment to the Health and Safety of Drivers and Pedestrians Along AA Highway.

AA Highway is located in Western Johnson County, Missouri, running from US 50 South Highway to Missouri Highway 58. The geographical area defined in Johnson County is NW 100 Road North to US 50, Missouri Highway W West to the Johnson County line at NW 2001/County Line/Hadsell Road, encompasses approximately 545 residences

surrounding AA Quarry and AA Highway. The speed limit is posted at 55 miles per hour and there are no shoulders on the sides of the roadway. In many places along AA Highway, the pavement simply falls off into a creek running alongside of the highway. This means that the common fail-safe of pulling into the ditch when danger presents itself is not an available option for vehicles coming into contact with a large gravel truck in distress. In addition, while some portions of AA Highway run on a flat plain, beginning two miles south of US 50 Highway, the road enters upon a series of rolling hills and broad curves. AA Highway serves as the main roadway for residential homes and developments adjacent to the highway. Additionally, there are numerous blind driveways along the route. Of the 117 access points along AA Highway, the majority are driveways, which feed into AA Highway among hills, curves and blind spots. The highway was not designed with commercial gravel trucks in mind.

Along AA Highway, between the proposed entrance to AA Quarry and US 50 Highway, stands approximately 50 mailboxes, the majority of which are positioned only two (2) feet from the highway pavement of AA Highway. AA Highway averages a 21 foot width, however a standard gravel truck measures 9'6" from mirror-to-mirror. This leaves but 6 inches of clearance for a gravel truck on the highway. Additionally, a school bus is around 9'3", which leaves barely 2 feet of clearance should the two pass one another on AA Highway. *See Memorandum*, Attachment 1, page 6. MoDOT has stated that due to budgetary constraints, the roadway cannot be widened. *Id.* Therefore, vehicles, joggers, pedestrians, and school children waiting along AA Highway for school buses, , are in danger of being struck by gravel trucks along AA Highway.

Additionally, a stop sign is located at the north end of the intersection of AA Highway and US 50 Highway, crossing to a median strip and coming upon a second stop sign. According to MoDOT's traffic survey, approximately 20,000 vehicles pass through the intersection each day at the speed limit of 65 miles per hour. Westbound US 50 Highway traffic approaches approximately 500' beyond the crest of a steep blind hill. The lack of acceleration and deceleration ramps on US 50 Highway makes the roadway extremely unsafe, in addition to the blind hill going westbound. A commercial truck traveling at these speeds approaching the blind hill would not have sufficient time to react to traffic situations. The AA Highway and US 50 Highway intersection unduly impairs the safety of all drivers entering and exiting the area.

B. The Condition of AA Highway Cannot Support the Quarry's Added Traffic and the State Should Not Bear the Increased Maintenance Costs for the Benefit of a Single Business.

The current condition of AA Highway is moderate. MoDOT was scheduled to perform routine maintenance of the roadway, including filling potholes and applying chip-and-seal. However, in lieu of the chip-and-seal, MoDOT has postponed the plans and hopes to repave the highway in 2015. The current condition of AA Highway will not be able to withstand the increased weight and traffic brought by numerous loaded gravel trucks. The increased maintenance of AA Highway due to the gravel trucks presents an undue burden on MoDOT. The increased deterioration of AA Highway would impair the safety of vehicle operators.

AA Highway cannot support the increased traffic gravel trucks will bring as a result of the quarry. MoDOT has stated publicly that it does not have the funding to complete the pre-scheduled maintenance and that they will not be able to complete any major road improvements until 2015. Additionally, they have no funds to widen the highway. The

precarious location of stop signs, entry and exit ramps, proximity to mailboxes, and blind driveways make increased large truck traffic undesirable for the area. Increases in accidents and fatalities are likely if the quarry begins to run numerous gravel trucks on a daily basis on AA Highway. Finally, there are no shoulders along AA Highway and pedestrians and drivers are at an increased risk of injury due to the lack of ample clearance on the roadway when a gravel truck drives by. This is not the right place for a quarry location as the public is not safely served by adequate roadways.

IV. THE FINANCIAL IMPACT OF THE QUARRY WILL RESULT IN DECREASED PROPERTY VALUES, HARMING THE LIVELIHOOD OF RESIDENTS.

A. Proximity to Established Quarries.

With two large commercial quarries located approximately ten miles to the west of the proposed quarry, and one commercial quarry located eight miles to the north, there is no demand for an additional quarry site in the area at this time. A gravel truck driver would inevitably find himself/herself driving past one of the commercial quarries in order to obtain gravel from the proposed quarry site. The driver would then have to pass the quarry again to return to his jobsite. Should a driver approach from the Kansas City metro area, he will drive past the two commercial quarries located to the west, Should a driver approach from I-70 Highway, he will drive past the commercial quarry located on Missouri Highway Z to the north of the proposed quarry site. The Applicant has stated that it anticipates local sales of 10,000 to 20,000 tons of gravel per year that is in competition with the adjacent commercial quarries already in place. *See Memorandum, Attachment 1, page 2.*

B. Sales Tax Revenue.

Johnson County, Missouri, will realize only marginal revenue from sales taxes resulting from commercial sale of the gravel from the proposed quarry site. According to the Missouri Economic and Research Information Center, 3,900 Missouri residents were employed in the field of Natural Resources and mining as of January 2013. At a public hearing in Lone Jack, Missouri, held on March 7, 2013, AA Quarry stated no new jobs will be created as a result of the proposed quarry site. Additionally, Johnson County, Missouri, is unzoned, with no business taxes. Sales taxes will be collected only when gravel from the proposed quarry site is sold commercially, however, as previously stated, AA Quarry expects to sell only 10,000 to 20,000 tons of commercial gravel per year, reserving the rest for its own projects. Thus, the quarry project will result in only minimal sales tax revenue for Johnson County.

C. Aggregate Decline in Property Values.

The aggregate decline in property values for residents surrounding the proposed quarry site unduly impairs the livelihood of Johnson County, Missouri, residents. It is well-established that properties located near gravel quarries are subject to a decline in value. It also is Missouri black-letter law that no person or business has the right to cause a decrease in another's property value without providing adequate compensation. To date, Applicant has offered no compensation to Johnson County property owners to off-set the decline in their property values. Damage caused by blasting in the quarry is not covered by insurance and residents do not have the option of purchasing such insurance. *See Minutes, pages 5-6.*

The Missouri Court of Appeals recently upheld a City Planning Commission's denial of a quarry expansion due to its incompatibility with the purposes of adjacent land. "As an

example of land use externalities, a house surrounded by sand and gravel pits is less enjoyable to live in and has less value for residential purposes than the same house surrounded by similar houses. The noise, smoke, fugitive dust, and heavy truck traffic generated by the excavations are so incompatible with residential life that the value of the house declines. Yet the gravel pit owners have no economic incentive to lessen the impacts of their activities since the declining value of the house does not affect the profitability of their businesses. In effect, it is a cost imposed by the gravel pit owners on the owner of the house. . . . The best way to minimize these external costs is to separate incompatible land uses or buffer them from each other.” *Martin Marietta Minerals, Inc. v. Bd. Of Zoning Adjustment*, 246 S.W.3d 9 (Mo. Ap. W.D. 2007).

Currently, approximately 70% of residences affected by the proposed quarry pay property taxes that support the Holden R-III School District. The remaining 30% of the affected residences pay property taxes to the Kingsville R-I School District. The proposed quarry site is wholly located in the Kingsville R-I School District. This means that any reduction in property values in the residences supporting the Holden and Kingsville School Districts results in an unrecoverable impairment to the livelihood of the Holden and Kingsville School Districts.

Should the proposed quarry open, only a few sections of the quarry area will be operating at any given time, meaning only these open sections will be reclassified as Commercial property subject to commercial property taxes. With the Assessor only valuing these few commercial areas, it is likely the increased property taxes from the quarry will not match the decreased property values of the residential properties. Therefore, operation of

these quarry areas will negatively impact the livelihood of the Kingsville R-I and Holden R-II School Districts.

The reduction in property tax collections due to the decrease in valuation of the residential properties surrounding the quarry site will also affect County revenues. Approximately 30% of monies collected through property taxes go towards maintaining County roads, supporting the Johnson County Sheltered Workshop, and compensating police and fire departments. The overall reduction of property tax collections will unduly impair the livelihood of Johnson County, Missouri, and the programs and services that the County Government provides its citizens.

As set forth above, Applicant has stated that the quarry will not create any new jobs, which means that Johnson County government will collect precious few tax dollars from the Applicant. There is no financial incentive for Johnson County, Missouri, relating to AA Quarry's operations. In fact, the neighboring school districts and County Government will suffer as property values decrease, tax revenues fall, and the quarry drives away potential home buyers looking in the area.

V. AA QUARRY'S PERMIT REQUEST MUST BE DENIED BECAUSE THE QUARRY NEGATIVELY IMPACTS THE HEALTH, SAFETY, AND LIVELIHOOD OF SURROUNDING RESIDENTS.

A. Edward Earls.

The proposed quarry site, and its operation, will impact the health, safety, and livelihood of surrounding residents and visitors. By way of example, the quarry is located within a mile of Mr. Edward Earls, a severely developmentally disabled resident, who will be adversely affected by the blasting activities and increased traffic from loud gravel trucks hauling rock from the area. Mr. Earls is 27 and resides less than one mile from the proposed

quarry site, at 444 NW 1851st Road, Johnson County, Missouri. Mr. Earls has lived in the area since 2009.

He suffers from non-verbal Down Syndrome. Down Syndrome is a genetic condition that leaves a person with an extra chromosome, causing behavioral and developmental abnormalities. *See* National Library of Medicine. Except for brief periods, Mr. Earls and his caregiver remain confined to the home at all times. Due to Mr. Earls' disorder, he stays up throughout the night and sleeps during the daytime hours.

In a letter dated February 20, 2013, which was provided to the Commission during the Meeting, Dr. Marie Delcambre noted the importance of keeping Mr. Earls in a quiet environment. She states that since coming to reside in a "controlled setting and quiet environment," Mr. Earls' behavior has become more manageable and he is able to sleep without the aid of medication. Additionally, because Mr. Earls' has non-verbal Down Syndrome, he is unable to report the potential lethal side effects of sedative medication that could ease his anxiety from the explosions and gravel truck noise from the proposed quarry. Because of these reasons, his doctor has identified him as a non-candidate for such sedative medication.

The program director for Developing Potential, Inc., an adult daycare center for the developmentally challenged, stated in a May 1, 2013 letter that was provided to the Commission at the meeting, that Mr. Earls is "no longer a match for programming" because of safety issues. The director cites him getting upset "around loud noises" and found that he indicated the desire to be at home. Therefore, it has been determined that Mr. Earls is a non-candidate for outside care and the best course of action for him is to remain in the home. The director of Developing Potential states, "[l]arge noises startle Edward which cause increased

communication concerns.” Since remaining at home, Mr. Earls has shown progressive behavior that the activities and increased noise from the proposed quarry site will disrupt.

On July 30, 2013, at 8 a.m., gravel trucks began delivering gravel to a construction site on Mr. Earl’s street. He remained awake for two hours while the gravel trucks came and went from the quarry site. Within five minutes of the gravel trucks completing their operations, Mr. Earls was asleep.

The noise from the trucks and rock crushers through the past summer resulted in an increase stress level for Mr. Earls. In addition to disrupting his sleep patterns, the noise has led to increased urination and bowel evacuation while fully dressed. At an informal public meeting held on March 7, 2013, AA Quarry stated regular business hours to be from 7 a.m. to 5 p.m., Monday through Saturday. However, the quarry added that blasting and rock crushing would be performed on an as-needed basis, thus making it impossible for Mr. Earls to have any semblance of a routine schedule. It is beyond dispute that the noise from the trucks and blasting activities will unduly impair the health and livelihood of Mr. Earls.

B. William Gard.

Another example of the proposed quarry’s impact on the health, safety, and livelihood of surrounding residents is the impairment and distress to Mr. William Gard, a Vietnam Veteran who suffers from depression and anxiety. William and Dianne Gard have lived on the same street as Mr. Earls, less than one mile from the proposed quarry site, since 2010. Mr. Gard was a 73C20 Disbursement Specialist, serving in the United States Army from November 17, 1966 until November 4, 1968, when he received an honorable discharge as a level E-4 Specialist.

Since returning from Vietnam, Mr. Gard has received mental health treatment for symptoms of anxiety and depression. Currently, Mr. Gard is part of an on-going treatment program at the Kansas City Veterans Administration Hospital. According to his treating psychologist, his symptoms are consistent with those usually appearing after a traumatizing ordeal that involves either the threat of harm or actual physical harm. *See* National Institute of Mental Health. One of the treatment methods is to make a list of external factors that trigger symptoms, and finding ways of reducing stress in these situations. *Id.* Additionally, another basic method of the coping process is listed as going to a place where the person feels safe. *Id.*

According to a February 11, 2013 letter from Jaymee Dow, Ph.D., which was submitted to the Commission during the Meeting, she stated that Mr. Gard's symptoms are easily aggravated by external noises. Therefore, with constant external stressors emanating from the quarry, Mr. Gard will be unable to reduce the stress of the situation.

Additionally, the place he feels safest, his home, will be the site of the stress, leaving him nowhere to go to escape using common coping procedures. The blasting noises and vibrations from the quarry activities will trigger Mr. Gard's depression and anxiety that will seriously aggravate his condition and the progress he has made through his mental health recovery process.

C. Horse Riders.

The proposed quarry site is located within a tenth of a mile from a stable of domestic horses, who will be adversely affected by the blasting activities and increased traffic from loud gravel trucks, which have the potential of harming their riders if startled.

James and Susan Richards have lived at 408 NW AA Highway since 1987. Their home is located approximately a tenth of a mile from the proposed quarry site. Since moving to their home, they have kept horses on their land for recreation. The Richards regularly have their grandsons, who reside across the street, and their granddaughter, who resides in Lone Jack, Missouri, over to their home to interact and ride the horses.

In the summer of 2012, the horses reacted by “bolting” when the quarry conducted blasting activities, notwithstanding the fact that the Applicant did not have a land disturbance permit to even build the quarry at that time. It is likely that a blasting event could occur while the Richards’ grandchildren are riding, or are near, horses that bolt or are spooked by the noise, thereby maiming or injuring the children. Even if blasting were to occur at regularly scheduled hours, the quarry serves to unduly restrict the Richards’ livelihood and ability to freely ride their horses, or have their grandchildren interact with the horses, whenever they would like. Of course, and as set forth above, the Applicant refuses to have scheduled hours for blasting or rock crushing. Therefore, it would be impossible for the Richards to predict or schedule when they should not allow anyone near their horses.

Mr. Earls, Mr. Gard, and the Richards are a small example of property owners whose health and safety are affected as a result of the quarry activities. Each resident resided in the area prior to Applicant’s decision to purchase the land for use as a quarry. Mr. Earls’ family brought him to the area because it was a quiet, stable place where his behavior could progress. Mr. Gard served our country during the Vietnam War and has post-traumatic stress disorder as a result, which is easily triggered by the blasting activities of the quarry. The Richards’ family is in danger of injury should they happen to be horseback when AA Quarry begins its sporadic blasting activity, which has previously spooked their horses. The

proposed quarry will unduly affect the health, safety, and livelihood of these individuals and others in a way that drastically changes their way of life.

VI. THE QUARRY ACTIVITIES WILL RESULT IN IMPAIRMENT TO THE LIVELIHOOD OF RESIDENT BUSINESS OWNERS.

A. Solutions 4 Fundraising

Ms. Lorri Adams has resided less than a mile from the proposed quarry site since 2010. She is the owner and CEO of Solutions 4 Fundraising, a professional consulting firm specializing in marketing and development services to non-profit organizations. Solutions 4 Fundraising was formed in 2008 and Ms. Adams operates the business from her home during normal business hours Monday through Friday, and occasionally on weekends. Ms. Adams manages a staff of four to seven campaign directors, conducts board and volunteer training, administers company marketing activities, and is the point-of-contact person for all new customer acquisitions. Ms. Adams also handles the daily business tasks of payroll, website updates, email, phone calls, etc. To carry out her business operations, Ms. Adams has created a typical home office environment.

Most of Ms. Adams' clients are located throughout the Midwest, in various states. Ms. Adams must often conduct webinar trainings for board, staff, and volunteers. Additionally, these clients require telephone conferences to service their needs. The noise level from the AA Quarry impairs the livelihood of Solutions 4 Fundraising. In Summer 2012, when a jackhammer was in continuous operation at the quarry, the sound from the jackhammer resonated every five seconds, starting at 7 a.m. and lasting until 7 p.m. This occurred throughout the weekdays, as well as many weekends, from April through September of that year, which included months when the quarry was not supposed to be disturbing the land without a permit. During this period, the sound interfered with the

telephone discussions and webinar trainings that Ms. Adams needed to conduct. The noise became so distracting, Ms. Adams was forced to move her webinar operations to a family member's home in Kansas City, approximately 45 minutes away. This adds additional costs for Solutions 4 Fundraising and inconveniences Ms. Adams, as well as her family members and her clients.

It is clear that the blasting and constant rock crushing from AA Quarry will further disrupt Ms. Adams' home business. It will unduly impair her livelihood and ability to continue to provide clear communication to her clients. Without the ability to adequately communicate with clients, Ms. Adams will lose business and suffer financial hardship.

B. Chiropractic Practice/Alliance of Divine Love Ministry.

Tim and Lee Ann Stamm reside less than two miles from the proposed quarry site. They purchased their home in 1999. Currently, Mrs. Stamm operates her chiropractic business from their home. Routine chiropractic procedures performed by Mrs. Stamm include acupuncture and physical therapy. In addition to her chiropractic practice, Mrs. Stamm is also a licensed Alliance of Divine Love Minister. Rev. Stamm conducts ministry services from her home, including teaching classes on self-improvement, conducting counseling sessions, mediation, spiritual healing, and Reiki energy treatments. Due to the nature of these services, it is crucial that they are conducted in a serene, peaceful surrounding.

In addition to the self-improvement services that Rev. Stamm offers, the couple also hosts weddings, memorial services, and spiritual services at their home. The noise and vibrations emanating from the quarry while blasting occurs is disruptive to clients who seek peace and tranquility from their time with Rev. Stamm. A tenet of the Alliance of Divine

Love ministry is love and honor for the earth. The continued destruction of the rock shelf will undoubtedly cause distress to followers of the Alliance of Divine Love.

The nature and livelihood of the Stamm's businesses will be unduly impaired by the increased blasting and vibrations caused by the quarry's activities.

C. M&D Motorsports.

Darren and Misty Cutright's land adjoins the proposed quarry site along its northern border. The Cutrights have resided in this area since 2001, and operate M&D Motorsports from their home. The company purchases used vehicles to repair and resell for a profit. The proposed quarry site is 400 feet from the residence and within 100 feet of the outbuilding where the Cutrights conduct their business.

The dust and sedimentation arising from the blasting and hauling out of gravel will impair the Cutrights' ability to keep their property and sale vehicles clean. Additionally, the Cutrights will have to keep the facility climate controlled throughout the year to cut down on the dust, which will increase the cost of operations. Expenses will increase dramatically due to the constant upkeep required to keep the vehicles free of dust and constantly ready for customers to inspect and buy.

M&D Motorsports will be unable to perform many of the detailing tasks that require a steady hand during the day due to the vibrations from the quarry, which will restrict the company's hours of operation. Because the company performs cosmetic repairs, such as paint work, it is much easier to work during the daylight hours. The noise interferes with business transactions and preparing the vehicles for sale. The proximity of the quarry activities to M&D Motorsports unduly impairs the livelihood of the Cutrights' business.

CONCLUSION

Petitioners respectfully request that the Commission deny Applicant's permit application pursuant to R.S. Mo. § 444.773. Applicant has repeatedly failed to comply with statutory requirements, codes, and regulations, and has been cited for violating The Clean Water Act. This history of non-compliance shows a likelihood that Applicant will refuse to be compliant on future occasions. Under R.S. Mo. § 444.773.4, the Commission is allowed to take into consideration previous instances of non-compliance when it appears they will lead to future instances of non-compliance. Additionally, the health, safety, and livelihood of the residents surrounding AA Quarry will be impaired due to the blasting activities, increased noise from rock crushers, the increased traffic from gravel trucks, and the dust aggravation.

Respectfully submitted,

ZEILER LAW FIRM, L.C.

By: 

David L. Zeiler MO #46806
2012 NW South Outer Road
Blue Springs, MO 64015
816-988-7215
877-517-2615 [Toll Free Fax]
dzeiler@zeilerlawfirm.net

ATTORNEY FOR PETITIONERS

CERTIFICATE OF SERVICE

I certify that on August 8, 2013, I served a true and accurate copy of the above via electronic mail on:

W.B. Tichenor, DNR – Hearing Officer
3710 Shadow Glen Court
Columbia, Missouri 4844
wblichenor@gmail.com

G. Steven Ruprecht
sruprecht@brlawkc.com

Attorneys for Applicant

Timothy P. Duggan
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri 65102
Tim.duggan@ago.mo.gov

Daren Eppley
Daren.eppley@ago.mo.gov

Attorneys for Land Reclamation Program

Attorneys for Respondent



An Attorney for Petitioners