

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

In the Matter of:	)	
	)	
AA QUARRY LLC	)	Proceeding Under
AA Quarry Site # 2462	)	The Land Reclamation Act,
Johnson County, Missouri,	)	Sections 444.760 – 444.789, RSMo <sup>1</sup>
New Site Permit Application	)	
	)	
ROBERT & LIESL SNYDER,	)	
	)	
<i>Petitioners,</i>	)	
	)	
v.	)	Permit # 1094
	)	
DEPT. OF NATURAL RESOURCES,	)	
KEVIN MOHAMMADI,	)	
Staff Director,	)	
Land Reclamation Program,	)	
Division of Environmental Quality,	)	
<i>Respondent,</i>	)	
	)	
AA QUARRY LLC.,	)	
<i>Applicant,</i>	)	
	)	

**RECOMMENDED DECISION AND ORDER**

**HOLDING**

Petitioners<sup>2</sup> failed to demonstrate by competent and substantial scientific evidence or otherwise demonstrate that the Applicant or the operations of associated persons or corporations in Missouri were guilty of present acts of noncompliance of any environmental law administered by the Missouri Department of Natural resources where such acts of noncompliance resulted in harm to the environment.

The Hearing Officer recommends that Respondent’s Recommendation that Permit # 1094 be approved be sustained and the Permit be approved, as required by sections 444.772 and 444.773 RSMo.

**Counsels:**

Petitioners appeared by Counsel, David L. Zeiler, Zeiler Law Firm, L. C., Blue Springs, Missouri, until September 4, 2014, thereafter Petitioners appeared pro se.<sup>3</sup>

Respondent appeared by Counsel, Timothy P. Duggan, Assistant Attorneys General, Jefferson City, Missouri

Applicant appeared by Counsel, G. Stephen Ruprecht, Brown & Ruprecht, PC, Kansas City, Missouri.

**Hearing Officer:**

Case Heard and Recommended Decision and Order prepared by W. B. Tichenor, Hearing Officer.

**Identification of Parties & other Entities**

The parties and other entities are identified throughout the Recommended Order as follows:

Robert and Liesl Snyder	Petitioner(s) or Snyder(s)
Kevin Mohammadi	Respondent or Mohammadi
AA Quarry LLC	Applicant or AA Quarry
Radmacher Brothers Excavating Co. Inc.	RBEC or RadBro <sup>4</sup>
Radmacher Land & Equipment Management Co.	RLEMC or Radmacher Land
<i>(The two Radmacher entities or either of them may also be identified as simply Radmacher Brothers)</i>	
Missouri Land Reclamation Commission	LRC or Commission
Clean Water Commission	CWC
Dam and Reservoir Safety Council or Program	Dam Safety or DRSC/DRSP
Dam and Reservoir Safety Law	DRSL or Dam Safety Law

**ISSUES**

The Commission takes this appeal to determine: whether there is competent and substantial scientific evidence on the record, which demonstrates a pattern of present<sup>5</sup> multiple acts of noncompliance, by Applicant,<sup>6</sup> of any environmental law administered by the Missouri Department of Natural Resources at any single facility in Missouri where such noncompliances resulted in harm to the environment.<sup>7</sup> This is the sole theory under which Petitioners prosecuted their case.<sup>8</sup>

Petitioners made no claim and presented no evidence to establish that their health, safety, or livelihood will be unduly impaired by the issuance of Permit # 1094. Petitioners made no claim that the operator (AA Quarry LLC) has, during the five (5) year period immediately

preceding the date of the permit application demonstrated a pattern of noncompliance at other locations that suggest a reasonable likelihood of future acts of noncompliance. *See*, **THEORY OF PETITIONERS' CASE**, *infra*.

In the absence of the required evidence to establish multiple acts of noncompliance of DNR environmental laws which resulted in harm to the environment the new site permit application # 1094 is to be approved as required by sections 444.772 and 444.773 RSMo. The Hearing Officer having considered all of the relevant evidence upon the record, the relevant statutes, regulations, case law, and briefs of the parties enters this Recommended Decision and Order.

### **PROCEDURAL HISTORY**

The procedural history of the Matter is as follows:

1. November 16, 2012: Applicant prepared Permit Application for Industrial Mineral Mines under 10 CSR 40-10.020 for the new site AA Quarry.<sup>9</sup>
2. December 11, 2012: Applicant notified by letter from Tucker Fredrickson, Environmental Specialist, that the Land Reclamation Program deemed the Permit Application complete.<sup>10</sup>
3. December 12, 2012: Public Notification Letter sent to Johnson County Commission by Certified Mail.<sup>11</sup>
4. December 20, 2012 – January 10, 2013: Public Notice of Surface Mining Application – New Permit for AA Quarry LLC published in THE HOLDEN IMAGE for four consecutive weeks (12/20, 12/27, 1/3 & 1/10).<sup>12</sup>
5. March 7, 2013: A public meeting was conducted by the Land Reclamation Program relative to the proposed AA Quarry.<sup>13</sup>
6. April 2, 2013: Staff Director, Kevin Mohammadi, Land Reclamation Program issued Director's Recommendation – AA Quarry, LLC, Permit # 1094. The Staff Director recommended approval of the Applicant's application because the company had satisfied all of the application requirements of "The Land Reclamation Act." The Recommendation included the Land Reclamation Program's consideration of all the comments made by the public at the public hearing.<sup>14</sup>

7. April 2, 2013: Tucker Frederickson, Environmental Specialist III informed Petitioners by letter of their right and the process to request a formal hearing. Thereafter Petitioners requested a formal hearing.<sup>15</sup>
8. May 23, 2013: The Land Reclamation Commission granted Petitioners' request for a formal hearing.<sup>16</sup>
9. August 11 – 14 & September 23, 2014: Formal Hearing conducted at the Department of Natural Resources Kansas City Regional Office, 500 NE Colbern Rd., Lee's Summit, Missouri, Hearing Officer W. B. Tichenor presiding.
10. October 10, 2014:<sup>17</sup> Petitioners' Post-Hearing Brief and Applicant's Post-Hearing Brief filed with the Hearing Officer.
11. October 20, 2014: Reply Brief of Applicant filed with Hearing Officer.
12. October 29, 2014: Reply Brief of Petitioners filed with Hearing Officer.

**SUMMARY OF EVIDENCE**

**Petitioner's Evidence**  
**Testimony**

The following witnesses testified on behalf of Petitioner:

<b>WITNESS</b>	<b>TRANSCRIPT<sup>18</sup></b>
Robert Snyder	I:35 – 185; IV:826 – 830
Kevin Mohammadi	I:187 – 212
Michael Elkana	I:214 – 222
Linda Carroll	II: 232 – 238
Jim Martin	II:239 – 248
Misty Cutright	II:250 – 269
Aaron Bleibaum	II:270 – 309
James Coles	II: 310 – 374
James Helgason	II:376 – 385
Paul Simon	III:474 – 519
William Zeaman	III:521 – 545
Larry Slechta	III:546 – 560
Thomas Radmacher	III:562 – 652
Nathan Hamm	IV:666 – 732
Patrick Peltz	IV:848 – 937

## Exhibits

The following exhibits were received into evidence on behalf of Petitioners.<sup>19</sup>

EXHIBIT	DESCRIPTION
A	Aerial Photo dtd 4/10/10 – Radmacher Brothers Route AA Land <sup>20</sup>
C	Aerial Photo dtd 2/16/12 – Radmacher Brothers Route AA Land
D	Aerial Photo dtd 2/16/12 – close up of proposed quarry site from C
F	Aerial Photo dtd 8/27/12 – driveway of RBEC Route AA Land
G	Aerial Photo dtd 1/3/13 – AA Quarry Site Mine Plan and Permit Boundaries
I	Aerial Photo dtd 8/27/12 – close up of proposed quarry site
J	Aerial Photo dtd 2/9/13 – new dam at quarry site
K	Email, dtd 4/30/13 & 15 photos of construction of new dam dtd 4/29/13
L	Photo dtd 4/29/13 – construction of new dam
M	Photo dtd 3/27/14 – top of new dam
N	Photo dtd 3/27/14 – rock on RBEC land and adjoining land
O	Photo dtd 3/27/14 – rock on adjoining land to RBEC land
P	Aerial Photo dtd 10/31/02 – portion of Route AA Land
Q	Aerial Photo dtd 6/15/09 – portion of Route AA Land
R	Aerial Photo dtd 4/10/10 – portion of Route AA Land
S	Aerial Photo dtd 7/8/10 – portion of Route AA Land
T	Aerial Photo dtd 2/9/13 – equipment at quarry site
U	Aerial Photo dtd 2/9/13 – portion of quarry site
V	Aerial Photo dtd 2/9/13 – portion of quarry site
W	Aerial Photo dtd 2/9/13 – quarry site
X	Aerial Photo dtd 8/27/12 – quarry site and Echo Lake
Y	Aerial Photo dtd 8/27/12 – Echo Lake
Z	Aerial Photo dtd 2/9/13 – Lower Dam at quarry site
AA	Aerial Photo dtd 8/27/12 – quarry site and surrounding area on RBEC land
BB	Photo dtd 4/11/13 – stream bed at toe of new dam
DD	Photo dtd 8/20/13 – area behind the new dam
EE	Photo dtd 8/20/13 – cattle waterer behind new dam
FF	Photo dtd 3/27/14 – water below farm pound/behind new dam
GG	Photo dtd 3/27/14 – water below farm pound/behind new dam
HH	Photo dtd 3/27/14 – outlets from farm pound
II	Photo dtd 3/27/14 – outlets from farm pound
JJ	Photo dtd 3/27/14 – farm pound
MM	General Operating Permit – MORA01538, dtd 7/6/12 – Borrow Site
NN	Storm Water Pollution Prevention Plan – MORA01538, dtd 7/6/12
PP	Land Reclamation Program Complaint Investigation, dtd 6/19/12
RR	Report of Compliance Inspection – Radmacher Borrow Site – dtd 12/14/12
SS	ePermitting Certification and Signature Document – dtd 7/6/12
TT	Forms E & G Application for General Permit – dtd 12/4/12
YY	Email Receipt Permit # MORA02837 Application Fee – dtd 3/13/13
ZZ	Radmacher Borrow Site Inspection Records – 9/15/12 – 1/31/14

AAA	Report of Compliance Inspection – AA Quarry Permit MO-RA02937
DDD	SCS Aquaterra Dam Topography AA Quarry, dtd 4/19/13
EEE	Deposition of Thomas Joseph Radmacher, dtd 4/24/14
III	Permit Application for Industrial Mines – AA Quarry LLC, dtd 11/15/12
MMM	Stormwater Permit Requirements for Land Disturbance Activities, dtd 8/12
GGGG	Missouri Dam Safety Laws and Regulations ( <i>one page summary</i> )
KKKK	Email with Precipitation data for Kingsville 1/1/11 – 2/19/14
LLLL	Director’s Recommendation – AA Quarry, Permit # 1094, dtd 4/2/13
PPPP	Section 444.765 RSMo
TTTT	Section 444.772 RSMo
UUUU	Section 444.773 RSMo
WWWW	10 CSR 40-10.010 – 10 CSR 40-10.100 – Land Reclamation Commission
YYYY	10 CSR 22-1.010 – 10 CSR 22-1.030 – Dam and Reservoir Safety Council
FFFFF	Email dtd 3/11/13 sending copy of 10 CSR 20-6.020
GGGGG	Copy of 10 CSR 20-6.020 – Clean Water Commission
HHHHH	Email dtd 3/8/13 – Bill Zeaman to Robert Snyder – AA Quarry
KKKKK	Email dtd 2/19/13 – Robert Snyder to A. Bleibaum – Photos quarry land
CCCCC	Notification of Blasting Operations dtd 7/10/12 – Radmacher borrow site
DDDDDD	Portion of RBEC contract dtd 3/15/12 – Chouteau Parkway Improvements
EEEEEE	Photo of driveway entrance to RBEC AA land with sign board, dtd 6/3/14
FFFFFFF	Photo of rock checks (BMP) <sup>21</sup> on a portion of RBEC AA land, dtd 6/3/14
IIIII	10 CSR 20-6.200 – Clean Water Commission – Storm Water Regulations
JJJJJ	Petitioners’ Chart on Precipitation and AA Quarry Reports
KKKKKK	Aerial Photo dtd 4/10/10 – portion of AA land
LLLLLL	Aerial Photo dtd 2/16/12 – portion of AA land in KKKKKK

**Respondent’s Evidence**

No witnesses testified and no exhibits were introduced into evidence on behalf of Respondent.

**Applicant’s Evidence**  
**Testimony**

Robert Radmacher testified on behalf of Applicant.<sup>22</sup>

**Exhibits**

The following exhibits were received into evidence on behalf of Applicant.<sup>23</sup>

<b>EXHIBIT</b>	<b>DESCRIPTION</b>
AP 1	Geotechnical Boring Log – 8/18/11
AP 2	Land Reclamation Program Complaint Investigation – 6/19/12
AP 3	General Operating Permit MORA01538 – 7/6/12
AP 3A	Satellite Photograph Radmacher Land – Addendum to AP 3

AP 4	Storm Water Pollution Prevention Plan (SWPPP) Radmacher Borrow Site – 7/6/12
AP 4A	Best Management Practices (BMP) Diagram – Addendum to AP 4
AP 8	Permit Application – AA Quarry LLC – 11/15/12
AP 9	DNR Land Reclamation Program – Notice of Completed Application – 12/11/12
AP 10	DNR – Report of Compliance Inspection – 12/14/12
AP 12	DNR – Pre-Construction Prohibition Waiver for LLC Quarry LLC – 1/17/13
AP 16	General Operating Permit – MORA02837 – 3/13/13
AP 17	Storm Water Pollution Prevention Plan Radmacher Borrow Site – 3/13/13
AP 18	Notice of Director’s Recommendation Permit #1094 – 4/2/13
AP 19	Corps of Engineers – Notice of Permit Noncompliance – 4/2/13
AP 20	Radmacher Brothers Excavating Response to AP 19 – 4/4/13
AP 22	DNR – Notice of Non-regulation by Dam & Reservoir Safety Program – 5/15/13
AP 23	Radmacher Application for Dept. of Army Permit – 6/6/13
AP 24	DNR – Permit to Construct – 6/22/13
AP 25	DNR – Report of Compliance Inspection – 9/20/13
AP 26	Corps of Engineers – Conditional Approval Section 404 Permit – 6/6/14
AP 27	DNR – 401 Water Quality Compliance Certification – 4/28/14
AP 28	DNR – Stormwater Permit Requirements – Land Disturbance Activities – 8/12
AP 32	Photograph of Rock Check Dam on Radmacher Property
AP 39	Guidance to Identify Waters Protected by Clean Water Act – 8/15/13
AP 42	Photograph of Bulletin Board on Radmacher Property
AP 45	List of gravel purchased for Radmacher’s Chouteau Parkway Project – 5/12/14
AP 48	DNR – How to Obtain Quarry Permits – 9/10
AP 49	Email – Tucker Fredrickson to Robert Radmacher (100’ setback) – 8/23/13
AP 50	Affidavit of Publication – AA Quarry LLC – 1/17/13
AP 51	Photograph Rock Check Dam on Radmacher Property
AP 53	Holden Weather Station Report Summary – 1/1/13 – 8/9/13
AP 57	Email – Robert Radmacher to Kathy Lee (404 Permit Application) – 8/15/13
AP 58	Dam Topography – AA Quarry LLC – 4/19/13
AP 59	Dam Topography – AA Quarry LLC – 5/17/13
AP 60	Dam Topography – AA Quarry LLC – 5/17/13
AP 61	Photograph of water valves below rock check dam
AP 62	Photograph of rock check dam (access road & water valves marked)
AP 63	Photograph of portion of rock check dam
AP 65	DNR – Dam & Reservoir Safety - Agricultural Exemption Information Sheet
AP 66	DNR – Dam & Reservoir Safety – Rock Check Dam less than 35’ – 7/23/14
AP 67	Sketch – Cross Section of Rock Check Dam as constructed

## FINDINGS OF FACT

### **Uncontested Material Facts**

By Order dtd 1/13/14, the following were set as Uncontested Material Facts:<sup>24</sup>

1. Radmacher Land and Equipment Management Company, LLC, a Missouri limited liability company owned by Robert Radmacher and Thomas Radmacher, was formed in the year 2004, with its principal office and place of business located in Pleasant Hill, Missouri (hereafter "RLE).

2. In January 2011, RLE purchased the 520-acre site located on AA Highway in Johnson County, Missouri, which is the subject of this permit dispute.

3. On July 6, 2012, Radmacher Brothers Excavating Co., Inc. (another company owned by the Radmacher Brothers) ("RadBro") applied for and received on 7/6/12 a "General Operating Permit" under the Missouri Clean Water Law and the Federal Water Pollution Control Act for 9.15 acres of the site, effective 7/6/2012 through 2/7/2017. The permit allowed RadBro to engage in "construction or land disturbance activity" (e.g., clearing, grubbing, excavating, grading, and other activities . . .) together with storm water control measures, said activities being covered by the Land Disturbance Permit. On this permit application RadBro answered "No" to the question of whether its activities would disturb the Waters of America. (*July 6 MSOP MORA01538*)

4. On July 20, 2012, Tom and Robert Radmacher prepared Articles of Organization for AA Quarry, LLC, ("AA Quarry") a Missouri limited liability company (LC 1243292). The principal office and place of business of AA Quarry, LLC is also in Pleasant Hill, Missouri. The Missouri Secretary of State issued a certificate of organization for AA Quarry LLC on July 20, 2012 (*AA Quarry Articles of Organization*)

5. On November 16, 2012, AA Quarry prepared an application for land reclamation permit (*Permit Application for Industrial Mineral Mines under 10 CSR 40-10.020(1)*).

6. AA Quarry on December 26, 2012, submitted its "Application for Authority to Construct" to the Missouri DNR Air Pollution Control Program. (*December 19, 2012 letter from Aquaterra (for AA Quarry) to DNR.*)

7. Kyra L. Moore, Director, forwarded a letter dated January 17, 2013, to Robert Radmacher of AA Quarry approving construction activities for a new open pit quarry, but did not allow for operation. (*January 17, 2013 letter from DNR to AA Quarry.*)

8. DNR Land Reclamation Program advised AA Quarry on January 22, 2013 by certified letter that after the public notices had been given regarding the permit application, DNR had received letters from the public regarding requests for a public meeting. DNR inquired if AA Quarry would agree to a public meeting being held. AA Quarry so agreed. (*January 22, 2013 letter from DNR to AA Quarry.*) AA Quarry proceeded to a public hearing on March 7, 2013.

9. On January 30, 2013, the Kansas City Regional Director of the Department of Natural Resources, Andrea Collier, P.E., sent a letter to RadBro enclosing a public notice for the proposed "Missouri State Operating Permit to Discharge", directing RadBro to post the public notice on a bulletin board at its place of business. A draft of the "Missouri Operating Permit" (General Permit MOG 49 1251) was attached to the letter. (*January 30, 2013 letter from DNR to AA Quarry.*)

10. On or about March 5, 2013, Michael T. McFadden, Regional Project Manager of the Kansas City Corps of Engineers office, reviewed Applicant's construction activities at the dam and pond area and determined that Applicant was in noncompliance with General Condition 31 of the Nationwide Permit requiring a pre-construction notification to the Corps of Engineers district office before the start of construction activities.

11. Applicant wrote a letter to Mr. McFadden on March 6, 2013 stating that Applicant was authorizing Nathan Hamm, P.E., Vice President Program Manager for SCS Aqua Terra to prepare Applicant's 404 application to bring the project into compliance. (*March 6, 2013 letter from Applicant to Corps of Engineers.*)

12. On or about March 13, 2013, RadBro applied to the DNR Clean Water Commission for a second land disturbance permit (Missouri State Operating Permit, General Operating Permit No. MORA 02837). This permit also allowed for construction and land disturbance activities at the site and was issued effective March 13, 2013, again through the ePermitting system. (*DNR MSOP No. 02837.*)

13. On April 2, 2013, Respondent issued his written recommendation to the land Reclamation Commission to issue a new permit for a total of 214 acres of the 520-acre site.

Respondent's recommendation noted that concerns of the public were not all successfully resolved by the public meeting. The recommendation included Attachment 1, summary document prepared by DNR regarding the public meeting comments and staff responses. Respondent reported that he anticipated that members of the public would request a formal hearing and that timely requests and his recommendation would be placed on the agenda for the Land Reclamation Commission's May 23, 2013 meeting. (*April 2, 2013 LRP Staff Recommendation Memorandum*)

14. On April 2, 2013, Tucker Frederickson of the DNR Land Reclamation Program advised Petitioners of their rights to request a public hearing from the Land Reclamation Commission. (*April 2, 2013 letter from DNR to certain Petitioners.*) Petitioners thereafter requested a formal public hearing and between May 1 and May 3, 2013, Kevin Mohammadi advised that the Land Reclamation Commission would decide whether or not to grant a formal public hearing at the meeting on May 23, 2013. (*Example letter from DNR re: Request for Public Hearing and May 23, 2013 LRC Meeting.*)

15. On April 2, 2013, David R. Hibbs, Regulatory Program Manager in the Operational Division of the U.S. Department of the Corps of Engineers Kansas City District, issued to Applicant the official written "Notice of Noncompliance" with Permit No. NWK2013-00247 for the Applicant's project work asserting that the dam/pond work was located in the head waters of "several unnamed tributaries" to the south fork of the Blackwater River, located above Echo Lake. (*April 2, 2013 Corps of Engineers Letter.*)

16. Applicant sent another letter dated April 4, 2013 to the Corps of Engineers confirming Applicant's intent to bring the project into compliance with all permit requirements. (*April 4, 2013 Letter of Applicant to Corps of Engineers.*)

17. On May 23, 2013, Petitioners attended the Land Reclamation Commission, presented their statements and evidence, and requested that the Commission grant them standing and formal public hearing before the Commission determined whether to grant Applicant's permit request. The Commission voted to grant Petitioners a formal public hearing.

18. A final 404 application was submitted to the Corps on June 6, 2013. (*Application to Corps of Engineers for 404 Permit.*)

19. On July 22, 2013, a permit to construct was issued to AA Quarries LLC. Susan Heckenkamp, New Source Review Unit Chief of the Air Pollution Control Program of DNR, on

that date forwarded a letter and the permit to construct (No. 072013-014) to Robert Radmacher (*July 22, 2013 letter from DNR to AA Quarry.*) This permit was not appealed to the Air Conservation Commission. Future enforcement of the terms of that permit is through that Commission and the Air Pollution Control Program.

20. Respondent's determination that the application is complete is not challenged for purposes of the formal public hearing.

21. Respondent's staff has not found that Applicant has conducted mining operations without a permit in violation of the Land Reclamation Act.

22. AA Quarry, LLC did not send notices by certified mail of its intent to operate a surface mine on the Quarry Property to the last known addresses of all land owners of record owning real property contiguous, or adjacent, to the Quarry Property.

23. Applicant placed fill materials in a stream that the Army Corp of Engineers has designated as the Waters of America (the "**Stream**"), which created a dam.

24. The Dam and Reservoir Safety Program representative informed Applicant that if the Dam exceeded 35 feet in height, the State would be required to regulate the dam for safety.

25. Applicant did not obtain permit before lowering the height of the dam. The owner is required to obtain a construction permit only if the dam is over 35 feet. DRSP cannot verify that the dam was ever over 35 feet in height.

26. Applicant removed material from the top of the Radmacher Lower Dam and placed that material at the downstream side of the dam, but above the channel.

### **Testimony of Petitioner's Witnesses**

27. Robert Snyder:<sup>25</sup> Mr. Snyder testified relative to his investigation of the activities on the Radmacher land (*381 NW AA Highway*), where the proposed quarry is to be located. He provided his observations, opinions, conclusions, and conjectures relative to what he deemed to be eleven acts of noncompliance with laws and regulations administered by the Department of Natural Resources (DNR). Mr. Snyder is not qualified by knowledge, skill, experience, training or education as an expert<sup>26</sup> with regard to the enforcement of the laws and regulations, of the Land Reclamation Commission, the Clean Water Commission, the Dam and Reservoir Safety Council, or any other entity of the Department of Natural Resources, or the Army Corps of Engineers. Mr. Snyder's testimony failed to establish that any entity of the DNR had issued any notice of violation or notice of an act of noncompliance for any of the eleven acts claimed by

Petitioners to be acts of noncompliance. His testimony failed to establish that any entity of the DNR had issued any notice of an act resulting in harm to the environment for any of the eleven acts claimed by Petitioners to be acts of noncompliance. The testimony failed to establish any alleged act of noncompliance with a law administered by the DNR which resulted in harm to the environment.

28. Kevin Mohammadi:<sup>27</sup> Mr. Mohammadi testified as to the permitting process in the present matter. None of his testimony established any entity of the DNR had issued any notice of violation or notice of an act of noncompliance for any of the eleven acts claimed by Petitioners to be acts of noncompliance. His testimony did not establish that any entity of the DNR had issued any notice of an act resulting in harm to the environment for any of the eleven acts claimed by Petitioners to be acts of noncompliance. The testimony failed to establish any alleged act of noncompliance with a law administered by the DNR which resulted in harm to the environment.

29. Michael Elkana:<sup>28</sup> Mr. Elkana testified as to his involvement as a permit writer for the Clean Water Commission and his meeting and discussion with Mr. Snyder in February 2013. None of his testimony established any entity of the DNR had issued any notice of violation or notice of an act of noncompliance for any of the eleven acts claimed by Petitioners to be acts of noncompliance. His testimony did not establish that any entity of the DNR had issued any notice of an act resulting in harm to the environment for any of the eleven acts claimed by Petitioners to be acts of noncompliance. The testimony failed to establish any alleged act of noncompliance with a law administered by the DNR which resulted in harm to the environment.

30. Linda Carroll:<sup>29</sup> Ms. Carroll testified as to a visit that she made to the Radmacher property on Route AA, sometime in 2013. None of her testimony established any entity of the DNR had issued any notice of violation or notice of an act of noncompliance for any of the eleven acts claimed by Petitioners to be acts of noncompliance. Her testimony did not establish that any entity of the DNR had issued any notice of an act resulting in harm to the environment for any of the eleven acts claimed by Petitioners to be acts of noncompliance. The testimony failed to establish any alleged act of noncompliance with a law administered by the DNR which resulted in harm to the environment.

31. Jim Martin:<sup>30</sup> Mr. Martin testified to his observations and the photographs that he took of construction of the lower dam on the Radmacher property in 2013. None of his testimony established any entity of the DNR had issued any notice of violation or notice of an act of noncompliance for any of the eleven acts claimed by Petitioners to be acts of noncompliance. His testimony did not establish that any entity of the DNR had issued any notice of an act resulting in harm to the environment for any of the eleven acts claimed by Petitioners to be acts of noncompliance. The testimony failed to establish any alleged act of noncompliance with a law administered by the DNR which resulted in harm to the environment.

32. Misty Cutright:<sup>31</sup> Ms. Cutright testified concerning her attendance at meetings concerning the proposed quarry on the Radmacher property. None of her testimony established any entity of the DNR had issued any notice of violation or notice of an act of noncompliance for any of the eleven acts claimed by Petitioners to be acts of noncompliance. Her testimony did not establish that any entity of the DNR had issued any notice of an act resulting in harm to the environment for any of the eleven acts claimed by Petitioners to be acts of noncompliance. The testimony failed to establish any alleged act of noncompliance with a law administered by the DNR which resulted in harm to the environment.

33. Aaron Bleibaum:<sup>32</sup> Mr. Bleibaum testified his involvement as an employee of the DNR in relation to the two land disturbance permits issued for the Radmacher property and an inspection by Patrick Peltz of the land disturbance project on that property. None of his testimony established any entity of the DNR had issued any notice of violation or notice of an act of noncompliance for any of the eleven acts claimed by Petitioners to be acts of noncompliance. His testimony did not establish that any entity of the DNR had issued any notice of an act resulting in harm to the environment for any of the eleven acts claimed by Petitioners to be acts of noncompliance. The testimony failed to establish any alleged act of noncompliance with a law administered by the DNR which resulted in harm to the environment.

34. James Coles:<sup>33</sup> Mr. Coles testified relative to his routine water pollution compliance inspection of the Radmacher property on September 4, 2013. This inspection resulted in a finding of two acts of noncompliance at the Radmacher property.<sup>34</sup> Neither act of noncompliance was one of the eleven acts claimed by Petitioners as an act of noncompliance. None of Mr. Cole's testimony established any entity of the DNR had issued any notice of violation or notice of an act of noncompliance for any of the eleven acts claimed by Petitioners

to be acts of noncompliance. His testimony did not establish that any entity of the DNR had issued any notice of an act resulting in harm to the environment for any of the eleven acts claimed by Petitioners to be acts of noncompliance. The testimony failed to establish any alleged act of noncompliance with a law administered by the DNR which resulted in harm to the environment.

35. James Helgason:<sup>35</sup> Mr. Helgason testified concerning a meeting, phone conversations and email correspondence with Robert Snyder. None of his testimony established any entity of the DNR had issued any notice of violation or notice of an act of noncompliance for any of the eleven acts claimed by Petitioners to be acts of noncompliance. His testimony did not establish that any entity of the DNR had issued any notice of an act resulting in harm to the environment for any of the eleven acts claimed by Petitioners to be acts of noncompliance. The testimony failed to establish any alleged act of noncompliance with a law administered by the DNR which resulted in harm to the environment.

36. Paul Simon:<sup>36</sup> Mr. Simon testified concerning the Dam Reservoir Safety Program and the inspection of the dam that was constructed on the Radmacher property. None of his testimony established any entity of the DNR had issued any notice of violation or notice of an act of noncompliance for any of the eleven acts claimed by Petitioners to be acts of noncompliance. His testimony did not establish that any entity of the DNR had issued any notice of an act resulting in harm to the environment for any of the eleven acts claimed by Petitioners to be acts of noncompliance. The testimony failed to establish any alleged act of noncompliance with a law administered by the DNR which resulted in harm to the environment.

37. William Zeaman:<sup>37</sup> Mr. Zeaman testified concerning various aspects of surface mining under the jurisdiction of the Land Reclamation Program and application of the applicable statutes and regulations applicable to the proposed quarry on the Radmacher property. None of his testimony established any entity of the DNR had issued any notice of violation or notice of an act of noncompliance for any of the eleven acts claimed by Petitioners to be acts of noncompliance. His testimony did not establish that any entity of the DNR had issued any notice of an act resulting in harm to the environment for any of the eleven acts claimed by Petitioners to be acts of noncompliance. The testimony failed to establish any alleged act of noncompliance with a law administered by the DNR which resulted in harm to the environment.

38. Larry Slechta:<sup>38</sup> Mr. Slechta testified relative to his investigation of a complaint received by the Land Reclamation Program with regard to activity on the Radmacher property. None of his testimony established any entity of the DNR had issued any notice of violation or notice of an act of noncompliance for any of the eleven acts claimed by Petitioners to be acts of noncompliance. His testimony did not establish that any entity of the DNR had issued any notice of an act resulting in harm to the environment for any of the eleven acts claimed by Petitioners to be acts of noncompliance. The testimony failed to establish any alleged act of noncompliance with a law administered by the DNR which resulted in harm to the environment.

39. Thomas Radmacher:<sup>39</sup> Mr. Radmacher testified concerning the business activities of Radmacher Brothers Land Management and Radmacher Excavating as it related to matters connected with the Route AA Radmacher property. None of his testimony established any entity of the DNR had issued any notice of violation or notice of an act of noncompliance for any of the eleven acts claimed by Petitioners to be acts of noncompliance. His testimony did not establish that any entity of the DNR had issued any notice of an act resulting in harm to the environment for any of the eleven acts claimed by Petitioners to be acts of noncompliance. The testimony failed to establish any alleged act of noncompliance with a law administered by the DNR which resulted in harm to the environment.

40. Nathan Hamm:<sup>40</sup> Mr. Hamm testified relative to his activities and involvement in the obtaining of the 404 Permit from the Army Corps of Engineers for the dam that was constructed on the Radmacher property. None of his testimony established any entity of the DNR had issued any notice of violation or notice of an act of noncompliance for any of the eleven acts claimed by Petitioners to be acts of noncompliance. His testimony did not establish that any entity of the DNR had issued any notice of an act resulting in harm to the environment for any of the eleven acts claimed by Petitioners to be acts of noncompliance. The testimony failed to establish any alleged act of noncompliance with a law administered by the DNR which resulted in harm to the environment.

41. Patrick Peltz:<sup>41</sup> Mr. Peltz testified concerning his inspection of the Radmacher property on November 28, 2012 and his report on the inspection.<sup>42</sup> None of his testimony established any entity of the DNR had issued any notice of violation or notice of an act of noncompliance for any of the eleven acts claimed by Petitioners to be acts of noncompliance. His testimony did not establish that any entity of the DNR had issued any notice of an act

resulting in harm to the environment for any of the eleven acts claimed by Petitioners to be acts of noncompliance. The testimony failed to establish any alleged act of noncompliance with a law administered by the DNR which resulted in harm to the environment.

### **Findings Related to Theory of Petitioners' Case**

42. No Claim of Impairment. Petitioners presented no evidence and made no argument that their health, safety or livelihood would be unduly impaired by impacts from activities that the recommended mining permit would authorize.<sup>43</sup> See, THEORY OF PETITIONERS' CASE, *infra*.

43. No Claim of Past Noncompliance. Petitioners presented no evidence and made no argument that the permit application should be denied based on past noncompliance during the five year period immediately preceding the date of the permit application that suggests a reasonable likelihood of future acts of noncompliance.<sup>44</sup> See, THEORY OF PETITIONERS' CASE, *infra*.

44. Petitioners' Allegation 1 – No Act of Noncompliance. The activity complained of under Petitioners' Allegation 1 (land disturbance without a permit) did not constitute an act of noncompliance of an environmental law administered by the DNR, i.e. Clean Water Law. The land disturbance came under the farm land and agricultural exemption to the requirement to obtain a permit. See, Land Disturbance Prior to Obtaining Required Permits, *infra*.

45. Petitioners' Allegation 1 – No Environmental Harm. There was no harm to the environment resulting from the activities complained of under Petitioners' Allegation 1. The land disturbance was exempt activity under the Clean Water Law. See, Issue of Harm to the Environment Common to Each Allegation, and Land Disturbance Prior to Obtaining Required Permits, *infra*.

46. Petitioners' Allegation 2 – No Act of Noncompliance. The activity complained of under Petitioners' Allegation 2 (false and inaccurate information on application for land disturbance permit) did not constitute an act of noncompliance of an environmental law administered by the DNR, i.e. Clean Water Law. There was no intention to provide false, misleading or inaccurate information in the application. See, False and Inaccurate Information on Permit Application – MORA 01538, *infra*.

47. Petitioners' Allegation 2 – No Environmental Harm. There was no harm to the environment resulting from the activities complained of under Petitioners' Allegation 2. No

harm to the environment was caused by the answer given on the permit application. *See, Issue of Harm to the Environment Common to Each Allegation*, and *False and Inaccurate Information on Permit Application – MORA 01538, infra*.

48. Petitioners’ Allegation 3 – No Act of Noncompliance. The activity complained of under Petitioners’ Allegation 3 (location of the public notice sign – MORA 01538) did not constitute an act of noncompliance of an environmental law administered by the DNR, i.e. Clean Water Law. There was no intention on the part of Radmacher Brothers to not properly locate the sign and their understanding was that the sign was properly located at the entrance to the Borrow Site. *See, Improper Placement of Notification Sign – MORA 01538, infra*.

49. Petitioners’ Allegation 3 – No Environmental Harm. There was no harm to the environment resulting from the activities complained of under Petitioners’ Allegation 3. No harm to the environment was caused by the locating of the sign at the entrance to the Radmacher Borrow site, as opposed to the entrance to the Radmacher Land. *See, Issue of Harm to the Environment Common to Each Allegation*, and *Improper Placement of Notification Sign – MORA 01538, infra*.

50. Petitioners’ Allegation 4 – No Act of Noncompliance. The activity complained of under Petitioners’ Allegation 4 (quarrying for commercial purposes without a permit) did not constitute an act of noncompliance of an environmental law administered by the DNR, i.e. Land Reclamation Law. Radmacher Brothers farm related improvements involving the excavation and using of limestone on the site were exempted activities. As to the borrow operations, there was no evidence that the borrow operations involved anything other than borrowing excavated limestone materials that were unprocessed, therefore not requiring a LRC permit. *See, Quarrying for Commercial Purposes Without LRC Permit, infra*.

51. Petitioners’ Allegation 4 – No Environmental Harm. There was no harm to the environment resulting from the activities complained of under Petitioners’ Allegation 4. No harm to the environment can be concluded from activity that is exempt from having a permit (farm land and agricultural use) or that is permitted (borrow operations) without a permit. *See, Issue of Harm to the Environment Common to Each Allegation*, and *Quarrying for Commercial Purposes Without LRC Permit, infra*.

52. Petitioners’ Allegation 5 – No Act of Noncompliance. The activity complained of under Petitioners’ Allegation 5 (not mailing certified notice letters to certain landowners) did not

constitute an act of noncompliance of an environmental law administered by the DNR, i.e. Land Reclamation Law. AA Quarry LLC acted based upon the instructions and information provided by the LRC staff on this point. There was no land owned by neighboring landowners that was contiguous or adjacent to the proposed mine plan land. *See, Notices By Certified Mail – Permit # 1094, infra.*

53. Petitioners’ Allegation 5 – No Environmental Harm. There was no harm to the environment resulting from the activities complained of under Petitioners’ Allegation 5. No harm to the environment can be concluded from the fact that Applicant did not send certified notice letters. *See, Issue of Harm to the Environment Common to Each Allegation, and Notices By Certified Mail – Permit #1094, infra.*

54. Petitioners’ Allegation 6 – No Act of Noncompliance. The activity complained of under Petitioners’ Allegation 6 (placement of BMP’s under MORA 01538) did not constitute an act of noncompliance of an environmental law administered by the DNR, i.e. Clean Water Law. The BMP’s put in place by Radmacher Brothers were the same as those identified in the map attached to the SWPPP. Therefore, the BMP’s were in compliance with the Permit, the SWPPP, the Clean Water Act and the Clean Water Act Regulations. *See, Placement of BMP’s – MORA 01538, infra.*

55. Petitioners’ Allegation 6 – No Environmental Harm. There was no harm to the environment resulting from the activities complained of under Petitioners’ Allegation 6. No harm to the environment can be concluded from the fact that Radmacher Brothers constructed the BMP’s that they represented they would construct and which were not objected to or denied by the Clean Water Program. *See, Issue of Harm to the Environment Common to Each Allegation, and Placement of BMP’s – MORA 01538, infra.*

56. Petitioners’ Allegation 7 – No Act of Noncompliance. The activity complained of under Petitioners’ Allegation 7 (SWPPP not in compliance with MORA 01538 permit) did not constitute an act of noncompliance of an environmental law administered by the DNR, i.e. Clean Water Law. The SWPPP was not shown to be defective or deficient. Nor was it established to not be in compliance with the Permit, and applicable laws and regulations. Therefore, the SWPPP was proper under the Permit, the Clean Water Act and the Clean Water Act Regulations. *See, SWPPP – MORA 01538, infra.*

57. Petitioners' Allegation 7 – No Environmental Harm. There was no harm to the environment resulting from the activities complained of under Petitioners' Allegation 7. No harm to the environment can be concluded from the fact that Radmacher Brothers prepared and presented the SWPPP as required and were never advised by any staff of the CWC that the SWPPP was not proper under the Permit. *See, Issue of Harm to the Environment Common to Each Allegation, and SWPPP – MORA 01538, infra.*

58. Petitioners' Allegation 8 – No Act of Noncompliance. The activity complained of under Petitioners' Allegation 8 (completeness and accuracy of land disturbance inspection forms) did not constitute an act of noncompliance of an environmental law administered by the DNR, i.e. Clean Water Law. No determination of incompleteness or inaccuracy of the forms was concluded by any member of the CWC staff who was involved in the inspections of the Radmacher Borrow Site. *See, Land Disturbance Inspection Forms – MORA 01538, infra.*

59. Petitioners' Allegation 8 – No Environmental Harm. There was no harm to the environment resulting from the activities complained of under Petitioners' Allegation 8. No harm to the environment can be concluded from the fact that Radmacher Brothers completed the land disturbance inspection forms as they understood the forms were to be completed. Furthermore, no harm to the environment can be concluded where there was no evidence of any sediment from the Borrow Site leaving the Radmacher Brothers property and entering the waters of the state. *See, Issue of Harm to the Environment Common to Each Allegation, and Land Disturbance Inspection Forms – MORA 01538, infra.*

60. Petitioners' Allegation 9 – No Act of Noncompliance. The activity complained of under Petitioners' Allegation 9 (failure to maintain on site the Land Disturbance Forms and SWPPP) did not constitute an act of noncompliance of an environmental law administered by the DNR, i.e. Clean Water Law. No conclusion was made by any member of the CWC staff who was involved in the inspections of the Radmacher Borrow Site that the documents were required to be maintained on site continuously, even when business operations were not in progress and no activity was being conducted on site. *See, Land Disturbance Forms & SWPPP on Site – MORA 01538, infra.*

61. Petitioners' Allegation 9 – No Environmental Harm. There was no harm to the environment resulting from the activities complained of under Petitioners' Allegation 9. No harm to the environment can be concluded from the fact that Radmacher Brothers maintained a

copy of the land disturbance forms and SWPPP on site only when the site was actually being worked, as opposed to leaving the documents on site at all times. See, Issue of Harm to the Environment Common to Each Allegation, and *Land Disturbance Form & SWPPP on Site – MORA 01538, infra.*

62. Petitioners’ Allegation 10 – No Act of Noncompliance. The activity complained of under Petitioners’ Allegation 10 (failure to obtain the Federal 404 Permit) did not constitute an act of noncompliance of an environmental law administered by the DNR. Instead, the activity involved a federal act. Present acts of noncompliance must be of an environmental law administered by the Missouri DNR. The federal clean water act is not administered by the DNR. Therefore, Allegation 10 does not provide a basis upon which Permit # 1094 can be denied by the LRC. See, Permit 404 – Federal Clean Water Act, infra.

63. Petitioners’ Allegation 10 – No Environmental Harm. There was no harm to the environment resulting from an act of noncompliance of a state environmental law. The purpose of a 404 Permit is to permit or authorize an activity which has some impact on the waters of the United States. In this instance, the construction of a dam on an ephemeral stream of the waters of the United States which resulted in a loss of a portion of the stream and the construction of an impoundment of water. See, Issue of Harm to the Environment Common to Each Allegation, and *Permit 404 – Federal Clean Water Act, infra.*

64. Petitioners’ Allegation 11 – No Act of Noncompliance. Dam Construction The activity complained of under Petitioners’ Allegation 11 (construction of a dam without a permit) did not constitute an act of noncompliance of an environmental law administered by the DRSP, i.e. Dam and Reservoir Safety Law. The dam as constructed was exempt from any permit requirement under the Dam Safety Law. There was no act of noncompliance in not obtaining a permit when none was required in the first place. See, Dam Construction, infra.

65. Petitioners’ Allegation 11 – No Environmental Harm. There was no harm to the environment resulting from an act of noncompliance of a state environmental law. The lawful construction of the dam was not shown to have resulted in any harm to the environment. See, Issue of Harm to the Environment Common to Each Allegation, and *Dam Construction, infra.*

**CONCLUSIONS OF LAW**  
**and**  
**DECISION**

**JURISDICTION**

The hearing in this matter is authorized by § 444.773.3 RSMo, which provides in relevant part: “...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.”<sup>45</sup>

The Hearing Officer was duly appointed by the Land Reclamation Commission of the Department of Natural Resources to conduct a hearing and recommend to the Commission a decision.<sup>46</sup> The Hearing Officer and the Commission have jurisdiction over this appeal.

**HEARING PROCEDURE**

Section 444.789 provides that the hearing held in this matter is a contested case, that the parties may conduct discovery, make oral arguments, introduce testimony and evidence, and cross-examine witnesses. The statute authorizes a member of the Missouri Bar to be appointed to hold the hearing and make recommendations, with the final decision reserved to the Commission. The Hearing Procedure mandated by statute and regulation was followed in this case.<sup>47</sup>

**LAND RECLAMATION COMMISSION AUTHORITY**

The Land Reclamation Commission is the agency given authority to administer the Land Reclamation Act.<sup>48</sup> No statutory or regulatory authority is given to the LRC, or the Land Reclamation Program, with regard to enforcement or making determinations of violations or acts of noncompliance under any other environmental law administered by the Department of Natural Resources. More specifically, there is no statutory or regulatory basis upon which the LRC can administer, enforce, or make a determination of noncompliance with regard to the Missouri Clean Water Law<sup>49</sup> or the Missouri Dam and Reservoir Safety Law.<sup>50</sup> The LRC has no authority relative to the administration or enforcement of §404 the Federal Clean Water Act.<sup>51</sup>

An administrative entity such as the LRC has only such authority and powers which the legislature has expressly or impliedly conferred.<sup>52</sup> Therefore, as a matter of law, the LRC is without authority to rule that any given action is a violation or an act of noncompliance with either the Missouri Clean Water Law or the Missouri Dam and Reservoir Safety Law. Absent a determination by the agencies charged with the administration and enforcement of these two laws that an act of noncompliance has occurred, the LRC has no basis upon which it can find an act of noncompliance with either of the two cited laws.

Under the statutes and regulations which govern the LRC no authority is given to an individual citizen or group of citizens to make a determination that an entity has committed an act of noncompliance with regard to the Land Reclamation Law or Land Reclamation Regulations. Therefore, Petitioners, as a matter of law, have no authority to determine that Applicant was guilty of an act of noncompliance.

#### **CLEAN WATER COMMISSION AUTHORITY**

The Clean Water Commission (CWC) is the agency given authority to administer the Missouri Clean Water Law. The power to determine if an act of noncompliance with the Clean Water Law has occurred rests solely with the CWC and the staff thereof. There is no provision in the Clean Water Law which grants to any other entity or to a citizen or citizens the authority to determine acts of noncompliance. In the absence of a finding by the appropriate personnel of the Department of Natural Resources – Clean Water section that certain actions constitute an act or acts of noncompliance, a party cannot be deemed by the LRC to have committed an act of noncompliance. Therefore, as a matter of law allegations and assertions by Petitioners of acts of noncompliance under the Clean Water Law have no merit where there was no determination by the staff of the CWC that an act of noncompliance had occurred.

#### **DAM & RESERVOIR SAFETY COUNCIL AUTHORITY**

The Dam and Reservoir Safety Council is the agency given authority to administer the Dam and Reservoir Safety Law. The power to determine if an act of noncompliance with the DRSL has occurred rests solely with the Council and the staff thereof. There is no provision in the DRSL which grants to any other entity or to a citizen or citizens the authority to determine acts of noncompliance. In the absence of a finding by the appropriate personnel of the Council that certain actions constitute an act or acts of noncompliance, a party cannot be deemed by the LRC to have committed an act of noncompliance. Therefore, as a matter of law allegations and

assertions by Petitioners of acts of noncompliance under the DRSL have no merit where there was no determination by the staff of the Council that an act of noncompliance had occurred.

### **PETITIONER'S BURDEN OF PROOF**

#### ***Petitioners' Argument Relating to Burden of Proof***

Petitioners assert, under their interpretation of §444.773.4 RSMo, that their only “obligation is simply to ‘demonstrate multiple present acts of noncompliance, of any environmental law administered by the Department of Natural Resources at any single facility in Missouri that resulted in harm to the environment.’”<sup>53</sup> Petitioners argue that the burden to demonstrate present acts of noncompliance does not require them “to demonstrate actual documented violations of environmental law, only non-compliant activity which has caused harm to the environment.”<sup>54</sup> Petitioners assert that all that is necessary for them to establish present acts of noncompliance is to present testimony and photographic evidence. The position of Petitioners is that introducing a photograph and having Mr. Snyder provide his unsupported opinion and conclusion of what the photograph depicts constitutes a demonstration of “non-compliant activity which has caused harm to the environment.”<sup>55</sup> In other words, Petitioners claim there is no evidentiary standard applicable to them. Their argument is that all they need to do is present some document and the unsubstantiated conjecture and surmise of Mr. Snyder and non-compliant activity and harm to the environment has been established. The Hearing Officer is not so persuaded and finds the position taken by Petitioners to be critically and fatally flawed for the reasons that will now be set forth.

#### ***Petitioners' Burden of Proof Argument in Error***

Petitioners misinterpret §444.773.4 RSMo concerning Petitioners' burden of proof. §444.773.3 states that if the Director recommends issuance of a permit it is to be issued except in those instances where a petitioner's health, safety and livelihood will be unduly impaired by issuance of the permit.<sup>56</sup> The statute first addresses the issue of direct impairment of the petitioner. It states that where the Commission finds, based upon competent and substantial scientific evidence on the record, that an interested party's (petitioner's) health, safety and livelihood will be unduly impaired by issuance of the permit, the Commission may deny it. However, Petitioners in this instance elected to not proceed under this theory, but conceded that the operation of the AA quarry under Permit # 1094 would not unduly impair their health, safety and livelihood.

Section 4 goes on to provide a petitioner a second method to satisfy its obligations under the statute. This method, more or less, relates to an indirect impact to the public at large and possibly the environment. This method can be generally identified as a theory of noncompliance. Section 4 provides that where the petitioner can demonstrate by competent and substantial scientific evidence past acts of noncompliance by the applicant at other locations in Missouri which suggest a likelihood of noncompliance as to the current application, that the permit may be denied. However, limits are placed on this indirect impairment or alternative means of proof.

For example, the statute says that past acts standing alone cannot meet the test. Such past acts (*committed within the five year period immediately preceding the date of the permit application*) must indicate the probability of future noncompliance and future noncompliance cannot be found unless (a) the noncompliance is caused, or has the potential to cause, risk of harm to health or environment, (b) has caused, or has potential to cause, pollution, (c) was knowingly committed or (d) is other than "minor" as defined by the United States Environmental Protection Agency. In the event that the applicant has no history of noncompliance (*five years prior to date of application*) at other locations in Missouri, the statute also permits a petitioner to satisfy the "noncompliance" alternative by a second method. The petitioner can demonstrate "present acts" of noncompliance or that there is a reasonable likelihood the applicant will not comply in the future. The statute goes on to state that this present-acts alternative ". . . will satisfy the noncompliance requirement of this subsection."

Therefore, it is clear that both past acts of noncompliance and present acts of noncompliance can be demonstrated in order to satisfy the indirect noncompliance alternative to the direct undue impairment alternative in the statute. In this case, Petitioners have elected to forgo any attempt to establish any acts of noncompliance in the five years prior to the date of the application (November 15, 2012). Petitioners have conceded that there were no acts of noncompliance by Applicant or Radmacher Brothers Companies at any other site in Missouri.

However, like the past noncompliance alternative, the present noncompliance alternative has limits. There must be

- (1) Multiple noncompliances, not a single noncompliance; and
- (2) The noncompliance must be of a law administered by the Missouri DNR; and

- (3) At a single facility; and
- (4) Result in harm to the environment; or
- (5) Impair the health, safety or livelihood of a person outside of the facility (apparently not necessarily the petitioner's).

Therefore, the statute is clear in setting forth two alternative methods of proof regarding permit challenges:

- (1) Personal, direct, undue impairment to the Petitioners' health, safety and livelihood by Applicant's quarry operation; or
- (2) Possible indirect impairment to the public at large by acts of noncompliance with laws of Missouri consisting of two parts
  - (a) Past acts of noncompliance at other facilities indicating potential for future acts of noncompliance; or
  - (b) Present acts of noncompliance or facts illustrating potential future noncompliance.

In other words, the two possible grounds upon which denial of the permit might be based are undue impairment to Petitioners health, safety and livelihood or acts of noncompliance, past or present. Both the statute §444.773.3 and 4, RSMo., and the regulation 10 C.S.R. 40-10.080(3) set out these two alternatives, both of which require proof by competent and substantial scientific evidence as to the Petitioners' burden of going forward or burden of production. The statute, especially subsection 4, as well as the regulation must be read together in their entirety.

The Petitioners would have the Hearing Officer break the requirement down into three separate alternatives rather than two; i.e., (1) direct impairment, (2) past noncompliances, and (3) present noncompliances, so that the Petitioners might argue that the present noncompliance requirement does not require proof by competent and substantial scientific evidence. Petitioners make that argument based on the theory that there is no predicate statement about the quality of proof prior to the statute discussing present noncompliances.

This argument runs directly contrary to the language of the statute that specifically states in Subsection (4) (§444.773.4) that present acts ". . . will satisfy the noncompliance requirement of this subsection." The only other noncompliance requirement in the subsection is the past acts segment. Therefore, the language can mean nothing other than present acts of noncompliance will in fact satisfy the past acts of noncompliance alternative, which requires proof by competent

and substantial scientific evidence. Therefore, the standard of competent and substantial scientific evidence applied to a direct impairment claim is likewise the same standard to be applied to the acts of noncompliance claim.

There is no legal support to the argument that the legislature intended Petitioners to prove impairment to their health, safety and livelihood and past acts of noncompliance by competent and substantial scientific evidence, then give Petitioners a pass or a bye on the burden of proof for present acts of noncompliance where the latter is simply intended to satisfy the former (if demonstrated). The argument is illogical and contrary to the entire intent of the section. It reaches an absurd result.

Furthermore, the present acts requirement also requires a demonstration that the ". . . noncompliance resulted in harm to the environment or impaired the health, safety or livelihood of a person outside of the facility." Again, it makes no sense that this could be proven but not by virtue of the burden of competent and substantial scientific evidence. In *Lake Ozark/Osage Beach Joint Sewer Board v. The Missouri Department of Natural Resources, the Land Reclamation Commission and Magruder Limestone Company, Inc.*, 326 S.W.3d 38 (Mo.App. W.D. 2010), the court reviewed the burden of proof issue and clearly indicated the burden is broken down into two categories, the burden of production and the burden of persuasion. The Court found that the initial burden of production is upon Petitioners to produce evidence sufficient to have the issue decided by the fact finder. To meet that burden, Petitioners must present competent and substantial scientific evidence of impact. It is only at that point that the burden shifts to the Applicant to present competent and substantial scientific evidence that Petitioners (health and safety) ". . . will not be unduly impaired by the impact from the permitted activity." *Id.* at p. 43, 44.

Following Petitioners' argument that they need not prove present acts of noncompliance and harm to the environment by competent and substantial scientific evidence, would not Applicant then be excused from satisfying its burden of persuasion by bringing forth competent and substantial scientific evidence? If such were to be the case, then to adopt Petitioners' argument would set a portion of §444.773.4, outside of the statute and established an entirely new and different proof scheme contrary to the statute, the regulation, and Missouri Court of Appeals Western District statements in *Lake Ozark v. Missouri DNR*. Such a line of reasoning is illogical and would result in an unreasonable, illogical, oppressive or absurd result.

Furthermore, tying the past acts and present acts alternative together is *Lincoln County Stone Co., Inc. v. Koenig*, 21 S.W.3d 142 (Mo.App. E.D. 2000), stating that statute should be considered in such a way as to avoid unreasonable, oppressive or absurd results. *Id.* at 148. The court there looked at the issue of whether both past and present acts of noncompliance should be the subject of the Commission's consideration for the effect upon health, safety and livelihood and permit issuance. The court found the clear intent of the legislature to look at both in order to avoid an absurd interpretation result. Although the burden of proof itself was not the subject of direct discussion by the court, the court did make it clear that the two were inextricably intertwined in the statute and to separate them as if they were totally different made for an incorrect interpretation.

"If one were to interpret §444.773.3 to permit consideration of past acts of noncompliance as being dispositive . . . a permit seeker could never put to rest past noncompliance. . . . Conversely, if [the] section . . . were interpreted only to pertain to current noncompliance, a permit seeker could preclude the hearing petitioner from bringing suit by simply complying with applicable laws and regulations at the time the hearing petitioner requested the hearing." *Id.* at 147-148.

In a footnote on page 148 the court also noted:

"A hearing petitioner must show what the language of the statute requires, namely a noncompliance with applicable laws and regulations by the permit seeker. . . . Any remedy to prevent the operation of a mine short of noncompliance is outside the purview of the Act."

The court then went on to make it clear that the Hearing Officer and the Commission can look at both past and present noncompliance to satisfy the statute and as a means to satisfy the noncompliance requirement of the statute. Again, the noncompliance requirement is in effect a single requirement that may be demonstrated by both present and past acts of noncompliance.

As to the burden of proof stated in the statute, there is no indication on the part of the legislature to adopt two different burdens of proof for essentially what is a single ground to deny a permit. Since both past and present acts of noncompliance can be used to satisfy the noncompliance requirement of the statute, it is abundantly clear that both must be demonstrated by the same evidentiary standard – competent and substantial scientific evidence.

Finally, assuming for the sake of discussion only, and not finding, that Petitioners' position that they are not required to prove acts of noncompliance and resulting harm by competent and substantial scientific evidence then it must follow that the Applicant would

likewise be under no burden of persuasion to present competent and substantial scientific evidence in response and rebuttal to the Petitioners' demonstration. Nevertheless, in each instance alleged by Petitioners, the evidence on the record adduced from the Petitioners' own witnesses, as well as the testimony proffered from Robert Radmacher, clearly provided a sound foundation and probative basis upon which it can only be concluded that Applicant carried its burden of persuasion that Applicant and Radmacher Brothers were not guilty of any acts of noncompliance of any state environmental law which resulted in harm to the environment.

***Evidence to Establish an Act of Noncompliance***

The question then becomes what establishes an act of noncompliance under the LRC statute and regulations? Snyder Exhibit AAA (*Report of Compliance Inspection, dtd 9/20/13*) provides the example. This is the report of the inspection conducted by Jimmy Coles of the Missouri DNR, Clean Water Section (*Coles' Report*). It is noted the Coles' Report does not represent an act of noncompliance asserted by Petitioners in the theory of their case. It is not one of the eleven alleged acts of noncompliance. Accordingly, it provides no basis upon which Permit # 1094 can be denied.

The Coles Report was the result of an inspection by a DNR staff person under the Clean Water Law. It illustrates what substantial and persuasive scientific evidence is to demonstrate an act of noncompliance with an environmental law. Mr. Coles as an employee of DNR operating under the authority of the Clean Water Commission made his inspection on September 4, 2013. The result of that inspection was: "The facility was found to be out of compliance with the MCWL, the Clean Water Commission Regulations and MSOP MO-Rao2837, based upon the observations made at the time of the inspection."<sup>57</sup>

A person with training to conduct a compliance inspection acted. This individual was not acting under his own authority, but was acting under the jurisdiction and authority of the sole entity empowered to make determinations of compliance or noncompliance with the Missouri Clean Water Law, the Clean Water Commission Regulations and Permit 02837. There is no authority given by statute or regulation conferring upon any private citizen the authority to enforce the MCWL, CWC Regulations or the provisions of Permit 02837. Mr. Coles concluded that as a result of his inspection there were two "unsatisfactory features" at the Radmacher Brothers Borrow Site. He also determined the "required action" to address the unsatisfactory features was taken by the operator as required and "no further action is required at this time."<sup>58</sup>

This completed action established an act of noncompliance consisting of two unsatisfactory features.

There exists in statutes and regulations governing the various areas of responsibility for the DNR the requirements necessary for any entity of DNR to address matters of noncompliance. It is the DNR entities having jurisdiction over the given area of law and regulation that establish when a company is guilty of an act of noncompliance. There is no statute or regulation that places in the hands of a private citizen authority to enforce DNR statutes, regulations and permits and make a determination that an act of noncompliance has occurred. Therefore, the only means by which an act of noncompliance can be established is by and through the inspection process, carried out by a person or person authorized under the appropriate statutes and regulations to conduct the applicable inspection.

As will be address, *infra*, Petitioners evidence has failed as to each of their separate eleven alleged acts of noncompliance to establish a single instance in which the result of an inspection by the appropriate DNR entity resulted in a Report of Compliance Inspection concluding any act of noncompliance that resulted in harm to the environment.

#### ***General Burden of Proof***

The burden of proof as it relates to the issues raised (*assertions of acts of noncompliance resulting in harm to the environment*) and the relief sought (*denial of Application Permit # 1094*) by Petitioners is on the Petitioners. The general principle is that the burden of proof rests on the party bringing the action, the Petitioners in the present case. In general, the party seeking to establish a claim bears the burden of proof to establish the entitlement to the claim.<sup>59</sup>

Petitioners were required therefore, to present competent and substantial evidence to support its claims for relief in opposition to AA Quarry's Application for New Site Permit # 1094.<sup>60</sup> Competent evidence is evidence that is admissible, that is relevant to an issue in a given proceeding.<sup>61</sup> Substantial evidence is evidence that a reasonable mind would accept as adequate to support a conclusion; evidence beyond a scintilla.<sup>62</sup> Substantial evidence is evidence that if true has probative force upon the issues and from which the trier of facts can reasonably decide a case.<sup>63</sup>

#### ***Scientific Burden of Proof***

Petitioners also had a specific burden of proof established by statute and Commission regulation. Not only must Petitioners' evidence on the claims asserted meet the standard of

competent and substantial, but that evidence must be scientific evidence.<sup>64</sup> Section 444.773.4 reads as follows:

“In any public hearing, if the commission finds, based on competent and substantial scientific evidence on the record, that an interested party’s health, safety or livelihood will be unduly impaired by the issuance of the permit, the commission may deny such permit. If the commission finds, based on competent and substantial scientific evidence on the record, that the operator has demonstrated, during the five-year period immediately preceding the date of the permit application, a pattern of noncompliance at other locations in Missouri that suggests a reasonable likelihood of future acts of noncompliance, the commission may deny such permit. In determining whether a reasonable likelihood of noncompliance will exist in the future, the commission may look to past acts of noncompliance in Missouri, but only to the extent they suggest a reasonable likelihood of future acts of noncompliance. Such past acts of noncompliance in Missouri, in and of themselves, are an insufficient basis to suggest a reasonable likelihood of future acts of noncompliance. In addition, such past acts shall not be used as a basis to suggest a reasonable likelihood of future acts of noncompliance unless the noncompliance has caused or has the potential to cause, a risk to human health or to the environment, or has caused or has potential to cause pollution, or was knowingly committed, or is defined by the United States Environmental Protection Agency as other than minor. If a hearing petitioner or the commission demonstrates either present acts of noncompliance or a reasonable likelihood that the permit seeker or the operations of associated persons or corporations in Missouri will be in noncompliance in the future, such a showing will satisfy the noncompliance requirement in this subsection. In addition, such basis must be developed by multiple noncompliances 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. For any permit seeker that has not been in business in Missouri for the past five years, the commission may review the record of noncompliance in any state where the applicant has conducted business during the past five years.

The term “scientific evidence” is not defined in §§ 444.773, 444.765, 10 CSR 40-10.080 or 10 CSR 40-10.100. Therefore, the following terms are defined for purposes of this Order.

Scientific – of or dealing with science, based on, or using, the principles and methods of science, done according to methods gained by training and experience.<sup>65</sup>

Science – original knowledge, systematized knowledge derived from observation, study and experimentation.<sup>66</sup>

Scientific knowledge – Knowledge that is grounded on scientific methods that have been supported by adequate validation. Four primary factors are used to determine whether evidence amounts to scientific knowledge: (1) whether it has been tested; (2) whether it has been subject to peer review and publication; (3) the known or potential rate of error; and (4) the degree of acceptance within the scientific community.<sup>67</sup> This is the test applied under the *Daubert* standard.<sup>68</sup> The Supreme Court has also held that similar scrutiny must be applied to nonscientific expert testimony.<sup>69</sup> The evidentiary test to be applied under § 490.065 RSMo guides the admission of expert testimony in contested administrative proceedings and the test is similar to that set forth in *Daubert*.<sup>70</sup>

Scientific evidence – testimony or opinion evidence that draws on technical or specialized knowledge and relies on scientific method for its evidentiary value.<sup>71</sup> Scientific evidence encompasses opinions of an expert based upon facts or data of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reliable. Scientific evidence may also include the facts or data underlying recognized studies and the resulting conclusions from such studies.<sup>72</sup>

***Petitioners’ Asserted “Demonstration” Burden Not Satisfied***

Assuming for the sake of discussion only, and not finding, that all Petitioners were required to do was present some photographs and/or other documents and the conclusory opinion of Mr. Snyder of what he assumed or surmised were acts of noncompliance, their “demonstrations” are not adequate to establish an issue of fact sufficient for the Commission to deny the permit. As will be addressed below, in instance after instance the evidence on the record, refutes, rebuts and renders Petitioners’ “demonstration” irrelevant and unpersuasive. The sum of Petitioners’ case on each allegation simply boils down to a non-expert opinion that an act of noncompliance was committed by Radmacher Brothers. There is nothing and no one to substantiate Petitioners’ non-expert assumptions, conclusions, and conjectures on the issues raised.

Assuming further, for the sake of discussion only, and not finding, that Petitioner’s “demonstrations” established prima facie certain acts of noncompliance of an environmental law administered by the DNR, there was no evidence as relates to any of the eleven allegations that established a resulting harm to the environment. Specifically, no competent and substantial scientific evidence was presented by Petitioners to establish any resulting harm to the environment from their alleged acts of non-compliance.

**THEORY OF PETITIONERS’ CASE**

The theory of the case which the Petitioners present is that AA Quarry LLC, or entities which are part of the Radmacher Brothers business operations, have been guilty of present acts of noncompliance with certain laws which fall under the administration of the Department of Natural Resources which resulted in harm to the environment. Petitioners presented no evidence and made no argument to support any claims of: (1) undue impairment of their health, safety or livelihood by the issuance of the new site permit # 1094; or (2) a pattern of noncompliance during the five year period immediately preceding the date of the permit application (November

15, 2012) that suggests a reasonable likelihood of future acts of noncompliance.<sup>73</sup> Specifically, the Petitioners make eleven allegations upon which they seek to have Permit # 1094 denied by the Commission.

### **Alleged Acts of Noncompliance**

The alleged acts of noncompliance pled by the Petitioners are:<sup>74</sup>

1. Applicant<sup>75</sup> caused land disturbance in an amount greater than 1 acre prior to obtaining the required permits.
2. Applicant provided the Missouri false and inaccurate information in its application for general land disturbance permit MORA 01538.
3. Applicant placed the public notification sign supplied with the MORA 01538 permit in a location that was impossible to see from the public road that provides access to the site.
4. Applicant quarried for commercial purposes without first obtaining the required land reclamation permit.
5. Applicant failed to send required notices of its intent to operate a surface mine by certified mail to the last known addresses of all recorded land owners of contiguous real property or real property located to the proposed mine plan area.
6. Applicant failed to place any BMP's<sup>76</sup> inside the 9.15 permit area.
7. Applicant's SWPPP<sup>77</sup> does not include all of the necessary requirements stated in the body of Applicant's land disturbance permit.
8. Applicant failed to keep complete and accurate land disturbance inspection forms as required in its land disturbance permit and the SWPPP.
9. Applicant failed to keep land disturbance forms and the SWPPP on site.
10. Applicant placed fill materials into jurisdictional waters of the United States prior to obtaining the necessary permits – 404 (Army Corps of Engineers) and 401 (Clean Water Certification – DNR)
11. Applicant constructed a dam<sup>78</sup> over 35 feet in height without obtaining the necessary permits from DNR Dam and Reservoir Safety Program.

### **Questions to be Analyzed & Answered**

The case presents two questions to be analyzed and answered as each relates to each allegation of noncompliance.

First, was there a determination by the DNR entity authorized by statute to administer and enforce the appropriate statute applicable to each allegation that AA Quarry LLC or persons or corporations (Radmacher Brothers Companies) associated with AA Quarry LLC had committed an act of noncompliance?

Second, if an act of noncompliance was determined by the appropriate entity for each given allegation did the entity find such act resulted in harm to the environment?

If both questions are shown by the evidence to be answered in the affirmative with regard to a sufficient portion of Petitioners' allegations, the Commission may deny the permit. If either of the questions is shown by the evidence to be answered in the negative, with regard to Petitioners' allegations the Commission does not have the required basis under the applicable law and regulations to deny the permit, and the Applicant is entitled to have the Application approved. As will now be addressed, Petitioners have failed to make their case.

### **ANALYSIS AND DECISION – PETITIONER'S ALLEGATIONS**

#### **General Analysis and Decision**

The allegations presented make no claim that Petitioners' health, safety or livelihood would be unduly impaired by impacts from the activities that the recommended mining permit authorizes. Therefore, the Commission has no basis under this standard to deny Permit # 1094.

Petitioners made no argument and presented no evidence that AA Quarry LLC had, during the five year period immediately preceding the date of the permit application for Permit # 1094, demonstrated a pattern of noncompliance at other locations in Missouri that suggested a reasonable likelihood of future acts of noncompliance. Therefore, the Commission has no basis under this standard to deny Permit # 1094.

Petitioners presented no line of argument or evidence which addressed the issue of whether any of the alleged acts of noncompliance had impaired the health, safety, or livelihood of persons outside the facility.<sup>79</sup> Accordingly, the Commission has no basis under the impairment of health, safety or livelihood standard for acts of noncompliance to deny the approval of Permit # 1094.

Petitioners' sole argument is that the eleven alleged acts satisfy the present acts of noncompliance with resulting harm to the environment requirement under the statute and regulation. For the reasons that will now be addressed, Petitioners have failed to establish any present acts of noncompliance resulting in harm to the environment which warrants the denial of Permit # 1094.

### **Issue of Harm to the Environment Common to Each Allegation**

With regard to acts of noncompliance, §10 C.S.R. 40-10.080(F) requires in the first instance that Petitioners establish all issues of fact (their allegations) by competent and substantial scientific evidence. The second critical issue that cuts across all of Petitioners' alleged issues of fact is that such acts must have ". . . resulted in harm to the environment. . . ." Two elements must be established an act of noncompliance and a resulting harm to the environment as a result of the act of noncompliance. If Petitioners have failed to establish either element for any given allegation, that allegation cannot be used as a basis to deny Permit # 1094. Petitioners failed to adduce any evidence at the hearing, let alone competent and substantial scientific evidence on the record, of harm to the environment resulting from the alleged act of noncompliance.

Petitioner Snyder testified regarding alleged land disturbance on the farm and that he saw "white material" or "a white substance" in the ephemeral stream beds of the farm upstream from Echo Lake. He claimed this white material or substance flowed from the 9.15 acre land disturbance area.<sup>80</sup> On cross examination Mr. Snyder admitted that Petitioners possessed no competent and substantial scientific evidence that any material or substance from the Applicant's farm found its way into Echo Lake. Snyder obtained water samples, but he never had them analyzed. He admitted he was not competent to testify regarding "sediment" and did not attribute to the farm the "white stuff" that he observed in Echo Lake photographs. Petitioner Snyder could not testify that any sediment that might have come off the farm exceeded any legally allowable tolerances.<sup>81</sup> Snyder acknowledged Exhibit AP 18, page 21, established that less than 1% of the Echo Lake drainage area comes from the farm. No other witness for Petitioners supported Petitioners' claim on this issue of sediment contamination or pollution entering state waters from the land disturbance area under MSOP 1538.<sup>82</sup>

Petitioners' testimony developed from other witnesses did not support Petitioners' position. Patrick Peltz, a Clean Water Program Environmental Specialist, visited the Applicant's

site on November 20, 2012, and again on November 28, 2012 for the purpose of performing a routine water pollution compliance inspection regarding MSOP 1538. Mr. Peltz's written report,<sup>83</sup> concluded that the conditions of the borrow site subject to the permit were satisfactory and the site was in compliance with the Clean Water Law, the Clean Water Commission regulations, and MSOP 1538, the existing Land Disturbance Permit of July 6, 2012. His conclusions were based upon his observations at the time of the inspection and, specifically, he found no “noncompliances” or any violations of laws or regulations administered by the Department of Natural Resources. Mr. Peltz testified that if he had found any noncompliances, he would have noted them in his report in accordance with standard procedure. Moreover, Mr. Peltz did not observe any conditions with the potential to cause a risk to human health or environment or to cause pollution in the future. And, he stated if he had, he also would have noted in his report.<sup>84</sup>

Mr. Peltz's superior, Aron C. Bleibaum, another Clean Water Program specialist, testified that he signed off on Mr. Peltz's report. Mr. Bleibaum testified at the hearing that he recalled the Peltz report and did not see anything in it that was bothersome, odd or questionable. He opined that if Peltz had observed any noncompliances in his report, that he would have informed the Applicant and noted it in his report.<sup>85</sup>

Kevin Mohammadi, the Land Reclamation Program Director, also testified and stated that he visited the site on March 7, 2013. He testified that he observed the sediment basins and did not observe any sediment runoff from the site.<sup>86</sup>

Jimmy Coles, another Clean Water Program environmental specialist, was called by Petitioners and stated that he visited the site on March 7, 2013, along with Mr. Mohammadi. He testified that he observed no conditions that constituted a noncompliance or a violation of clean water laws or any Missouri Department of Natural Resources Clean Water Program regulation and that none existed.<sup>87</sup>

Mr. Coles returned to the site again on September 4, 2013, for another Clean Water Program routine water pollution inspection. At that time his written report<sup>88</sup> reflects that the site was out of compliance due to his observation of two unsatisfactory features. The first was a spot oil leak from heavy equipment and the second was some erosion on the downstream side of the large dam due to a heavy rain. His report indicates the Applicant cured these two features on September 5, 2013, and no further action by the Applicant was necessary. Mr. Coles further

testified these two features were "minor" in nature and "easily rectifiable," more importantly, "did not contribute to any water pollution." He testified he viewed the toe of the large dam and walked the channel for 100 yards downstream and found no evidence of the deposition of silt or sediment in the downstream area. He further stated he did not observe anything on site that was bothersome to him and, if he had, he would have so noted it in his written report or would have brought it up with the Applicant on site.<sup>89</sup>

Mr. Snyder testified that the Corps of Engineers 404 Noncompliance Letter confirmed that fill was placed by the Applicant into waters of the United States (at the rock check, at the upper dam and also at the lower dam). Mr. Snyder apparently believed this fact demonstrated impermissible impact or damage to the environment. However, Nathan Hamm, Applicant's engineer who assisted the Applicant with the 404 Application to the Corps of Engineers, testified that the 404 Permit ultimately was issued by the Corps of Engineers after the fact and it specifically authorized the work of the Applicant about which Petitioners complain. The Corps of Engineers determined that any environmental concern regarding Applicant placing fill in the waters of the United States was "minimal".<sup>90</sup> In point of fact the 404 Permit authorized the minimal environmental impact, albeit after the fact.

Mr. Hamm also testified concerning the Missouri Department of Natural Resources issuance of a Clean Water Quality Certification subsequent to the Corps of Engineers 404 Permit. In the Clean Water Quality Certification Letter of April 29, 2014, the Missouri Department of Natural Resources, Clean Water Program, stated that the impact of the 404 related work by Applicant "was not going to degrade water quality beyond applicable standards."<sup>91</sup> Hamm further opined that if the Applicant's activities regarding the rock check at the upper dam and the construction of the lower dam had degraded water quality beyond allowable standards, the Missouri Department of Natural Resources would not have issued Applicant's Exhibit 27. Moreover, the 401 Missouri Department of Natural Resources Water Quality Certification Letter contained thirteen conditions designed to assure that water quality standards are met.<sup>92</sup> Therefore, land disturbance by the Applicant did not result in harm to the environment. The evidence on the assertion of acts of noncompliance resulting in harm to the environment is Mr. Snyder's unsubstantiated opinion weight against the two reports of DNR staff members, the testimony of four DNR staff members and an independent professional engineer, all of who refute and rebut the Snyder opinion of any harm to the environment. Petitioners failed to meet

the threshold standards outlined in 10 C.S.R. 40-10.080(3)(B) and did not establish an issue of fact of any acts of noncompliance resulting in harm to the environment by competent and substantial scientific evidence. Nor did Petitioners demonstrate any act of noncompliance resulting in harm to the environment.

Likewise, the issue of the harm to the environment was not impacted by any of the remaining six alleged noncompliance issues related to the Missouri Clean Water Law and regulations. There was no competent and substantial scientific evidence adduced by the Petitioners of any environmental harm related to Applicant having stated in its application for MSOP 1538 that no part of the permit area to be disturbed was located within the jurisdictional waters of the United States. The same is true for the complaint concerning the posting location of the public notification sign under MSOP 1538. There is no evidence in the record that the nature and extent of the SWPPP contents, the maintenance of the SWPPP document on site, the quality of the site inspection records or the placement of BMPs on site resulted in any harm to the environment. Jimmy Coles testified that no environmental harm resulted from the SWPPP not being located on the site.<sup>93</sup> Kevin Mohammadi said he did not see any erosion on site and, therefore, there was no need for any BMPs in any event.<sup>94</sup> Mr. Snyder admitted that he was not competent to testify regarding BMPs and whether they were properly designed or installed.<sup>95</sup>

### **Specific Analysis and Decision**

Petitioners' eleven allegations will now be examined with regard to the applicable standard of evidence and the questions presented in this case. Allegations numbered 1, 2, 3, 6, 7, 8 and 9 all come under the purview of the Clean Water Law, administered and enforced by the Clean Water Commission and its staff. Specifically, the requirements for a land disturbance permit or the MORA 01538 permit. Allegations numbered 4 and 5 fall within the jurisdiction of the Land Reclamation Program. Allegation 10 relates to the enforcement of a federal statute by the Army Corps of Engineers. Allegation 11 falls under the Dam and Reservoir Safety Program of DNR.

#### ***Land Disturbance Prior to Obtaining Required Permits***

The regulations governing the permitting process for land disturbance provide for a farm land and agricultural exemptions.<sup>96</sup> Petitioners claimed that the work performed by the Radmacher brothers on the subject farm was not agricultural in nature and that the conclusion of representatives of DNR that the work was agricultural in nature was in error.<sup>97</sup> Robert

Radmacher testified that during the early period of ownership of the farm (February 2011 through July 2012) Radmacher's activities on the farm were agriculturally related to improvement of the farm land and enhancing the cattle operation.<sup>98</sup> The testimony of the employees of DNR, Patrick Peltz and Aaron Bleibaum, supported the testimony of Radmacher. No witnesses or evidence was offered by Petitioners to contradict Mr. Peltz, Mr. Bleibaum or Mr. Radmacher on this point. The allegation presented nothing but the unsubstantiated opinion of Mr. Snyder.

The evidence established the activity on the Radmacher land came under the farm land and agricultural exemption. Accordingly, there was no act of noncompliance. No evidence was presented by Petitioners that in any manner demonstrated that the exempted activity resulted in harm to the environment. *See, Issue of Harm to the Environment Common to Each Allegation, supra.*

#### Summary and Conclusion

Petitioners failed to present any substantial and persuasive scientific evidence or otherwise demonstrate:

(1) that the CWC issued any notice of a violation and act of noncompliance that Radmacher Brothers Land Company or Radmacher Excavation Company had caused land disturbance to an area greater than one acre prior to obtaining permit MORA 01538 that would not fall within the farm land and agricultural exemption;

(2) that CWC or staff of the CWC concluded that any actions result in harm to the environment.

The demonstration made by Petitioners did not establish that any land disturbance was not within the farm land and agricultural exemption, and did not establish any harm to the environment. Accordingly, Petitioners failed to establish an issue of fact, upon which Applicant then bore a burden of persuasion. Notwithstanding, assuming for the sake of discussion only, that Petitioners had met their burden of proof, the evidence presented on this issue was competent and substantial to carry Applicant's burden of persuasion.

Therefore, Petitioners' allegation is not well taken. It provides no basis upon which the Commission may deny the application for Permit # 1094.

***False and Inaccurate Information on Permit Application – MORA 01538***

Petitioners' claim under this allegation was that Robert Radmacher had provided false and inaccurate information on the permit application for MORA 01538 by answering "No" to a question of whether any part of the 9.15 disturbance area would impact the waters of the United States. Mr. Radmacher came to his conclusion by his review of Exhibit 39<sup>99</sup> and did not believe that any of the areas of the 9.15 acres or other areas on the farm land<sup>100</sup> would be considered to be waters of the United States. Nathan Hamm's testimony on this point<sup>101</sup> and the last page of Exhibit 19<sup>102</sup> establish that there was no identification or location of any waters of the United States within the 9.15 acre borrow site under MORA 01538. It was not until the Corps of Engineers made the decision that the Radmacher "gullies and ditches" were in fact something more than gullies and ditches that the error in answering the application question was discovered.

The evidence fails to establish any intent on the part of Mr. Radmacher to present false, inaccurate or even misleading information when he provided the answer in question. Petitioners provided no evidence that answering "No" to the question in any manner resulted in harm to the environment or impaired the health, safety, or livelihood of persons outside the facility. Simple logic (*and common sense*) dictates that an answer provided on an application does not result in harm to the environment.

**Summary and Conclusion**

As to this allegation, Petitioners failed to present any substantial and persuasive scientific evidence or to otherwise demonstrate:

(1) that the CWC issued any notice of a violation and act of noncompliance with regard to the answer provided by Mr. Radmacher on the application for MORA 01538; and

(2) that CWC or staff of the CWC concluded that the answer provided by Mr. Radmacher resulted in harm to the environment.

The demonstration made by Petitioners did not establish any intentionally false or misleading information was set forth on the application, and did not establish any harm to the environment. Accordingly, Petitioners failed to establish an issue of fact, upon which Applicant then bore a burden of persuasion. Notwithstanding, assuming for the sake of discussion only, that Petitioners had met their burden of proof, the evidence presented on this issue was competent and substantial to carry Applicant's burden of persuasion.

Therefore, Petitioners' point is not well taken. It provides no basis upon which the Commission may deny the application for Permit # 1094.

***Improper Placement of Notification Sign – MORA 01538***

Petitioners' next point relates to the placement of the MORA 01538 public notification sign. There is no dispute that the notice sign<sup>103</sup> originally was not located at the entrance to the farm from AA Highway; but instead was located up the driveway from the entrance on a signboard behind a farm house but at or near the fenced-in entrance to the borrow site permitted under MOTA 01538.<sup>104</sup> On page 9 of the Permit Body, the following language appears:

“13. Public Notification. The permittee shall post a copy of the public notification sign described by the Department at the main entrance to the site. The public notification sign must be visible from the public road that provides access to the site's main entrance. An alternate location is acceptable provided the public can see it and its noted in the SWPPP. The public notification sign must remain posted at the site until the permit has been terminated.”

First, it is noted that at no time when the sign was located at the fenced and gated entrance to the borrow site on the Radmacher land, instead of the entrance to the land off AA Highway did the Clean Water Commission issue a notice of violation and a finding of an act of noncompliance with the Clean Water Law to Radmacher Brothers Borrow Site.<sup>105</sup> Therefore, the sole entity charged with the administration of the applicable law did not deem the original location of the sign to be an act of noncompliance.<sup>106</sup>

Second, no competent and substantial scientific evidence or any other substantial evidence was presented that established any harm to the environment or the health, safety or livelihood of any person as a result of the sign placement.

Third, it was agreed by Mr. Snyder that no statute or regulation existed mandating the location of the sign at the entrance to the farm on AA Highway,<sup>107</sup> as opposed to placing it on a signboard at the entrance to the borrow site. The posting protocol is found only in the Land Disturbance instructions as noted above. Therefore, this allegation is not based upon a noncompliance or a violation of an environmental law or regulation but only the permit instructions. Furthermore, there was no attempt on the part of Petitioners to establish in any fashion how the location of the sign resulted in any harm to the environment.

***Summary and Conclusion***

As to this allegation, Petitioners failed to present any substantial and persuasive scientific evidence or otherwise demonstrate:

(1) that the CWC issued any notice of a violation and act of noncompliance with regard to the posting of the public notice for MORA 01538; and

(2) that CWC or staff of the CWC concluded that the posting of the sign at the entrance to the borrow site, as opposed to the entrance to the farm, resulted in harm to the environment

The demonstration made by Petitioners did not establish any intention on the part of Radmacher Brothers to not properly locate the public notice sign or establish that Radmacher Brothers were not acting in what they believed to be a proper location of the notice sign, and did not establish any harm to the environment. Accordingly, Petitioners failed to establish an issue of fact, upon which Applicant then bore a burden of persuasion. Notwithstanding, assuming for the sake of discussion only, that Petitioners had met their burden of proof, the evidence presented on this issue was competent and substantial to carry Applicant's burden of persuasion.

Therefore, Petitioners' point is not well taken. It provides no basis upon which the Commission may deny the application for Permit # 1094.

***Quarrying for Commercial Purposes Without LRC Permit***

Petitioners' complaint on this point was that Applicant operated a quarry for commercial purposes without first obtaining a permit from the Land Reclamation Commission. Petitioners' evidence on this matter consisted of photographs which Mr. Snyder claimed depicted quarry operations and equipment being used to excavate limestone. Mr. Snyder also testified that blasting occurred at the farm in July 2012, prior to AA Quarry applying for its Land Reclamation Permit. Petitioners assumed based on this information that Applicant quarried limestone for commercial purposes without an LRC permit.<sup>108</sup> The evidence on the record from the testimony of Bill Zeaman and Larry Slechta of the LRC Program, and of Robert Radmacher rebutted Petitioners' assumption.

Mr. Zeaman confirmed that 10 C.S.R. 40-10.010, relative to permit requirements for mining operations, requires a party to seek and obtain a Land Reclamation Permit for "commercial operations", including limestone mining. Mr. Zeaman was questioned regarding surface mining for commercial purposes and the meaning of the term "commercial purposes." He answered that it related to the sale or exchange of minerals in a sale, barter or trade transaction. He also stated he was familiar with the concept of "borrow sites" and that it was permitted to remove consolidated materials from a borrow site without a Land Reclamation

Permit "as long as you don't process the material"; i.e., size it, sort it or put it through other forms of beneficiation. Mr. Zeaman also said that if limestone material was taken off the site (borrowed) for any use offsite, so long as ". . . they just blasted off the side of a hill and scoop it up with a front end loader and do not sort it or anything, and they take everything, then it's a borrow site." He said the same would be true if someone used a rock hammer instead of blasting the rock. Taking rock from the Radmacher borrow site to a bridge project would not constitute a "commercial purpose" without the material being processed, such as beneficiation.<sup>109</sup>

Mr. Radmacher testified that after Radmacher received MSOP 1538 on July 6, 2012 to use the 9.15 acres land disturbance site on the farm as a borrow site, Radmacher broke rock and trucked some of it off site to the Chouteau Trafficway Project being constructed by Radmacher Brothers Excavating. Radmacher used a "hoe ram" to break the rock and did not put the rock that went to the Chouteau Project through any form of beneficiation<sup>110</sup> or improvement. When Applicant considered quarrying for "commercial purposes", Applicant formed AA Quarry, LLC to do that. Applicant bought a commercial crusher plant in anticipation of commercial operations and this crusher plant currently sits disassembled on the ground at the farm. This is true despite the fact that the Missouri Department of Natural Resources Air Commission issued a permit to Applicant to construct the crusher plant.<sup>111</sup> Applicant has engaged in no efforts to begin quarry operations until a determination regarding the Land Reclamation Permit is obtained.<sup>112</sup> Radmacher Land and Equipment Management bought the farm in early 2011 to run cattle operations. The farm was in a run-down condition so Radmacher built ponds, put in fences, broke rock with a hoe ram, and moved it around the farm to various locations for erosion control, and overseeded the land and rotated their cattle around the farm.<sup>113</sup>

As noted by Mr. Zeaman, §444.766 RSMo of the Land Reclamation Act exempts excavations on site of minerals for purposes of construction of land improvements as unrelated to the mining of minerals for a commercial purpose. §444.765(8) defines "excavation" as any operation in which minerals are moved, removed or displaced for purposes of construction at the site of the excavation by means of any tools, equipment, explosives, and includes but is not limited to digging, boring, ripping, etc. §444.765(11) defines "minerals" as a constituent of the earth in a solid state when extracted from the earth is usable in its natural form. And, most importantly, §444.765(3) defines "commercial purpose" as the extracting of minerals for their value in "sales" to "other persons" or incorporation into a product. §444.766(2) (2) (b) further

provides that no permit is required to move minerals within the confines of real property where the excavations occur or to remove minerals from the real property when at no time are they subject to ". . . crushing, screening, or other means of beneficiation. . ."; and "are not used for a commercial purpose on a frequent and on-going basis."

Therefore, Radmacher Brothers farm related improvements involving the excavation and using of limestone on the site were exempted activities. As to the borrow operations, there was no evidence that the borrow operations involved anything other than borrowing excavated limestone materials that were unprocessed. No witness from the Missouri Department of Natural Resources Land Reclamation Program testified that the Applicant engaged in commercial quarry operations subject to permit regulations. Larry Slechta from the Land Reclamation Program issued a single report regarding the farm operations and concluded that limestone of the farm was being used as riprap and was not being sold.<sup>114</sup> In short, Petitioners presented no evidence upon which a conclusion could be reasonably made that the Radmacher activity was other than exempted farm land activity and permitted borrow site operations. None of the activity can be concluded to be quarrying for commercial purposes under the Land Reclamation Law. Furthermore, since the activity was allowed under the Land Reclamation Law without a permit there was no harm to the environment for the exempted and permitted activity and operations.

By statute, §444.766(3) RSMo, if the Program Director had determined that a surface mining permit was required for Radmacher Brother's actions on the farm, such determination was to be sent to Radmacher Brothers Land Company in writing, an informal conference conducted, a written determination made, and a Land Reclamation Commission hearing conducted. But until a determination was made, the Radmacher Brothers Land Company could have continued its activities.<sup>115</sup> None of this occurred. Moreover, 10 C.S.R. 40-10.010(2)(B)(1) states that "surface mining for industrial minerals may be conducted without a permit by an individual for personal use." Therefore, any operations on the farm (and even the borrow operations) were exempted from permitting requirements as they were for the personal use of the Radmacher Brothers Land Company.

In summary, the Missouri Department of Natural Resources Land Reclamation Program did not conclude that the Applicant or Radmacher Brothers Land Company was engaging in commercial quarrying operations without a permit or that the Applicant or Radmacher Brothers Land Company had failed to apply for a permit prior thereto. No other witnesses, expert or

otherwise, testified for the Petitioner and offered any competent and substantial scientific evidence sufficient to establish an issue of fact that the activities on the farm required the issuance of a Land Reclamation Permit and/or the Applicant or Radmacher Brothers Land Company was quarrying minerals for commercial purposes without first obtaining a permit from the Land Reclamation Commission.

*Summary and Conclusion*

As to this allegation, Petitioners failed to present any substantial and persuasive scientific evidence or otherwise demonstrate:

(1) that the Land Reclamation Program issued any notice of a violation and act of noncompliance with regard to quarrying of limestone without obtaining a LRC permit; and

(2) that LRC or staff of the Land Reclamation Program concluded that the activities of Radmacher Brothers in using rock on the farm for land improvements or for borrow operations, resulted in harm to the environment.

The demonstration made by Petitioners did not establish that Radmacher Brothers had conducted activities which in fact required obtaining a LRC permit, and did not establish any harm to the environment. Accordingly, Petitioners failed to establish an issue of fact, upon which Applicant then bore a burden of persuasion. Notwithstanding, assuming for the sake of discussion only, that Petitioners had met their burden of proof, the evidence presented on this issue was competent and substantial to carry Applicant's burden of persuasion.

Therefore, Petitioners' point is not well taken. It provides no basis upon which the Commission may deny the application for Permit # 1094.

***Notices By Certified Mail – Permit # 1094***

Petitioners argue that after the filing of AA Quarry LLC's Application for an Industrial Mines Permit with the Department of Natural Resources, the Applicant was required, but failed, to send certified letters of intent to operate a surface mine to adjacent or adjoining landowners. Mr. Snyder testified there was no evidence of certified letter notifications being sent on this project.<sup>116</sup> No factual dispute exists that Applicant did not send certified letter notifications, because there are no landowners whose land was contiguous or adjacent to the proposed mine plan area.

Exhibit AP 8, the Land Reclamation Program Application,<sup>117</sup> contains an aerial view map of the mine plan boundary (in red) and boundaries of the land owned by the Applicant (in blue).

According to Exhibits AP 48 and AP 49, the proposed mine plan area (in red) is set back 100 feet from the existing boundaries of the land owned by the Radmacher Brothers (in blue). Petitioners admitted on the record that the mine plan boundary is set back 100 feet from the farm property line or boundary.

Under LRC regulation,<sup>118</sup> the AA Quarry proposed mine plan boundary is neither contiguous, nor adjacent to any real property owned by other landowners. For purposes of the regulation, “Contiguous shall mean in actual contact, touching along a boundary or at a point”<sup>119</sup> and “Adjacent shall mean immediately opposite from, as in across a road right-of-way, or across a river or stream.”<sup>120</sup>

Clearly, the proposed mine plan boundary would not meet the definition of "contiguous". Nor is the mine plan boundary adjacent to any other real property, since it is not immediately opposite from any such land being separated only by a road right-of-way or a river or stream. The mine plan boundary is separated from any other real property, any road right-of-way and any river or stream by a 100 foot wide strip of Radmacher land. It is self-evident that the DNR interprets its regulations so that the separation of 100 feet between the mine plan boundary and the neighboring property boundary does not render the neighboring property "adjacent" to the mine plan boundary. The Department of Natural Resources’ interpretation of its own regulation is to be given great weight. An agency's interpretation generally is to be given deference if an agency's interpretation of a statute is reasonable and consistent with the language of the statute. Deference to agency action is even more clearly in order when interpretation of its own regulation is at issue.<sup>121</sup>

Mr. Radmacher testified that he inquired of the Missouri Department of Natural Resources regarding the application of this particular statute and regulation to the Applicant's permit application and received confirmation that if the Applicant set back the mine plan boundary 100 feet from the property boundaries, certified letters to landowners would not be required.<sup>122</sup> Kevin Mohammadi also testified on this issue regarding certified letters to landowners and the 100-foot setback rule. Mr. Mohammadi concurred that certified letter notices were not required to the neighboring landowners in this case.<sup>123</sup> The evidence establishes that the other necessary certified letter had been sent to the County Commission and that the public notices had been published in the local newspapers.<sup>124</sup> No other witnesses testified favorably to Petitioners' position on this issue.

Nevertheless, the purpose of all three notices (publication, notice to public officials, and certified letters to neighbors) is to provide notice of the surface mining permit application. In this case, Petitioners' witness Misty Cutright testified concerning a neighborhood meeting held in January of 2013, the month after the Land Reclamation Permit Application was received in Jefferson City and a month before the DNR public meeting was held in early March of 2013. She testified that virtually all of the landowners surrounding the farm were present at this neighborhood meeting in January of 2013, the purpose of which was to advise neighbors of the permit application and to discuss putting together a community group to stop the quarry.<sup>125</sup>

While the statute and regulations and DNR interpretation do not require sending certified letters to the neighboring landowners in this case, all of them were aware of the quarry permit circumstances at or about the same point in time that the certified letters, if they had been sent, would have been received by the neighbors.

In summary, the certified letters of notice pursuant to statute and regulations were not required to be sent in this instance; but notwithstanding the exemption, notice was received by the neighbors in any event and no prejudice occurred to anyone as a result. Petitioners established no issue on this question with competent and substantial scientific evidence or by any “demonstration.”<sup>126</sup> No evidence was tendered whatsoever as to how mailing or not mailing certified letters resulted in harm to the environment.

#### Summary and Conclusion

As to this allegation, Petitioners failed to present any evidence:

(1) that the Land Reclamation Program issued any notice of a violation and act of noncompliance with regard to the regulation addressing mailing by certified mail a notice of intent to operate a surface mine;<sup>127</sup> and,

(2) that LRC or staff of the Land Reclamation Program concluded that the action of Applicant in not sending any certified mail notice of intent to operate a surface mine to other landowners, resulted in harm to the environment.

The demonstration made by Petitioners did not establish that Applicant was in fact required to send the certified letters as asserted and did not establish any harm to the environment. Accordingly, Petitioners failed to establish an issue of fact, upon which Applicant then bore a burden of persuasion. Notwithstanding, assuming for the sake of discussion only,

that Petitioners had met their burden of proof, the evidence presented on this issue was competent and substantial to carry Applicant's burden of persuasion.

Therefore, Petitioners' point is not well taken. It provides no basis upon which the Commission may deny the application for Permit # 1094.

***Placement of BMP's – MORA 01538***

Petitioners' claim as to this allegation was that the Applicant failed to ". . . place BMPs in the permit area as required by statute or regulations"; and/or as required by the Land Disturbance Permit. Mr. Snyder testified that in his opinion there were no BMPs placed by the Applicant in the 9.15 acre area; and that the BMPs illustrated on Applicant's Exhibit AP 4, last page, and Applicant's Exhibit AP 4(a) and also the last page of Applicant's Exhibit AP 17, were outside the 9.15 acre permit area. It is the Petitioners' position that this somehow created a noncompliance with the Clean Water Law.<sup>128</sup>

Exhibit AP 3, the Land Disturbance Permit of July 6, 2012, requires the Applicant to install "site specific" practices to best minimize the soil exposure, soil erosion and the discharge of pollutants."<sup>129</sup> The type and location of required BMPs are set forth at pages 5 and 6 of the Land Disturbance Permit and particularly on pages 4-6 in paragraph C (Requirements), subparagraph (3) (SWPPP Requirements) and subparagraphs (e) (f) and (g) relative to nonstructural and structural BMPs. In all three subparagraphs the stated BMPs are referred to as "for use" "at the site". There is no requirement that the BMPs be "on" the site, if the site is defined as the 9.15 acre permit area. Nonstructural BMPs can include, for example, vegetation, trees, mulch, sod, seed, geotextiles, etc.; and structural BMPs can include diverting water flows, silt fences, diversion dikes, drainage swales, sediment traps, rock check dams, subsurface drains, pipe drains, soil drains, gabions, and sediment basins, etc.<sup>130</sup>

BMPs for storm water control are specifically described in the regulations as a schedule of activities, prohibitions of practices or maintenance procedures or other practices that reduce the amount of soil available for transport or a device that reduces the amount of suspended solids in runoff "before discharged to the waters of the state." Neither the Land Disturbance Permit nor the regulations specifically state that all BMPs must be placed or located within the confines of the specifically permitted disturbed area. The express intent is to implement BMPs or place structural or nonstructural BMPs "at the site" to prevent or reduce sediment being discharged to "the waters of the state."

For example, the regulation cited above lists a number of types of BMPs for storm water control as: state approved standard specifications and permit programs . . . employee training in erosion control . . . site preparation, surface stabilization, runoff control measures, runoff conveyance measures, inlet and outlet protection, stream bed protection, a critical path method or schedule for performing erosion control and other proven method for controlling runoff and sedimentation. These BMPs (or practices) are of many different types and only some are recognized structural BMPs that can be placed in a permitted area. The regulation apparently recognizes nonstructural BMPs which obviously cannot be placed or located physically within the permitted boundaries as argued by the Petitioners. How would one locate "employee training" within a 9.15 acre site? In addition, the BMPs are required to be "site specific" and, therefore, it is implicit that they may be varied depending on the location or site layout.

Even the Land Disturbance Permit at page 6, paragraph (i) states that "storm water discharges from disturbed areas which leave the site shall pass through an appropriate impediment to sediment movement such as a sedimentation basin, sediment traps and silt fences prior to leaving the land disturbance site." This is exactly what was implemented by Radmacher Brothers on the farm site.

Mr. Snyder admitted on cross examination that Applicant had installed a ditch check, rock check and a sediment basin and he also admitted that he was not competent to testify regarding the issue of BMPs and whether they were properly designed or installed or whether they were right or wrong.<sup>131</sup> Since he was the only witness providing the only evidence for Petitioners, there is no competent and substantial scientific evidence for Petitioners' position on this issue. Petitioners' evidence was simply the unsubstantiated opinion of Mr. Snyder.

Also, as noted above, Mr. Peltz inspected Applicant's site regarding the 9.15 acre permit in November of 2012 and reviewed the Applicant's SWPPP and specifically the last page of the SWPPP and stated on page 2 of Exhibit AP 10 that "Radmacher Brothers have the site plan with all BMPs drawn on the plan . . . Radmacher Brothers have engineered and constructed the site in order to manage storm water discharges associated with the facility . . ." He went on to note that Radmacher Brothers had constructed the dam and the rock checks, and their purpose was to preserve soil. He preliminarily concluded "Radmacher's BMPs will serve as structural conservation practices to preserve soil resources . . . Assorted BMPs have been constructed throughout . . . to manage storm water before it runs onto the excavation and mining area and

also to manage storm water in the excavated zones. Agricultural practices were incorporated as BMPs to conserve soil and manage storm water runoff on the entire site." His ultimate conclusion was that the Radmacher borrow site, the 9.15 acres, was in compliance with the Clean Water Law and the Land Disturbance Permit. The report's conclusions are directly contrary to and rebut the Petitioners' position on this issue.

Mr. Peltz also testified at the hearing that the BMPs generally are to be located in the permitted area but can be located outside of that area where the permitted area is only part of the area owned by the permittee. Mr. Peltz indicated the key factor is that sediment does not get into the state or U.S. waters beyond prescribed limits. Mr. Peltz volunteered that the Radmacher borrow site was "very well managed."<sup>132</sup> Mr. Radmacher testified that Mr. Peltz never advised him of any problem or issue of noncompliance with the Land Disturbance Permit, the SWPPP or relative to BMPs.<sup>133</sup>

Petitioners also called as witnesses on this same subject Kevin Mohammadi, Aron Bleibaum, Jimmy Coles and Nathan Hamm.

Mr. Mohammadi said, as previously noted, he did not see any erosion on his site visit and did not see any need for any other BMPs.<sup>134</sup>

Mr. Bleibaum reviewed the site on March 7 and stated that water runoff from the land disturbance area was going into a pond outside of the permit area but within boundaries of the property and, therefore, there was no violation.<sup>135</sup> His position was similar to that of Mr. Peltz.

Jimmy Coles from the Clean Water Program, who inspected the Borrow site on September 4, 2013, said the project was stabilized and vegetated and covered with gravel in the disturbed area to prevent erosion. He went on to say that the BMPs are not designed to prevent storm water from leaving the project. BMPs, whether procedural, managerial or structural, are intended to make the water clean before it leaves the property. At to the 9.15 acre permitted area, there was no existing water course flowing through it. It was all sheet flow on rock. There was no distinct channel or stream. The permit area had a general slope and rain simply soaked in or ran off. Appropriate BMPs for sheet runoff under the regulations would include rock liners, rock checks, ditch checks to slow the water runoff. The sheet flow on Applicant's property led to the ditch check area and these BMPs were "appropriate sediment control measures used in these situations."<sup>136</sup>

Nathan Hamm further testified that the rock check and large dam both served the purpose to "reduce sediment leaving the site."<sup>137</sup> In other words, the BMPs in this situation were "site specific" as required by Land Disturbance Permit 1538.

Robert Radmacher also explained the BMPs installed by Applicant including the rock check in Applicant's Exhibit 51 at the upper pond and noted that it collects the sheet flow and the sediment from the 9.15 acre site because of the lack of any channel on the flat area to control the flow. The rock check location was the best place to cap sediment off the 9.15 acre site. Radmacher further testified that neither Mr. Peltz nor Mr. Coles had ever advised the applicant of any issue with respect to Applicant's BMPs after their site inspections.<sup>138</sup>

In summary, Petitioners have adduced no competent and substantial scientific evidence to demonstrate that the Applicant's on-site BMPs failed to comply with the Land Disturbance Permit, the SWPPP, the Clean Water Act or the Clean Water Act Regulations. All evidence on this point was contrary to the Petitioners' position and established the Radmacher Borrow site to be in compliance with the Clean Water Law and regulations. The BMPs obviously were effective in that no pollution, no sediment nor environmental harm was demonstrated by Petitioners nor observed by the permittee or any of the DNR representatives that visited the site on multiple occasions over a one-year period.

#### Summary and Conclusion

As to this allegation, Petitioners failed to present any substantial and persuasive scientific evidence or otherwise demonstrate:

(1) that the Clean Water Commission issued any notice of a violation and act of noncompliance with regard to the number, type, location or effectiveness of the BMP's located on the Radmacher Land as shown on its permit application for MORA 01538; and

(2) that Clean Water Commission concluded that the action of Radmacher Brothers in placing the number and type of BMPs at the various locations on the Radmacher land as set out on Exhibit AP 4(a), resulted in harm to the environment or impaired the health, safety, or livelihood of persons outside the facility.

The demonstration made by Petitioners did not establish that the placement, number and type of BMPs was not as shown in the SWPPP map which constituted a part of the Application received by the CWC, and did not establish any harm to the environment or impaired health, safety, or livelihood of persons outside the facility. Accordingly, Petitioners failed to establish

an issue of fact, upon which Applicant then bore a burden of persuasion. Notwithstanding, assuming for the sake of discussion only, that Petitioners had met their burden of proof, the evidence presented on this issue was competent and substantial to carry Applicant's burden of persuasion.

Therefore, Petitioners' point is not well taken. It provides no basis upon which the Commission may deny the application for Permit # 1094.

***SWPPP – MORA 01538***

This allegation since it relates to the General Operating Permit<sup>139</sup> issued by the Missouri Clean Water Commission falls under the jurisdiction of the CLC. Petitioners' evidence on this issue was sparse. Mr. Snyder claimed that the SWPPP<sup>140</sup> was deficient.<sup>141</sup> He reviewed the index of the SWPPP which listed various documents as part of the SWPPP and then noted that they were not attached to the SWPPP. <sup>142</sup>From this evidence Petitioners conclude the SWPPP violates the Clean Water Law and Regulations. Petitioners presented no further evidence on this issue. No other witness testified in support of Mr. Snyder's unsupported conclusion that the SWPPP was defective, deficient or in noncompliance with laws and regulations.

Mr. Radmacher testified that he and his staff had prepared the SWPPP and simply used a template form that existed in their office from other SWPPPs prepared for other construction projects. He also testified that Mr. Peltz came to the farm in November 2012 and reviewed the SWPPP document in question with him. Mr. Peltz observed the upper pond and rock check and lower dam. The only comment Mr. Peltz made to Mr. Radmacher was to sign and date Applicant's Exhibit 4(a), the SWPPP BMP drawing page, which was the last page of the SWPPP.<sup>143</sup> The Peltz inspection resulted in the issuance of his report which concluded "The overall operation and appearance of the Radmacher Brothers Borrow Site was satisfactory. Radmacher Brothers Borrow Site was in compliance with the Missouri Clean Water Law and the Missouri Clean Water Commission Regulations."<sup>144</sup>

Aaron Bleibaum testified the purpose of the SWPPP was to detail erosion control measures to be employed relative to permits and the location of the BMPs. The SWPPP is the on-site control plan for storm water management. The SWPPP is not submitted to the Missouri DNR for approval as part of the permitting process. Instead, the permittee simply needs to have one for site inspection review and visits. If there is a problem or a defect with any SWPPP when reviewed, but no storm water sediment or pollution discharge, an inspector can simply ask that

the SWPPP be improved. It would not necessarily be any type of a violation. The permittee may simply receive a warning.<sup>145</sup>

Jimmy Coles inspected site in September of 2013 and reviewed the SWPPP provided to him for the Borrow Site. He stated the SWPPP contained all necessary components and information required by the Land Disturbance Permit. The SWPPP was examined to determine if it contained the minimum requirements of the MSOP. In his opinion, if the SWPPP contained the minimum requirements of the permit and was capable of achieving the required water quality standards within the permitted boundaries, then that would be sufficient for compliance purposes. The emphasis was to assure that water is clean. The paper work (the SWPPP) may come into play but the ultimate goal of the program is clean water.<sup>146</sup>

No evidence was presented of any sediment or pollution in state or federal waters in excess of any limits permitted by law. Petitioners failed to present any competent and substantial scientific evidence establishing any issue of fact demonstrating a noncompliance with any Clean Water Act statute or regulation relating to the Radmacher Borrow Site SWPPP.

#### *Summary and Conclusion*

As to this allegation, Petitioners failed to present any substantial and persuasive scientific evidence or otherwise demonstrate:

(1) that the Clean Water Commission issued any notice of a violation and act of noncompliance with regard to the Storm Water Pollution Protection Plan applicable to MORA 01538 and the Radmacher Borrow Site; and

(2) that the Clean Water Commission concluded that any actions of the Radmacher Brothers operating under MORA 01538 and the permit SWPPP, resulted in harm to the environment or impaired the health, safety, or livelihood of persons outside the facility.

The demonstration made by Petitioners did not establish that any violation or act of noncompliance with regard to the SWPPP, and did not establish any harm to the environment. Accordingly, Petitioners failed to establish an issue of fact, upon which Applicant then bore a burden of persuasion. Notwithstanding, assuming for the sake of discussion only, that Petitioners had met their burden of proof, the evidence presented on this issue was competent and substantial to carry Applicant's burden of persuasion.

Therefore, Petitioners' point is not well taken. It provides no basis upon which the Commission may deny the application for Permit # 1094.

***Land Disturbance Inspection Forms – MORA 01538***

Petitioners' next claim is that Applicant failed to maintain complete and accurate site land disturbance inspection records in accordance with the Land Disturbance Permit requirements. Specifically, Petitioners asserted inspections were not conducted at the intervals required by the permit.<sup>147</sup>

As has previously been noted, Patrick Peltz inspected the project in late November 2012 and, in accordance with his written report,<sup>148</sup> he reviewed Applicant's site inspection reports and stated: ". . . I examined the Storm Water Pollution Protection Plan (SWPPP) *and all documents required by the SWPPP.*" He further noted that "The site had sat idle for a period with no construction activity. During the idle period, the site had been inspected monthly \* \* \* Regular weekly inspections were being conducted since construction had restarted and was continuous \* \* \* Required records were available and up to date."<sup>149</sup> Mr. Peltz concluded that monthly inspections in the absence of any site activity in the permitted area were sufficient and, when work began again in the permitted area, weekly inspections were recommended.

At the hearing, Mr. Peltz confirmed that he had reviewed the inspection reports during his November inspection and the reports were "comprehensive". As noted in his report, he testified there was a "gap" in the reports for the period September 15 through October 15. However, he noted that the gap was not worth noting in his report and that he normally would not cite a permittee for something like that involving a small time frame.<sup>150</sup> There were no water discharges at the time of the Peltz inspection and the borrow site was found to be in compliance with the Clean Water Regulations and the Land Disturbance Permit.

Mr. Coles, who, as previously noted, reviewed the site on September 4, 2013, stated in his report, "At the time of the inspection no land disturbance activity was taking place within the permitted area. All previously disturbed land had been stabilized . . . \* \* \* The Storm Water Pollution Prevention Plan (SWPPP) *and required inspection records were provided . . . \* \* \** The MSOP requires . . . that the areas that have been stabilized must be inspected at least once per month. The *inspection reports reviewed indicated* that site inspections have been conducted every two weeks."<sup>151</sup> Mr. Coles concluded that monthly inspections in stabilized areas were sufficient.<sup>152</sup>

Both Mr. Peltz and Mr. Coles for the Clean Water Program reviewed Applicant's site inspection records and found no defects or deficiencies or grounds to conclude that the records

were inaccurate or incomplete as argued by the Petitioners. Both concluded that monthly inspection reports were sufficient in cases where no land disturbance activity was ongoing or in areas where land disturbance activity had occurred but the site was stabilized. In either instance a monthly report was sufficient. No witness for Petitioners, other than Mr. Snyder, indicated in any way that Applicant's inspection records were inaccurate or incomplete.

Thomas Radmacher testified that he conducted the site inspections for the reports and called the information into the office and noted that the reports were filled out in the office by others. He stated that he reviewed the completed records. He said that inspections were conducted at a minimum weekly and at times reports were filled out every two weeks, as noted above. He had others go to the farm daily and then report to him regarding any rain events and whether areas were wet. He would then have the office check local rain records for further action that needed to be taken relative to reports. Mr. Radmacher further testified that at no time did he ever observe any sediment leaving the Radmacher farm property.<sup>153</sup> In sum, there is no evidence supporting the Petitioners' position.

#### *Summary and Conclusion*

As to this allegation, Petitioners failed to present any substantial and persuasive scientific evidence or otherwise demonstrate:

(1) that the Clean Water Commission issued any notice of a violation and act of noncompliance with finding that Radmacher Brothers had maintained incomplete or inaccurate Land Disturbance Inspection Records at the Radmacher Borrow site; and

(2) that the Clean Water Commission concluded that any actions of the Radmacher Brothers in keeping Land Disturbance Inspection Records operating under MORA 01538, resulted in harm to the environment.

The demonstration made by Petitioners did not establish that any violation or act of noncompliance with regard to the Land Disturbance Inspection Records, and did not establish any harm to the environment. Accordingly, Petitioners failed to establish an issue of fact, upon which Applicant then bore a burden of persuasion. Notwithstanding, assuming for the sake of discussion only, that Petitioners had met their burden of proof, the evidence presented on this issue was competent and substantial to carry Applicant's burden of persuasion.

Therefore, Petitioners' point is not well taken. It provides no basis upon which the Commission may deny the application for Permit # 1094.

*Land Disturbance Forms & SWPPP on Site – MORA 01538*

Petitioners claim that the SWPPP was not present on site when Mr. Snyder visited in March of 2014.<sup>154</sup> Petitioners, therefore, claim that the failure of the Applicant to maintain the SWPPP on site continuously is a violation or noncompliance with the MSOP permit requirements. The permit requirements are found in Applicant's Exhibit 3, the July 6, 2012 Land Disturbance Permit and Applicant's Exhibit 16, the March 13, 2013 Land Disturbance Permit. The relevant requirements are found on page 9, paragraph 10 and on page 10 in paragraph F(1). The provisions provide that the applicant is to maintain copies of the MSOP, the SWPPP and the site inspection records and they shall be accessible during normal business hours; and a log of each inspection and a copy of the inspection report should be kept on site.

Mr. Radmacher acknowledged that the SWPPP was not maintained on site continuously as there was no permanent location in which to store or maintain it. Applicant maintained the SWPPP in vehicles when present on site and working.<sup>155</sup>

Mr. Peltz testified and identified Applicant's Exhibit 4 as the SWPPP referred to in his report of November 2012. With respect to the question of continuous presence of the SWPPP on site, Mr. Peltz testified that the SWPPP needs to be on site when the inspector is there and can have it immediately. The Department of Natural Resources allows permittees to bring the SWPPP to the site. The idea is that the SWPPP be "functional" and "available".<sup>156</sup>

Jimmy Coles also testified on this issue and he said that Mr. Radmacher had provided both the SWPPP records and the inspection reports to him when he came on site in September of 2013 for his review. He said that if there is no office on site or any place to keep the SWPPP and inspection records, it would be acceptable to keep them off site so long as they were made available to the inspector enabling the inspector to make a determination if the SWPPP and inspection records were acceptable. Mr. Coles stated that his position on this issue was consistent with Missouri Department of Natural Resources policy. The Land Disturbance Permit requires the SWPPP to be on site when land disturbance operations are in progress.<sup>157</sup> Mr. Coles stated that when he was on site on September 4, 2013, land disturbance was not in progress and at that time the site was stabilized. Therefore, he used his discretion regarding the issue of whether the SWPPP was to be maintained on site continuously.<sup>158</sup>

When reading the MSOP permit requirements regarding record retention and maintenance in Exhibit AP 3, page 9, paragraph 10, and page 10, paragraph F, it is reasonable to

conclude that Jimmy Coles' interpretation of the requirements is correct. The MSOP requires that the SWPPP and inspection records be retained and that they are to be made "accessible during normal business hours" (page 10(F)(1)); "shall be kept on site" (page 9, paragraph 10). However, it is less than abundantly clear whether they are to be kept on site continuously. In any case the application of the permit requirements as expressed by the staff of the Clean Water Commission is controlling in this matter.

Applicant and the other Radmacher entities received no complaints from the Missouri Department of Natural Resources representatives regarding location of the SWPPP and the inspection records and no citations were issued by the Clean Water Program. Both the inspections by Mr. Peltz<sup>159</sup> and Mr. Coles<sup>160</sup> indicate the records were supplied and reviewed by the Clean Water Program specialists and no negative comments made. Mr. Peltz's report, states, "SWPPP and inspection reports were provided and inspection records were "available and up to date". Mr. Coles' report states, "The Storm Water Pollution Prevention Plan (SWPPP) and required inspection records for the site were provided by Mr. Radmacher. The SWPPP contained all the components and information required by the SWPPP. \* \* \* The site inspection records review indicated that the site inspections have been conducted every two weeks."<sup>161</sup>

Therefore, Petitioners adduced no evidence of a competent and substantial scientific nature to develop an issue that the SWPPP and inspection records were to be maintained on site continuously, even when business operations were not in progress and no activity conducted on site. There is no support in the record for Mr. Snyder's unilateral interpretation of the MSOP contrary to that of the Missouri Department of Natural Resources Clean Water Program representatives. Additionally, Petitioners tendered no evidence to establish any harm to the environment that could possibly result from whether or not the SWPPP and inspection records were maintained on site when business operations were not in progress and no activity being conducted on site versus being available on site when business operations were in progress.

#### Summary and Conclusion

As to this allegation, Petitioners failed to present any substantial and persuasive scientific evidence or otherwise demonstrate:

(1) that the Clean Water Commission issued any notice of a violation and act of noncompliance with regard to keeping the Storm Water Pollution Protection Plan and Land Disturbance Inspection Records (LDIR) continuously at the Radmacher Borrow Site; and

(2) that the Clean Water Commission concluded that any actions of the Radmacher Brothers in having both the SWPPP and LDIR available for inspection, although not continuously at the site, resulted in harm to the environment.

The demonstration made by Petitioners did not establish any violation or act of noncompliance with regard to the location for keeping the SWPPP and LDIR, and did not establish any harm to the environment. Accordingly, Petitioners failed to establish an issue of fact, upon which Applicant then bore a burden of persuasion. Notwithstanding, assuming for the sake of discussion only, that Petitioners had met their burden of proof, the evidence presented on this issue was competent and substantial to carry Applicant's burden of persuasion.

Therefore, Petitioners' point is not well taken. It provides no basis upon which the Commission may deny the application for Permit # 1094.

***Permit 404 – Federal Clean Water Act***<sup>162</sup>

Petitioners assert that the actions of Radmacher Brothers relative to the issue of the 404 Permit constituted an act of noncompliance that could be considered to deny the LRC permit.<sup>163</sup> However, the allegations and proofs relative to this matter do not satisfy the requirements of 10 C.S.R. 40-10.080(F). Therefore, this allegation provides no basis upon which the LRC might deny Permit # 1094.

First, the actions of Radmacher Brothers in failing to obtain a 404 Permit prior to the construction of the lower dam did not involve an environmental law administered by the Missouri Department of Natural Resources or the Land Reclamation Commission. Instead, it involved an environmental law administered by the U.S. Army Corps of Engineers. The U.S. Army Corps of Engineers Notice of Permit Noncompliance stated in the second paragraph that "The Corps of Engineers has jurisdiction over all waters of the United States."<sup>164</sup>

Second, Petitioners adduced no competent and substantial scientific evidence that this action involving the Radmacher Brother's failure to satisfy preconstruction notification requirement to the Corps of Engineers ". . . resulted in harm to the environment." Nathan Hamm testified that the noncompliance cited in Exhibit 19 related to the failure of Applicant to give a written notice, not a determination by the Corps of Engineers of harm to the environment.<sup>165</sup>

Third, the evidence established that the Radmacher Brothers satisfied all requirements of the U.S. Army Corps of Engineers relative to the Federal Clean Water Law and that the 404 Permit was issued. The permit determined that the Radmacher Brother's project, which involved

placement of fill in the waters of the United States, "was authorized" by the Nationwide Permit (NWP (44)) Mining Activities. Furthermore, in approving the project the Corps "determined that the adverse environmental effects of this project are minimal, both individually and cumulatively, ... ." <sup>166</sup> The permitting process is for the purpose of authorizing activity that impacts the environment in some manner. In this instance, the impact was that the Corps permitted an ephemeral stream of the waters of the United States to have a dam constructed to change a portion of the stream to a water impoundment.

Mr. Snyder admitted on cross examination that the 404 Permit had been issued by the Corps of Engineers and he had no complaint with regard to it. His only complaint was that the Radmacher Brothers originally omitted to notify the Corps of Engineers prior to constructing the rock check dam and the large dam. <sup>167</sup>

Mr. Radmacher testified regarding the circumstances of his misunderstanding regarding whether a notice to the Corps of Engineers was necessary in this case. He described how he did not believe that the land disturbance and work on the farm impacted any waters of the United States; and, particularly, the rock check and the lower dam construction. He believed these devices affected only dry gullies on the farm, but not U.S. waters. He researched the issue on line <sup>168</sup> and discovered a document issued jointly by the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency. This document indicated that dry erosional features like gullies and ditches were not classified as waters of the United States. Therefore, he believed the work on the farm was exempt from 404 Permitting. Later, however, the Corps of Engineers expressed a different view and issued the Notice of Permit Noncompliance. The dry features or gullies and ditches on the farm were designated as ephemeral streams and, therefore, waters of the United States. <sup>169</sup>

Mr. Radmacher now understands the 404 related requirements relative to the farm and any further noncompliances regarding a notice of intent to construct or place fill in waters of the United States is subject to the Corps of Engineers investigation and approval. Because Applicant obtained a 404 Permit from the Corps of Engineers, no further notices of noncompliance regarding this particular issue are expected or even likely under the circumstances.

Mr. Hamm, the engineer hired by Radmacher Brothers, described in detail Radmacher Brother's efforts to comply with the law once notified of the 404 issue. Mr. Hamm noted that if Radmacher had notified the Corps of Engineers timely before construction of the rock check and

the lower dam, the process with the Corps would have been virtually the same and that issuance of "after the fact" 404 Permits was not unusual for the Corps of Engineers.<sup>170</sup>

### Summary and Conclusion

As to this allegation, Petitioners failed to present any substantial and persuasive scientific evidence or otherwise demonstrate:

(1) that the any entity of the DNR issued any notice of a violation and act of noncompliance with regard to an environmental law administered by the Missouri DNR having jurisdiction of the waters of the United States; and

(2) that any entity of the DNR made a determination that the Radmacher Brothers project for which Permit 404 was issued, resulted in harm to the environment; and

The demonstration made by Petitioners did not establish that any violation or act of noncompliance of an environmental law administered by DNR occurred, with regard to the Radmacher Brothers obtaining Permit 404, and did not establish any harm to the environment, that was not allowed under the Permit 404. Accordingly, Petitioners failed to establish an issue of fact, upon which Applicant then bore a burden of persuasion. Notwithstanding, assuming for the sake of discussion only, that Petitioners had met their burden of proof, the evidence presented on this issue was competent and substantial to carry Applicant's burden of persuasion.

Therefore, Petitioners' point is not well taken. It provides no basis upon which the Commission may deny the application for Permit # 1094.

### ***Dam Construction***

Petitioners' final claim is the assertion of an act of noncompliance relative to construction of the dam without a permit.<sup>171</sup> Jim Martin gave testimony as to his observation of earth moving on the top of the dam on April 29, 2013. Martin, however, provided no other relevant evidence.<sup>172</sup>

Paul Simon from DNR Dam and Reservoir Safety (Dam Safety) was called by Petitioners to describe how to measure the height of a dam from the low point on the crest to the low point on the toe. Mr. Simon stated that dam height is determined when representatives of the Missouri Department of Natural Resources Dam Safety Program come to a site and measure the dam. Mr. Simon said that if a dam is greater than 35 feet in height when Dam Safety measures it, then the dam is regulated by the Missouri DNR. In that case, a regulated dam would need permits.<sup>173</sup>

Petitioners' argument was that the dam constructed in this case was greater than 35 feet in height. Therefore, Petitioners alleged it was regulated, and that a permit was needed either to construct it and/or to modify it. However, Mr. Simon's testimony was that if a dam was constructed at greater than 35 feet before Dam Safety, or a certified engineer, measured it, but less than 35 feet when Dam Safety measured it, it would not be regulated. Thus no permits would be needed.<sup>174</sup>

Exhibit AP 60, a topography drawing dated May 17, 2013, provided summary information of elevation points affixed from an April 5, 2013 survey. Mr. Simon testified that the dam height, per the survey points shown on Exhibit 60, was approximately 34 feet in height. Next, Mr. Simon acknowledged that Dam Safety inspected and measured the dam on May 9, 2013.<sup>175</sup> The dam at that time was approximately 33.5 feet in height and, therefore, not regulated by the Missouri Department of Natural Resources. Mr. Simon also identified Applicant's Exhibit 66, a July 23, 2014 letter from Dam Safety, describing a re-measurement of the dam approximately one year later. This letter noted that the dam was still less than 35 feet in height and, therefore, not regulated.<sup>176</sup>

Mr. Hamm's testimony on this matter described how his firm secured the dam topographic elevation shots in Exhibit AP 60. He confirmed the shots were taken on April 5, 2013. The shots were taken prior to Mr. Martin's view of the work on the dam on April 29, 2013. He also identified Exhibits AP 58 and AP 59, which were additional drawings with elevation shots and/or contour lines drawn from the April 5 survey points. Hamm opined that the dam, when constructed, was approximately 30 feet in elevation, if you look at the contour lines only that are shown in Figure 3 of Exhibit AP 57 (the draft Application to the Corps of Engineers for the 404 Permit). This information was given to Robert Radmacher in April of 2013. Exhibit AP 59 contains more specific elevation information from the April 5, 2013 shots. Again, these shots show the dam height from the edge of grade (EOG) to the top of the dam with the difference being approximately 34 feet. This information also was given to Robert Radmacher. Hamm also identified Exhibit AP 23,<sup>177</sup> the final Permit Application to the Army Corps of Engineers for the 404 Permit.<sup>178</sup>

Mr. Simon for Dam Safety provided testimony regarding the agricultural exemption for dams found in the statutes and regulations. Mr. Simon testified that even if the dam was greater than 35 feet in height at some point in time, he did not view anything regarding the dam that

would have disqualified it for an agricultural exemption; and that it probably could have been exempted on an agricultural basis. He also stated that he found nothing defective with respect to the dam.<sup>179</sup>

Robert Radmacher testified about the original construction of the dam and described how it was designed, laid out and constructed to be no greater than 28 feet in height. He testified that concerning the dam height and measurement between location of the dam toe and edge of grade on the road on the front side of the dam as to how the edge of the grade (the road he installed to reach the pipes for the water) covered the dam toe and increased the measured height of the dam without an actual increase in the height of the dam crest. This explains the difference between the 28-foot design and construction and the later 34-foot measurement. He also stated that he reviewed the draft 404 Permit Application prepared by Mr. Hamm in April of 2013.<sup>180</sup> He noted a 30-foot height statement in Paragraph 18 of that exhibit and firmly believed the dam to be no taller than 30 feet at that time.<sup>181</sup>

Mr. Radmacher explained the reasons for working on the top of the dam in late April of 2013 as viewed by Mr. Martin. The purpose of starting work on the dam was not to reduce the height of the dam prior to the time that Dam Safety came to measure it; but instead, it related to efforts by Radmacher Brothers to reduce the dam height slightly in relation to the 404 Permit. Mr. Hamm and Mr. Radmacher were attempting to calculate the volume and extent of soil placed within the waters of the United States and measure anticipated water inundation of the reservoir to document impacts for the 404 Permit Application and the cost of "credits" necessary to be paid as a result of the inundation. However, Mr. Radmacher testified that shortly after beginning work on top of the dam in late April, it was stopped. This testimony of Mr. Radmacher regarding dam height was corroborated by Mr. Hamm.<sup>182</sup>

Petitioners apparently wanted to demonstrate that the lower dam was constructed at a height greater than 35 feet, thus requiring a Dam Safety permit to construct the dam in the first instance; and/or was not an agricultural dam and, therefore, exempted; and/or was lowered at later date to less than 35 feet, thus also requiring a permit; and that all of the above constituted a noncompliance of dam safety regulations by the Applicant. However, the exhibits and testimony established that the official regulated height of the dam was under 35 feet when measured by Dam Safety on both May 9, 2013 and July 14, 2013 and was less than 35 feet when constructed by Radmacher, and less than 35 feet in height when measured by Nathan Hamm on April 5,

2013, there is a total absence of competent and substantial scientific evidence of any violation or noncompliance relative to the lower dam construction or later modification, whether or not the dam qualified as an exempt agricultural structure.

*Summary and Conclusion*

As to this allegation, Petitioners failed to present any substantial and persuasive scientific evidence or otherwise demonstrate:

(1) that the Dam and Reservoir Safety Council issued any notice of a violation and act of noncompliance with regard to the Dam Safety Law and the height of the dam construction in 2013; and

(2) that the Dam and Reservoir Safety Council made any finding that the construction of the dam in 2013, resulted in harm to the environment.

The demonstration made by Petitioners did not establish that any violation or act of noncompliance with regard to the construction of the lower dam in 2013, and did not establish any harm to the environment. Accordingly, Petitioners failed to establish an issue of fact, upon which Applicant then bore a burden of persuasion. Notwithstanding, assuming for the sake of discussion only, that Petitioners had met their burden of proof, the evidence presented on this issue was competent and substantial to carry Applicant's burden of persuasion.

Therefore, Petitioners' point is not well taken. It provides no basis upon which the Commission may deny the application for Permit # 1094.

**SUMMARY AND CONCLUSION**

Petitioners' Allegation 10 (404 Permit) is based upon a federal law and not upon an environmental law administered by the Missouri Department of Natural Resources, therefore, it cannot be the basis upon which Permit # 1094 can be denied.

Petitioners Allegations 1, 2, 3, 6, 7, 8 and 9 all relate to the MORA 01538. This permit was issued under the Clean Water Law, an environmental law administered by the Missouri Department of Natural Resources. However, no staff member of the Clean Water Commission or any staff member of the DNR made any finding and conclusion with regard to any of these allegations that Radmacher Brothers were guilty of committing any act of noncompliance under the CWL. Furthermore, no staff member of the CWC or DNR determined that any of the activities of Radmacher Brothers relating to any of the allegations resulted in harm to the environment. In addition, the evidence placed into the record by the testimony and reports of the

employees of DNR, Mr. Hamm, and the testimony of both Thomas and Robert Radmacher rebutted each of the claims of Petitioners.

Allegations 4 and 5 are claims made under the Land Reclamation Law. No testimony or evidence was provided from any staff of the LRP to establish that Applicant was in noncompliance with the LRL on these two points. To the contrary, the testimony and evidence established that Applicant was in compliance with the LRL and that no harm to the environment has occurred as a result of the activity of Applicant. The testimony of the staff of LRP and Robert Radmacher on these two claims rebuts and negates Petitioners' Allegations.

Allegation 11 is a claim governed by the Dam and Reservoir Safety Law. Paul Simon's testimony established no violation of the DRSL had occurred with regard to the construction of the lower dam on the Radmacher property. His testimony established that since the dam was less than 35 feet it was exempt from having to obtain a permit under the DRSL. Mr. Simon and Mr. Hamm confirmed the height of the dam was less than 35 feet. Therefore, Petitioners' Allegation was refuted relative to any act of noncompliance. Furthermore, there was no showing of harm to the environment under the DRSL.

Petitioners failed to establish by competent and substantial scientific evidence any act of noncompliance under any of their allegations. Petitioners failed to establish by competent and substantial scientific evidence any harm to the environment under any of their allegations.

The evidence presented by the various DNR witnesses, Hamm, Thomas and Robert Radmacher rebutted each of the demonstrations attempted by Petitioners and carried any burden of persuasion which might be deemed to have existed for Applicant.

Petitioners failed to establish their case. There is no basis under sections 444.772 and 444.773 RSMo and 10 CSR 40-10.080 (3) to deny Permit # 1094.

### **ORDER**

IT IS RECOMMENDED by the undersigned, a hearing officer duly appointed by the Land Reclamation Commission of the Missouri Department of Natural Resources, that the New Site Permit Application # 1094 be approved, as required by sections 444.772 and 444.773 RSMo.

Any Finding of Fact that is a Conclusion of Law or Decision shall be so deemed. Any Decision that is a Finding of Fact or Conclusion of Law shall be so deemed.

SO ORDERED November 2, 2014.

MISSOURI DEPARTMENT OF NATURAL RESOURCES



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<sup>1</sup> The Revised Statutes of Missouri will be cited as RSMo in the Recommended Decision and Order, once an initial citation to a section has been given, the section will then only be referred by its section number without RSMo.

<sup>2</sup> The original list of Petitioners included the following individuals: David Earls, Creighton Cox, Diane Cox, Scott Gard, Diane Gard, Tammy Heider, Brad Mantzey, Jessica Mantzey, James Richards, Susan Richards, Robert Snyder, Liesl Snyder and Tim Stamm. By Revised Order on the Submission of Evidence, dtd 4/1/14, parties were informed: “Any party failing to file and exchange Narrative Testimony Statement(s) for the witness(es) for their direct case will be deemed to have abandoned their claim in the proceeding and to have withdrawn as a party to the proceeding. The deadline for filing of exhibits and Narrative Testimony Statements set by said Order was 5/9/14. By Order Dismissing Certain Petitioners, dtd 5/15/14, David Earls, Creighton Cox, Diane Cox, Scott Gard, Diane Gard, Tammy Heider, Brad Mantzey, Jessica Mantzey, James Richards, Susan Richards, and Tim Stamm were dismissed as Petitioners for failure to file any exhibits or Narrative Testimony Statements to establish a prima facie direct case. The matter proceeded with only Robert and Liesl Snyder as Petitioners.

<sup>3</sup> Mr. Zeiler filed his Motion to Withdraw as counsel for Petitioners, as Petitioners desired to proceed as pro se litigants. Order Granting Motion to Withdraw was issued September 4, 2014.

<sup>4</sup> Radmacher Brothers Excavating Company, Inc. is not a party in the matter, however, it is an affiliated or associated entity to Applicant. Both RBEC and AA Quarry Inc. are owned by Thomas and Robert Radmacher.

<sup>5</sup> Petitioners’ Post Hearing Brief – “Petitioners have made no such claim in this case as to past acts of noncompliance at other locations in Missouri suggesting a reasonable likelihood of future acts of noncompliance.” Petitioners’ case was based upon “present” acts of noncompliance.

<sup>6</sup> The term “Applicant” for purposes of stating of the issue includes persons and corporations associated with AA Quarry.

<sup>7</sup> Section 444.773.4 RSMo; 10 CSR 40-10.080 (3) (F)

<sup>8</sup> Petitioners’ Post Hearing Brief, pp. 1 – 2; p. 14 – “Petitioners request, based on information presented on the record in the formal hearing that the hearing officer’s recommendation be for denial of the permit due to applicant’s multiple present acts of noncompliance which have caused harm to the environment.”

<sup>9</sup> Exhibit AP 8; Uncontested Material Fact 10, Order dtd 1/13/14.

<sup>10</sup> Exhibit AP 9

<sup>11</sup> Exhibit AP 50

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<sup>12</sup> Exhibit AP 50

<sup>13</sup> Exhibit AP 18; Uncontested Material Fact 11

<sup>14</sup> Exhibit AP 18; Uncontested Material Fact 12

<sup>15</sup> Exhibit AP 18; Uncontested Material Fact 13

<sup>16</sup> Uncontested Material Fact 14

<sup>17</sup> By Order dtd 8/15/14 the Briefing Schedule was set: Briefs to be filed on or before 10/10/14; Response or Reply Briefs to be filed on or before 10/30/14.

<sup>18</sup> The Hearing in this matter was conducted on August 11, 12, 13, 14 & September 23, 2014. The Transcript consists of Volumes I, II, III, IV & V, one volume for each day. The page numbers continue from one volume to the next. The citations to the Transcript throughout this Decision and Order will be in the format of: Tr. Page:Line or Tr. Page

<sup>19</sup> The Parties stipulated to the admission of exhibits, their foundation and authenticity at the beginning of the Hearing (Tr. 11:9 – 12:3), a number of exhibits were then withdrawn prior to the close of the hearing (Tr. 819:1 – 826:7). Accordingly, there are gaps in the lettering of Petitioners' exhibits representing the withdrawn exhibits.

<sup>20</sup> This tract of land is where the proposed quarry to be operated under Permit # 1094 is located.

<sup>21</sup> Best Manage Practices

<sup>22</sup> Tr. 386-464; Tr. 733-818 – R. Radmacher Testimony

<sup>23</sup> The Parties stipulated to the admission of exhibits, their foundation and authenticity at the beginning of the Hearing (Tr. 11-12), a number of exhibits were then withdrawn prior to the close of the hearing (Tr. 819-826). Accordingly, there are gaps in the numbering of Applicant's exhibits representing the withdrawn exhibits.

<sup>24</sup> Certain facts stipulated to but that at the conclusion of the Formal Hearing were not deemed relevant have been deleted from the list. In addition, the listing of the uncontested facts has been rearranged into a chronological order.

<sup>25</sup> Tr. 35 – 185; 826 – 830

<sup>26</sup> Section 490.065 RSMo

<sup>27</sup> Tr. 187 – 212; Mr. Mohammadi is the Staff Director for the Land Reclamation Program. Tr. 187:12 – 20

<sup>28</sup> Tr. 214 – 222; Mr. Elkana was a permit writer for the Clean Water Commission at the time frame covered by his testimony. Tr. 214:17 – 21; 215:7 – 9

<sup>29</sup> Tr. 232 – 238; Ms. Carroll is a resident who lives in the neighborhood of the Radmacher property. Tr. 232:25 – 233:18

<sup>30</sup> Tr. 239 – 248; Mr. Martin owns and lives on land that abuts the Radmacher property. Tr. 239:5 – 21

<sup>31</sup> Tr. 250 – 269; Ms. Cutright owns and lives on land that abuts the Radmacher property. Tr. 250:16 – 19; 251:2 – 6

<sup>32</sup> Tr. 270 – 309; Mr. Bleibaum at the time relevant to this testimony was an employee of DNR and work in the water pollution section in compliance and enforcement as Water Pollution Unit Chief – Clear Water Commission. Snyder Exhibit RR; Tr. 271:5 – 8; 20 – 25

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<sup>33</sup> Tr. 310 – 374; Mr. Coles at the time relevant to his testimony was employed by DNR as an Environmental Specialist, Clean Water Commission. Snyder Exhibit AAA; Tr.312:2 – 313:2

<sup>34</sup> Both acts were corrected as per the inspection report’s Require Action for each act and the facility was returned to compliance with the State Operating Permit MO-RA02837. There was no finding that harm to the environment had occurred as a result of either of the two acts. The two acts were: (1) oil leaked from heavy machinery onto the ground; and (2) rip-rap in the drainage channel at the north end of the impoundment dam had eroded.

<sup>35</sup> Tr. 376 – 385; Mr. Helgason is the Environmental Manager of the Air Pollution, Solid Waste and Hazardous with DNR. Tr. 376:22 – 377:2

<sup>36</sup> Tr. 474 – 519; Mr. Simon is employed with the Dam Reservoir Safety Program as a civil engineer. Tr. 473:9 -15

<sup>37</sup> Tr. 521 – 545; Mr. Zeaman serves as the Chief of the Non-Coal Unit of the Land Reclamation Program. Tr. 522:11 – 23

<sup>38</sup> Tr. 546 – 560; Mr. Slechta is an Environmental Specialist III (*Inspector*) in the Land Reclamation Program. Tr. 547:4 – 13

<sup>39</sup> Tr. 562 – 652; Thomas Radmacher is Vice-President of Field Operations of Radmacher Brothers Excavating Company.

<sup>40</sup> Tr. 666 – 732; Mr. Hamm is a licensed professional engineer and Vice-President of SCS Aquaterra. Tr. 667:3 – 21.

<sup>41</sup> Tr. 848 – 937; Mr. Peltz is a Water Pollution and Environmental Specialist with the DNR – Clean Water Commission.

<sup>42</sup> Snyder Exhibit RR

<sup>43</sup> Section 444.773.3 RSMo: “In any public hearing, if the commission finds, based on competent and substantial scientific evidence on the record, that an interested party’s health, safety or livelihood will be unduly impaired by the issuance of the permit, the commission may deny such permit.” 10 CSR 40-10.080 (3) (D): “If the commission finds, based upon competent and substantial scientific evidence on the record that a hearing petitioner’s health, safety or livelihood will be unduly impaired by impacts from activities that the recommended mining permit authorizes, the commission may deny the permit.” *See*, Petitioners’ Post Hearing and Response Briefs – only claim “present acts of noncompliance,” no claim of undue impairment to health, safety or livelihood.

<sup>44</sup> Section 444.773.3 RSMo: “In any public hearing, ... If the commission finds, based on competent and substantial scientific evidence on the record, that the operator has demonstrated, during the five-year period immediately preceding the date of the permit application, a pattern of noncompliance at other locations in Missouri that suggests a reasonable likelihood of future acts of noncompliance, the commission may deny such permit.” 10 CSR 40-10.080 (3) (E): If the Commission finds, based upon competent and substantial scientific evidence on the record, that the operator has, during the five (5)-year period immediately preceding the date of the permit application, demonstrated a pattern of noncompliance at other locations in Missouri that suggests a reasonable likelihood of future acts of noncompliance, the commission may deny such permit, ...” *See*, Petitioners’ Post Hearing and Response Briefs – only claim “present acts of noncompliance” no claim of past acts of noncompliance.

<sup>45</sup> *See also*, 10 CSR 40-10.080(1) (F).

<sup>46</sup> Section 444.789.3 RSMo; 10 CSR 40-10.080(5) (C) (3).

<sup>47</sup> 10 CSR 40-10.080(5)

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<sup>48</sup> Section 444.767 RSMo – powers of the Land Reclamation Commission with regard to the administration of Sections 444.760 – 444.790.

<sup>49</sup> Sections 660.006 – 660.141 RSMo – Missouri Clean Water Law

<sup>50</sup> Sections 236.400 – 236.500 RSMo – Missouri Dam and Reservoir Safety Law. The statutes do not have a specific identification of Section 236.400 to 236.500 by the title Missouri Dam and Reservoir Safety Law, however, for purposes of this Recommended Decision and Order, the Hearing Officer has so identified the statutes by that title.

<sup>51</sup> 33 U.S.C. 1344

<sup>52</sup> *Curdt v. Missouri Clean Water Commission*, 586 S. W. 2d 58, 60 (Mo. App. E.D. 1979)

<sup>53</sup> Petitioners’ Post Hearing Brief p. 2

<sup>54</sup> Petitioners’ Post-Hearing Brief, p. 2. Petitioners’ position is based upon their apparent conclusion that an act of noncompliance is not actually a violation of environmental law, but rather an act of noncompliance is only “non-compliant activity” resulting in harm to the environment. No statutory or case law support is provided for such a position. An act of noncompliance must involve a violation of the applicable environmental law otherwise there would be no act of noncompliance.

<sup>55</sup> Petitioners’ Reply Brief, p. 2 – “The burden on the petitioners in this case. . . does not require the petitioners to demonstrate actual documented violations of environmental law, only non-compliant activity which as caused harm to the environment.”

<sup>56</sup> It is noted that an argument can be made based upon the plain language of §444.773.3 & 4, 10 SCR 40-10.080 (2) (B) and the holding of the Court in *Lincoln County Stone Co., Inc. v. Koenig*, 21 S.W. 3d 142 (Mo.App. E.D. 2000), that standing to be granted a formal public hearing rests upon a showing by a petitioner of undue impairment to the petitioner’s health, safety or livelihood by the issuance of the permit. Therefore, in the present case, due to the Petitioners failing to assert at hearing and offer evidence of undue impairment to their health, safety or livelihood they forfeited standing to pursue their case. Since that claim was not raised by either Respondent or Applicant, it is not further addressed.

<sup>57</sup> Snyder Exhibit AAA, p. 2 – **COMPLIANCE DETERMINATION**

<sup>58</sup> Snyder Exhibit AAA – p. 3 – **UNSATISFACTORY FEATURES** and **CONCLUSION**

<sup>59</sup> 20 MoPrac. §10:73, p. 409.

<sup>60</sup> Mo. Const. Art. V, § 18; 20 MoPrac. §10:60, p. 367 et seq.

<sup>61</sup> Black’s Law Dictionary, Seventh Edition (1999) – *admissible evidence, relevant evidence; City of Kansas City v. New York-Kansas Bldg*, 96 S.W.3d 846, 861 (Mo. App. 2001); *State v. Kidd*, 990 S.W.2d 175, 180 (Mo.App. 1999).

<sup>62</sup> Black’s Law Dictionary, Seventh Edition (1999) – *substantial evidence.*

<sup>63</sup> *George v. McLuckie*, 227 S.W.3d 503 (Mo.App.W.D. 2007); *Brown v. Bailey*, 210 S.W.3d 397, (Mo.App.E.D. 2006); *Preston v. Director of Revenue*, 202 S.W.3d 608 (Mo. 2006).

<sup>64</sup> §444.773.4 RSMo; 10 CSR 40-10.080 (3) (B) (E) & (F)

<sup>65</sup> Webster’s New World Dictionary, Second College Edition – *scientific*

<sup>66</sup> *Id.* – *science*

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- <sup>67</sup> Black's Law Dictionary, Seventh Edition – scientific knowledge
- <sup>68</sup> *Daubert v. Merrell Dow Pharm., Inc.* 509 U.S. 579, 113 S.Ct. 2786 (1993)
- <sup>69</sup> *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999)
- <sup>70</sup> Courtroom Handbook on Missouri Evidence -2011, Wm. A. Schroeder, Section 702.5.a, p.440
- <sup>71</sup> Black's Law Dictionary, Seventh Edition – scientific evidence
- <sup>72</sup> *Section 490.065, RSMo; State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. 2004 *en banc*); Courtroom Handbook on Missouri Evidence, Wm. A. Schroeder, Sections 702-705, pp. 434 - 477; *Wulfinf v. Kansas City Southern Industries, Inc.*, 842 S.W.2d 133 (Mo. App. E.D. 1992).
- <sup>73</sup> Petitioners' Post Hearing Brief; Petitioners' Response Brief
- <sup>74</sup> Narrative Testimony Statement – Robert Snyder, filed with the Hearing Officer prior to the Formal Public Hearing; Tr. Etc.
- <sup>75</sup> Applicant as used in Allegations 1, 2, 3, 6, 7, 8, 9, 10 & 11 does not related to or describe AA Quarry LLC, but rather the entity being described as “Applicant” is the Radmacher Land Company or Radmacher Excavation Company. Both of these Radmacher entities are associated with AA Quarry LLC, in that the Radmacher Brothers – Robert & Thomas – are the principles in all three corporations.
- <sup>76</sup> Best Management Practice
- <sup>77</sup> Storm Water Pollution Protection Plan
- <sup>78</sup> There existed a water impoundment (pond or small lake) for which a dam had been constructed prior to the purchase of the subject farm by Radmacher Brothers. The dam which is the subject of this allegation was constructed by Radmacher Brothers during 2013.
- <sup>79</sup> For purposes of the discussion, analysis and decision, the facility is deemed to be the borrow or land disturbance site under MORA 01538 and the proposed bonded area under Permit # 1094.
- <sup>80</sup> Tr. 83-86 – Snyder Testimony; Snyder Exhibits X and Y
- <sup>81</sup> Tr.126-128, 131-132
- <sup>82</sup> Exhibit AP 3
- <sup>83</sup> Exhibit AP 10
- <sup>84</sup> Tr. 911-912, 918-919, 923 – Peltz Testimony
- <sup>85</sup> Tr. 286, 289-291, 294-295 – Bleibaum Testimony
- <sup>86</sup> Tr. 201-202 – Mohammadi Testimony
- <sup>87</sup> Tr. 348 – Coles Testimony
- <sup>88</sup> Exhibit AP 25
- <sup>89</sup> Tr. 329-331, 335, 349-351, 358 – Cole Testimony

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<sup>90</sup> Tr. 720, 721 – Hamm Testimony; Applicant's Exhibit AP 26

<sup>91</sup> §644.051.1 RSMo prohibits the discharge of water contaminants into the waters of the state which reduce the quality of such waters below the Water Quality Standards established by the Commission.

<sup>92</sup> Tr. 722-723, 731-732; Exhibit AP 27

<sup>93</sup> Tr. 370-371 – Coles Testimony

<sup>94</sup> Tr. 203 – Mohammadi Testimony

<sup>95</sup> Tr. 131-135 – Snyder Testimony

<sup>96</sup> 10 CSR 20-6.200 (1) (B) 5 & 6

<sup>97</sup> Tr. 123-126 – Snyder Testimony

<sup>98</sup> Tr. 394-396, 397-403 – R. Radmacher Testimony

<sup>99</sup> Guidance to Identify Waters Protected by the Clean Water Act

<sup>100</sup> What were considered by R. Radmacher as gullies and ditches – Tr. 412:15 – 414:21

<sup>101</sup> Tr. 680-682

<sup>102</sup> Corps of Engineers Non-Compliance Notice

<sup>103</sup> The Public Notification Sign consists of an 8 ½ inch by 11 inch paper on which is provided the following information: Missouri Department of Natural Resources **STORMWATER DISCHARGES FROM THIS LAND DISTURBANCE SITE ARE AUTHORIZED BY THE MISSOURI STATE OPERATING PERMIT NUMBER: MORA01538 ANYONE WITH QUESTIONS OR CONCERNS ABOUT STORMWATER DISCHARGES FROM THIS SITE, PLEASE CONTACT THE MISSOURI DEPARTMENT OF NATURAL RESOURCES AT 1-800-361-4827** A copy of the notice is in Snyder Exhibit MM as an addendum page to the Permit.

<sup>104</sup> Tr. 430 – 432 – R. Radmacher Testimony; Mr. Radmacher's testimony was that it was standard practice in his construction business to post land disturbance permit notices in project job trailers and that at the time he did not focus on trying to hide the sign. No one from DNR instructed Radmacher to move the sign or informed him it was posted in the wrong location. After the Petitioners' complaint was made, the sign was moved to the farm entrance at AA Highway.

<sup>105</sup> The Owner, Continuing Authority and Facility Name stated on the General Operating Permit – MORA 01438 is Radmacher Brothers Borrow Site.

<sup>106</sup> Jimmy Coles (*DNR-Clean Water Commission Staff*) visited the borrow site on March 7, 2013 and observed the sign behind the house at the entrance to the borrow site. He never instructed Mr. Radmacher that the sign should be moved. (*Tr. 326-328 – Coles Testimony*)

<sup>107</sup> Tr. 141-154 – Snyder Testimony

<sup>108</sup> Tr. 43, 92-97 – Snyder Testimony; Snyder Exhibits T & W

<sup>109</sup> Tr. 524 – 532 – Zeaman Testimony

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<sup>110</sup> “Benefaction”, the dressing or processing of minerals for the purpose of regulating the size of the desired product, removing unwanted constituents, and improving the quality or purity of a desired product. §444.785 (2) RSMo

<sup>111</sup> Applicant Exhibit 12; Applicant Exhibit 24

<sup>112</sup> Tr. 405 – 411, 439 – 444 – R. Radmacher Testimony

<sup>113</sup> Tr. 394 – 400 – R. Radmacher Testimony

<sup>114</sup> Applicant Exhibit 43; Tr. 546 – 560 – Slechta Testimony

<sup>115</sup> §444.766(2). *See also* 10 C.S.R. 40-10.070 regarding enforcement procedures employed by the DNR for quarry operations without a permit and notices and remedial actions.

<sup>116</sup> Tr. 44; 105 – 107, 109 – 110; §444.772, RSMo; Snyder Exhibit TTTT & WWWW; 10 C.S.R. 40-10.020

<sup>117</sup> Exhibit AP 8

<sup>118</sup> 10 CSR 40-10.020 (E)2.A.

<sup>119</sup> 10 CSR 40-10.020 (E)2.A. (I)

<sup>120</sup> 10 CSR 40-10.020 (E)2.A. (II)

<sup>121</sup> *Lincoln County Stone, Inc. (and the Missouri Land Reclamation Commission) v. Koenig*, 21 S.W.3d 142, 145 [1-3] (Mo.App. 2000); *State of Mo. ex rel Webster (and the Missouri Department of Natural Resources)*, 825 S.W.2d 916, 931 [8-9]

<sup>122</sup> Applicant's Exhibit 49 – Email dtd 12/17/12 from Tucker Fredrickson to Robert Radmacher – “That is correct, it is your choice to have the setback and not send the notification letters.

<sup>123</sup> Tr. 192-200 – Mohammadi Testimony

<sup>124</sup> Tr. 199, 200, 206, 207 – Mohammadi Testimony

<sup>125</sup> Tr. 260-266 – Cutright Testimony

<sup>126</sup> *See Lake Ozark, et al. v. Magruder Limestone, Inc.*, 326 S.W.3d 38 (Mo.App. 2010), holding that Petitioners' failure to demonstrate prejudice relative to notice issue under 10 C.S.R. 40-10.020(H) defeated Petitioners' claim. There was no evidence that Applicant's failure relative to notice caused any potential petitioners to miss the opportunity to join in the case.

<sup>127</sup> 10 CSR 40-10.020 (I) 1.B

<sup>128</sup> Tr. 44-45, 77-80 – Snyder Testimony

<sup>129</sup> Exhibit AP 3, page 3, paragraph (c)(2)

<sup>130</sup> *See also* 10 C.S.R. 20-6(1)(c) Definitions (2) BMPs for Land Disturbance.

<sup>131</sup> Tr. 133-135 – Snyder Testimony

<sup>132</sup> Tr. 915-918, 920 & 930 – Peltz Testimony

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- <sup>133</sup> Tr. 452 – R. Radmacher Testimony
- <sup>134</sup> Tr. 203 – Mohammadi Testimony
- <sup>135</sup> Tr. 307, 300 – Bleibaum Testimony
- <sup>136</sup> Tr. 325-326, 336-337, 371-372 & 374 – Coles Testimony
- <sup>137</sup> Tr. 700 – Hamm Testimony
- <sup>138</sup> Tr. 420-425 – R. Radmacher Testimony; Exhibits AP 4 & 4(a)
- <sup>139</sup> Snyder Exhibit MM; Exhibit AP 3 & 3A
- <sup>140</sup> Snyder Exhibit NN; Exhibit AP 4 & 4A
- <sup>141</sup> Tr. 44 – Snyder Testimony
- <sup>142</sup> Tr. 115-116 – Snyder Testimony
- <sup>143</sup> Tr. 415-420, 448-451, 454-456 – R. Radmacher Testimony
- <sup>144</sup> Snyder Exhibit RR
- <sup>145</sup> Tr. 298-300 – Bleibaum Testimony
- <sup>146</sup> Tr. 324, 352-354 – Coles Testimony; *See also*, Exhibit AP 25, page 2 – Inspection Description & Observations
- <sup>147</sup> Tr. 45, 73-77 – Snyder Testimony
- <sup>148</sup> Exhibit AP 10
- <sup>149</sup> Exhibit AP 10, page 2
- <sup>150</sup> Tr. 897-899, 927-928 – Peltz Testimony
- <sup>151</sup> Exhibit AP 25, page 2
- <sup>152</sup> Tr. 322-323, 325-326 – Coles Testimony
- <sup>153</sup> Tr. 574, 577-579, 588, 592-593, 638-639 – T. Radmacher Testimony
- <sup>154</sup> Tr. 46, 116-117 – Snyder Testimony
- <sup>155</sup> Tr. 432-434 – R. Radmacher Testimony
- <sup>156</sup> Tr. 912-914 – Peltz Testimony
- <sup>157</sup> *See* Exhibit AP 3, MSOP 1538, page 3, paragraph C(2), which states: "A copy of the SWPPP must be available on site when land disturbance operations are in progress or other operational activity that may affect the maintenance or integrity of the best management practices (BMP) . . . structures and made available as specified under Section F Records of this permit."

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<sup>158</sup> Tr. 323, 356, 368-369 – Coles Testimony

<sup>159</sup> Exhibit AP 10

<sup>160</sup> Exhibit AP 25

<sup>161</sup> Exhibit AP 25, page 2

<sup>162</sup> Petitioners' allegation also relates to Clean Water Commission 401 permit. The evidence on this matter established that the DNR 401 permit is issued as a result of the issuance of the Federal 404 permit. A 401 permit is not issued until the 404 has been issued. The 401 permit was issued once the 404 permit was issued. Radmacher Brothers was not deemed by the DNR to have been guilty of any act of noncompliance relative to the 401 permit.

<sup>163</sup> Tr. 46 – Snyder Testimony

<sup>164</sup> Exhibit AP 19; *See also* 33 C.F.R. 320-332

<sup>165</sup> Tr. 675-676 – Hamm Testimony

<sup>166</sup> Tr. 692, 694-695, 697-678, 720-721 – Hamm Testimony; Exhibits AP 25, AP 26, AP 32, AP 51 & AP 62

<sup>167</sup> Tr. 171, 173 – Snyder Testimony

<sup>168</sup> Exhibit AP 39

<sup>169</sup> Tr. 412-415 – R. Radmacher Testimony; Tr. 680-682 – Hamm Testimony (Corps of Engineers jurisdictional determination; Exhibit AP 19 – last page

<sup>170</sup> Tr. 728, Tr. 700-701

<sup>171</sup> Tr. 46, 92 – Snyder Testimony; Snyder Exhibit J

<sup>172</sup> Tr. 242, 244 & 248 – Martin Testimony; Snyder Exhibits K & L

<sup>173</sup> Tr. 477-479, 481, 488-489, 513 – Simon Testimony

<sup>174</sup> Tr. 478 – Simon Testimony

<sup>175</sup> Exhibit AP 22

<sup>176</sup> Tr. 489, 491-492, 502-503 – Simon Testimony; Tr. 761-762 – R. Radmacher Testimony

<sup>177</sup> P. 2 of 3 – Item 18. Nature of Activity: “The earthen dam will be approximately 650 feet long, 34 feet high, ... .”

<sup>178</sup> Hamm Tr. 669, 685, 688-690, 697-699, 703-708, 713 – Hamm Testimony

<sup>179</sup> Tr. 481, 482, 493-500, 512, 513 – Simon Testimony

<sup>180</sup> Exhibit AP 57

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<sup>181</sup> Tr. 733-747 – R. Radmacher Testimony

<sup>182</sup> Tr. 747-758 – R. Radmacher Testimony; Tr. 708-713,718, 720 – Hamm Testimony