

**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, <i>et seq.</i> RSMo
New Site Permit Application)	
)	
DAVID EARLS, et al,)	
)	
<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>)	

RESPONDENT'S ANSWER

Petitioners have provided the grounds for their hearing request as a brief, but Respondent's answer is akin to a pleading. Any allegation of fact that is not specifically admitted herein shall be deemed denied.

Petitioners' Statement of Facts

A. Nature of the Case

The subject of this hearing is an application for a permit to engage in

the surface mining of limestone. An answer is not required to Petitioners' legal analysis concerning the nature of the case.

B. Procedural History

Respondent admits that a public meeting was held on March 7, 2013. Respondent admits that following that meeting, a Staff Director's Notice of Recommendation was issued to approve the permit application. Respondent further admits that staff did not feel that all of the concerns of the public were successfully resolved by the public meeting. Respondent denies that the Staff Director's Notice of Recommendation supports Petitioners' claim that: "Accordingly, he [Respondent] recommended a hearing be held." Rather the document states: "...this Director's recommendation will be on the May 23, 2013 Commission meeting agenda as a request for a hearing." Respondent presented requests for a hearing to the Land Reclamation Commission on May 23, 2013. Respondent was neutral as to the requests for a formal hearing. Respondent recommended issuing a permit to AA Quarries, LLC, to engage in surface mining.

C. Summary of the Argument

An answer is not required to the summary. Respondent answers allegations presented in the Argument section.

Petitioners' Argument

An answer is not required to the Petitioners' rhetorical introduction, on

page 3 through the first two lines on page 4, to their Argument.

I. Applicant’s Alleged Non-Compliance and Likelihood of Future Non-Compliance Under § 444.773 RSMo.

A. Standard of Review

If an answer is required to Petitioners’ statement of the “standard of review,” Respondent avers that it is fairly accurate. Further answering, Respondent avers that the statute, § 444.773.4 RSMo, which was the basis of the holding in *Lake Ozark v. Mo. Dep’t of Natural Res.*, 326 S.W.3d 38 (Mo. App. W.D. 2010), was legislatively amended, after the court’s opinion, to remove the sentence that expressly placed the burden of “proof” (the burden of “persuasion,” as the court described it) on the permit applicant. The court relied upon this sentence. But the court also relied upon the Commission’s implementing rule, 10 CSR 40-10.080(3)(B), which places the burden of “proof” (again, “persuasion”) on the Applicant, as to facts that Petitioners have first established with competent and substantial scientific evidence.

There has been no challenge to the validity of the rule on the basis that it is not authorized by the current statute. The regulation has not been amended since the statutory revision, and Respondent avers that the rule is consistent with both the earlier and current versions of the statute. The rule should therefore be followed in this case.

B. Evidence of Noncompliance

Respondent can neither admit nor deny the Petitioners' allegations of Applicant's non-compliance regarding any matters that were not reported to and investigated by the Department of Natural Resources. Respondent denies allegations of non-compliance unless the Department has documented a violation of a statute or regulation within the Department's enforcement authority. Respondent lacks sufficient information to be able to admit or deny Petitioners' allegations of injury or risk of injury to "those persons surrounding the proposed quarry site."

Respondent has no burden of proof regarding the allegations of non-compliance and their impact. However, to keep the record clean, Respondent further answers as follows:

Respondent understands that Applicant purchased the property in approximately 2011. The Department issued land disturbance permit no. MORA01538 to Applicant on July 6, 2012. The permit covers 9.15 acres. Kansas City Regional Office staff reviewed aerial photos of the location taken in 2003, 2004, 2006, 2007 and 2009 and concluded that this area had been disturbed by the previous owner. Respondent understands that previous owners conducted surface mining as far back as the 1960s.

Respondent is aware that Applicant has disturbed this area to obtain rock to be used to repair erosion areas on this particular tract of land and

other farms owned by the Applicant. These activities are allowable without either a land disturbance permit or land reclamation permit under agriculture or own-use exemptions. An inspection conducted by DNR staff on November 19, 2012 found the facility to be in compliance with permit no. MORA01538.

The Applicant has constructed a pond outside of the area that was permitted by land disturbance permit no. MORA01538. The pond was constructed with a cattle waterer installed at the base of the dam to provide water for livestock on the property. When Applicant indicated intent to use the pond as a retention basin for a future quarry operation, Department staff informed that a permit is required, if the pond was not to be used solely for agricultural purposes. On March 13, 2013, Applicant obtained land disturbance permit no. MORA02837 for 104.77 acres, which included the area where the pond was constructed and all areas between the pond and the 9.15 acres permitted under permit no. MORA01538.

Regarding Petitioners' allegation that Applicant has attempted to conceal plans for operating a quarry on the property, Respondent answers that Applicant complied with requirements for providing notice to the public.

Regarding Petitioners allegation that Applicant has failed to post a sign as required by 10 CSR 40-10.050(11), Respondent answers that the regulation requires signage upon issuance of the permit, not before. In this

case, a permit has not been issued. Respondent avers that signage required by the land disturbance permits was properly posted.

II. Applicant's Alleged Non-Compliance with the Clean Water Act and Alleged Continual Acts That Are Detrimental to the Environment.

Unless reported to and investigated by the Department of Natural Resources, and unless the Department has documented a violation of a statute or regulation within the Department's enforcement authority, Respondent can neither admit nor deny the Petitioners' allegations of Applicant's non-compliance. Respondent is unable to answer whether the Department investigated Petitioners' allegations that are not specific as to when they occurred. Respondent further avers that any alleged violations that occurred after the permit application was filed are irrelevant under § 444.773.4 RSMo Supp. 2012.

Respondent takes no position regarding the accuracy of Petitioners' allegations that Applicant violated laws or regulations enforced by the United States Army Corps of Engineers. Respondent answers, however, that these alleged violations are not relevant under § 444.773.4, which requires that the basis for denying a permit "must be developed by multiple noncompliance of any environmental law administered by the Missouri department of natural resources."

Further answering, Respondent denies that Applicant conducted mining activities without a Land Reclamation permit, based upon complaints the Department received and investigated.

Regarding the alleged violations of state dam safety requirements, Respondent avers as follows: The Water Resources Center, Missouri Dam and Reservoir Safety Program (DRSP) within the Department of Natural Resources regulates dams that are 35 feet or taller. The height of a dam is determined through a field survey conducted by licensed engineers on staff with the program. On May 9, 2013, the Department determined by survey, using a Sokkia automatic level, that Applicant's dam was less than 35 feet high. Although Mr. Tom Radmacher, speaking on behalf of Applicant, admitted that the dam had been lowered, the DRSP has no way of knowing whether the dam ever exceeded 35 feet in height. The Department cannot base a decision to regulate a dam on measurements made by adjacent landowners using approximate methods. Therefore, DRSP determined that a permit is not required for the dam, and DRSP will not be conducting regular inspections.

Regarding Petitioners' statement that DNR never investigated the complaint about the dam height, but instead informed Applicant that DNR was going to inspect the dam at a future date, giving Applicant time to lower the dam, Respondent avers: The Missouri Dam and Reservoir Safety Act

(§§ 236.400-500 RSMo) does not give DNR the authority to conduct unannounced inspections. Section 236.425.1(4) provides:

1. The chief engineer shall administer the provisions of sections 236.400 to 236.500 by

* * *

(4) Entering, at any reasonable time, any private or public premises as necessary to make an investigation or inspection of a dam or reservoir, or records kept, pertaining thereto, and such inspection *shall follow reasonable notice to the owner given prior to such investigation or inspection* except in the case of an emergency threatening public safety, life or property, in which case such inspection or investigation may be made without prior notice. (Emphasis added.)

The staff of the DRSP followed these requirements of the law in scheduling the inspection of the pond dam.

Regarding the allegations that Applicant dumped soil near the outfall of the dam, and that the soil was carried by storm water into water sources, and that this violated DSPS requirements, specifically, placement of material from the dam in the “catch basin side of the dam,” Respondent avers: The Missouri dam safety law does not address storm water management, nor does it specify that material cannot be placed at the heel of a dam. It appears that

other regulations are being attributed to the dam safety law in this section of Petitioners' brief.

In relation to Petitioners' reliance upon provisions within 10 CSR 40-10.050, Respondent avers that the regulation is not relevant because it will apply only if and after a permit to engage in surface mining is issued to Applicant. Respondent does not concede Petitioners' interpretation of the regulations cited in their brief, and reserves legal argument, in the event the hearing officer considers the regulations applicable or relevant.

Further answering, Respondent avers that Petitioners have not alleged facts sufficient to show, as required by § 444.773.4, that the alleged violations "resulted in harm to the environment or impaired the health, safety or livelihood of persons outside the facility."

III. Alleged Safety Issues and AA Highway Conditions

Respondent avers that no answer is required to Petitioners' introductory paragraph to this section of their brief.

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

Respondent lacks sufficient information to be able to admit or deny asserted facts related to alleged increased truck traffic on AA Highway and associated risks of undue impairment to the health and safety of highway users. Further answering, Respondent has no burden of proof regarding

these claims. Further answering, the Department does not regulate quarry operations with respect to truck traffic on public rights-of-way.

B. Alleged Added Traffic and the State's Increased Maintenance Costs

Respondent lacks sufficient information to be able to admit or deny asserted facts related to the claim that increased truck traffic on AA Highway will place an undue burden upon MoDOT. Further answering, Respondent has no burden of proof regarding the claim. Further answering, the allegation is vague. Finally, the allegation, even if supported by competent and substantial scientific evidence, is irrelevant under § 444.773.4. Further answering, the Department does not regulate quarry operations with respect to truck traffic on public rights-of-way.

IV. Alleged Decreased Property Values and Harm to Livelihood of Residents

A. Proximity to Established Quarries

Respondent lacks sufficient information to be able to admit or deny facts asserted to show that this quarry is not needed because of the location of two existing quarries in the area. Further answering, Respondent has no burden of proof regarding this claim. Further answering, Respondent is not required to consider the proximity of other quarries in recommending whether a permit should be granted. Further answering, Petitioners have

not alleged sufficient facts to show that the proximity of other quarries is relevant under § 444.773.4.

B. Sales Tax Revenue

Respondent lacks sufficient information to be able to admit or deny asserted facts related to Petitioners' claim that sales tax revenues will decrease as a result of the operation of AA Quarry. Further answering, Respondent has no burden of proof regarding this claim. Further answering, Respondent is not required to consider the impact upon sales tax revenues in recommending whether a permit should be granted. Further answering, Petitioners have not alleged sufficient facts to show that the impact upon tax revenues is relevant under § 444.773.4.

C. Alleged Aggregate Decline in Property Values

Respondent lacks sufficient information to be able to admit or deny asserted facts related to anticipated decreases in property values and property tax resources due to the operation of AA Quarry. Further answering, Respondent has no burden of proof regarding these claims. Further answering, Respondent is not required to treat the permit as either a substitute or surrogate for local land use planning and zoning, in recommending whether a permit should be granted. Further answering, Petitioners have not alleged sufficient facts to show that a decline in property values is relevant under § 444.773.4.

V. Alleged Negative Impacts upon Surrounding Residents

Respondent avers that the Land Reclamation Act provides no standards concerning detonation of explosives, noise pollution, or road issues. The Act does not provide standards for activities that occur outside the mine plan boundary relating to the protection of nearby residents.

A. Edward Earls

Respondent lacks sufficient information to be able to admit or deny the allegations related to Mr. Edward Earls. Further answering, Respondent has no burden of proof regarding the claim of undue impairment to him.

B. William Gard

Respondent lacks sufficient information to be able to admit or deny the allegations related to Petitioner William Gard. Further answering, Respondent has no burden of proof regarding his claim of undue impairment.

C. Horse Riders

Respondent lacks sufficient information to be able to admit or deny the allegations related to risks to recreational riders of horses owned by Petitioners James and Susan Richards. Further answering, Respondent has no burden of proof regarding their claim of undue impairment.

VI. Alleged Impairment to Resident Business Owners

Respondent avers that the Land Reclamation Act provides no standards concerning detonation of explosives, noise pollution, or road issues.

The Act does not provide standards for activities that occur outside the mine plan boundary relating to the protection of nearby residents.

A. Solutions 4 Fundraising

Respondent lacks sufficient information to be able to admit or deny the allegations related to Petitioner Lorri Adams. Further answering, Respondent has no burden of proof regarding the claim of undue impairment to her business.

B. Chiropractic Practice/Alliance of Divine Love Ministry

Respondent lacks sufficient information to be able to admit or deny the allegations related to Petitioner Tim Stamm. Further answering, Respondent has no burden of proof regarding his claim of undue impairment to his business.

C. M&D Motorsports

Respondent lacks sufficient information to be able to admit or deny the allegations related to Petitioners Misty and Darren Cutright. Further answering, Respondent has no burden of proof regarding their claim of undue impairment to their business.

Conclusion

WHEREFORE, Respondent has answered the claims set forth in Petitioners' brief to the best of his knowledge and belief.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was electronically mailed, this 9th day of September, 2013 to:

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