

**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
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>)	
)	

**PETITIONERS’ SUGGESTIONS IN OPPOSITION TO APPLICANT’S
MOTION TO EXCLUDE EVIDENCE OF ISSUES OUTSIDE OF THE
LAND RECLAMATION COMMISSION’S JURISDICTION AND TO
DISMISS ANY CLAIMS RELEVANT [sic] THERETO**

Petitioners, through counsel, respectfully submit their Suggestions in Opposition (the “**Suggestions**”) to Applicant’s Motion to Exclude Evidence of Issues Outside of the Land Reclamation Commission’s Jurisdiction and to Dismiss Any Claims Relevant [sic] Thereto (the “**Motion**”), and request that the Hearing Officer enter an Order overruling the Motion. For their Suggestions, Petitioners respectfully state as follows:

ISSUE PRESENTED

“Whether the language contained in 10 CSR 40-10.080(2)(B) – “The impact to the petitioner’s health, safety, and livelihood must be within the authority of any environmental law

or regulation administered by the Missouri Department of Natural Resources.” – limits whether the Land Reclamation Commission and hence the Hearing Officer can entertain the presentation of evidence”¹ on the “(1) nature of Route AA and the impact of additional truck traffic on the road; (2) impact on property values from the operation of the proposed quarry; and (3) blasting at the quarry” (collectively, the “**Briefing Issues**”). *Id.*

SHORT ANSWER

No. 10 CSR 40-10.080(2)(B) (the “**Standing Regulation**”), relates solely to the evidentiary standard that the Petitioners had to meet prior to the LRC giving the Petitioners standing, which is a regulatory prerequisite to the LRC granting Petitioners a formal public hearing (the “**Hearing**”). Thus, the LRC made its regulatory determination that the Petitioners had standing when it granted Petitioners the Hearing. Accordingly, the Standing Regulation is a pre-Hearing regulation governing the LRC, and in no way places any limitation on the LRC, through the Hearing Officer, in receiving, entertaining, or considering evidence on the Briefing Issues during the Hearing. Consequently, the Hearing Officer should enter its Order overruling the Motion.

BACKGROUND

In the Motion, Applicant AA Quarry LLC (“**Applicant**”) sets forth a series of factual allegations that it believes leads us to the current case posture. These alleged facts are irrelevant to the instant inquiry and constitute Applicant’s interpretation of the proceedings to date. Inasmuch as they are proffered to establish that Applicant has complied with all statutes, regulations, or rules regarding the proposed quarry, such facts are hereby denied. Additionally, all parties, through prior pleadings, have set forth a statement of facts, and, therefore, these

¹ See *Order Memorializing Pre-Hearing Conference*, entered August 27, 2013, at 3 (the “**Pre-Hearing Order**”).

Suggestions will not rehash all of the information, facts, and legal analysis previously filed.

In its brief in opposition (the “**Opposition Brief**”) to Petitioners’ opening brief (the “**Initial Brief**”), and at the pre-hearing conference, Applicant raised the issue of whether the LRC, through the Hearing Officer, could, under 10 CSR 40-10.080(2)(B), consider whether the quarry’s operation will unduly impair the Petitioners’ health, safety, and livelihood if these claims did not arise from an environmental law or regulation that the Missouri Department of Natural Resources (“**DNR**”) administers at the quarry site. Applicant argues that the evidentiary standard set forth in the Standing Regulation applies not only to the LRC’s determination of whether Petitioners have standing, but also during the Hearing, and, therefore, LRC, through the Hearing Officer, cannot receive, entertain, or consider any evidence on the Briefing Issues during the Hearing because these issues do not involve an environmental law or regulation that the DNR administers at the quarry site. Based on this alleged challenge to the LRC’s jurisdiction to consider the Briefing Issues in its determination on Applicant’s permit request, the Hearing Officer, in the Pre-Hearing Order, directed the parties to brief whether the LRC, through the Hearing Officer, could, pursuant to 10 CSR 40-10.080 (2)(B), entertain evidence at the Hearing on the “(1) nature of Route AA and the impact of additional truck traffic on the road; (2) impact on property values from the operation of the proposed quarry; and (3) blasting at the quarry.”²

In response to the Pre-Hearing Order, Applicant filed the instant Motion. In support of the Motion, Applicant argues that: 1) the LRC has original jurisdiction to determine whether Petitioners’ claims are within the scope of DNR authority; 2) the LRC lacks jurisdiction and authority to consider the Briefing Issues because these claims fall outside the environmental laws and regulations that the DNR administers; 3) the LRC cannot base its decision on whether to

² For purposes of these Suggestions, Petitioners define the Hearing Officer’s question presented as the “Jurisdictional Issue.” This definition is for brevity purposes only, and is in no way a concession that Applicant’s issue or argument presents any jurisdictional question for the Hearing Officer.

grant a permit to Applicant on the Briefing Issues because these claims are regulated by other entities; and 4) that claims involving the Briefing Issues should be dismissed with prejudice because evidence on these issues should be precluded. Applicant's argument on the Jurisdictional Issue puts the proverbial cart before the horse, and, therefore, the Court should overrule the Motion.

ANALYSIS AND ARGUMENT

I. INTRODUCTION.

The Motion is patently flawed, and, therefore, the Hearing Officer should enter its Order overruling the Motion on its face. The Motion fails for the following reasons: 1) the LRC, pursuant to 10 CSR 40-10.080, already has ruled on the Jurisdictional Issue by determining that Petitioners have standing in this proceeding; 2) the Motion is an improper appeal; 3) 10 CSR 40-10.080 (2)(B) does not control or limit the LRC, through the Hearing Officer, in the evidence received, considered, or entertained during the Hearing; and 4) by granting the Hearing to the Petitioners, and, therefore, conferring standing on the Petitioners, the LRC, through the Hearing Officer, may determine whether the Briefing Issues unduly impair the Petitioners' health, safety, and livelihood even if these issues do not involve environmental laws and regulations that the DNR administers at the quarry site. Petitioners address each ground in turn, together with other issues that Applicant raises in the Motion.

II. THE LRC ALREADY HAS RULED ON THE JURISDICTIONAL ISSUE.

The Motion impermissibly requests that the Hearing Officer rule on an issue that the LRC already has determined – Petitioners' standing to proceed with the Hearing on the Briefing Issues. In the Motion, Applicant attempts to focus the Hearing Officer on the Standing Regulation and claims that this is the sole regulation for the Hearing Officer to consider relative

to the alleged Jurisdictional Issue, and, in turn, the evidentiary standard, in moving forward on the Briefing Issues. Unfortunately, Applicant reads the Standing Regulation in a vacuum and ignores all other LRC governing regulations. Specifically, the LRC's governing regulations require the LRC to rule on the alleged Jurisdictional Issue prior to granting Petitioners the Hearing. The Standing Regulation is just that – an evidentiary standard to determine whether the Petitioners have standing to proceed with their claims. This is a determination that the LRC must make prior to granting a formal public hearing to petitioner. By granting Petitioners the Hearing, the LRC made the jurisdictional determination that is required under 10 C.S.R. 40-10.080.2(B), and, therefore, has settled the Jurisdictional Issue on the Briefing Issues.

Applicant's continued advancement of the Standing Regulation to prohibit Petitioners from proceeding with the Briefing Issues at the Hearing indicates, at the very least, a mistaken belief that the Standing Regulation controls any aspect of the Hearing from this point forward. As set forth below, the LRC already has made a determination regarding the Standing Regulation, which in turns answers the Jurisdictional Issue. In viewing the LRC's governing regulations on public hearings as a whole, there is no other logical result. Applicant's misplaced reliance on the Standing Regulation, as controlling the evidentiary standard at the Hearing on the Briefing Issues, renders the Jurisdictional Issue moot. Accordingly, the Hearing Officer should overrule the Motion.

Standing issues in surface mining cases are legend. That is because standing is at the very cornerstone of whether the LRC can grant a Petitioner a formal public hearing. It is the foundation on which the right to a formal public hearing is built. Without standing, the LRC lacks the jurisdictional power to grant such a hearing to a petitioner. Missouri case law is replete with challenges on appeal of whether the LRC properly determined a petitioner's standing status

prior to granting that petitioner a formal public hearing. Notably, however, these appellate reviews are done in accordance with administrative law procedure – appeals of administrative agency determinations or rulings are for courts to decide. As addressed, *infra*, the Hearing itself is not the forum for an appellate review.

Contrary to Applicant’s assertion, the Standing Regulation does not control the disposition of the Jurisdictional Issue. As with all statutes and regulations, the Standing Regulation cannot be read or interpreted in a vacuum. In this instance, the Hearing Officer should not countenance Applicant’s attempt to isolate the Standing Regulation outside of its intended purpose. Specifically, the Standing Regulation is but one regulation in a series of governing regulations that the LRC must consider in determining whether to grant a petitioner’s request for a formal public hearing. The LRC must comply with each of these regulations prior to granting such a request.

The LRC’s regulations place severe limitations on whether a petitioner may obtain a formal public hearing on a quarry permit application. That is why such hearings are rarely granted. The public hearing enabling regulation is set forth in 10 C.S.R. 40-10.080.1(G), which provides that “[t]he [LRC] may grant the petitioner a formal public hearing provided the petitioner has standing for such a hearing.” The regulations governing whether the LRC may grant a formal public hearing to a petitioner are set forth under 10 C.S.R. 40-10.080.2, which is captioned “Establishing Standing for a Public Hearing.” When read as a whole, this entire regulatory section, which includes the Standing Regulation, conclusively establishes that the LRC must make a determination on a petitioner’s standing prior to granting such petitioner a formal public hearing.

Contrary to Applicant’s assertion, the controlling regulation that disposes of the

Jurisdictional Issue, and, therefore, allows Petitioners to proceed with the presentation of their evidence on the Briefing Issues at the Hearing, is 10 C.S.R. 40-10.080.2(A). This regulation provides in relevant part that the LRC may grant a formal public hearing to a petitioner only if the petitioner has standing. Giving 10 C.S.R. 40-10.080.2(A) its express and plain meaning, the LRC could not have granted Petitioners the Hearing if it had not first determined that the Petitioners satisfied the standing requirements under 10 C.S.R. 40-10.080.2(B) on all issues that Petitioners presented to the LRC at the public meeting prior to the LRC granting Petitioners the formal public hearing, including, without limitation, the Briefing Issues.

More importantly, that is a determination that the LRC must make in the first instance. There is nothing in the record to suggest that the LRC, in making its standing determination, did not consider the Briefing Issues. In fact, the record speaks otherwise. Even more pertinent, there is nothing in the record to suggest that the LRC requested that the Hearing Officer, as part of the Hearing, receive and consider evidence on the issue of whether the Petitioners have standing on the Briefing Issues. In granting the Hearing to the Petitioners, Hearing Office must accept that the LRC has determined that the Petitioners satisfied the evidentiary standard under Standing Regulation, and, therefore, have standing to move forward at the Hearing on the Hearing Issues.

The LRC's actions and conduct in granting the Hearing support the proposition that it has made a standing determination in favor of the Petitioners. The LRC held a public meeting on the Applicant's permit request. The recommendation from the LRC Program Director, Kevin Mohammadi, was that the LRC should grant Applicant's the requested permit. The Petitioners attended that meeting and presented the LRC with "good faith" evidence on several issues regarding the proposed quarry site and operation, including, without limitation, all of the Briefing Issues. A review of the record of that public meeting reveals that the Petitioners did

present evidence on the Briefing Issues to the LRC. Following Petitioners' presentation, the LRC moved into a closed-door session. Upon returning to the public meeting, the LRC voted to grant Petitioners the Hearing.

Following the public meeting, the Petitioners met with members of the LRC and asked the LRC members which issues that the Petitioners presented at the meeting convinced the LRC to grant the Hearing. The members responded that it was all of the issues that the Petitioners advanced. Through these responses, the only logical conclusion is that during the closed door session, the LRC members discussed and determined that the Petitioners had met the evidentiary standard under the Standing Regulation on all issues that the Petitioners advanced at the meeting, including, the Briefing Issues, and, therefore, had standing. Upon making this determination, the LRC members returned to the meeting and voted in favor of the Hearing, as noted above.

Additionally, one of the Petitioners, David Earls, followed up by email with the LRC after the public meeting and again questioned whether there were specific issues that the Petitioners advanced that the LRC considered in their decision to grant the Hearing. Don Willoh of the Missouri Attorneys' General Office, and an attorney for the LRC, responded by email to Mr. Earls that there were no restrictions or limiting conditions relating to the issues on which the LRC granted the Hearing. A true and correct copy of Mr. Willoh's email is attached to these Suggestions as Exhibit A and incorporated by reference. From Mr. Willoh's statement, it is patently obvious that the LRC concluded that the Petitioners could proceed on all issues that they raised at the public meeting, including, the Briefing Issues, at the Hearing.

Through the above series of events, it readily apparent that the LRC was aware of its regulatory requirements, considered these regulatory prerequisites, determined that the Petitioners had standing on all issues advanced, including, without limitation, the Briefing Issues,

and granted the Hearing to the Petitioners. If Applicant was unhappy with this standing determination, it should have appealed the LRC's decision to the proper court, rather than raising it at this juncture.

Additionally, and absent from Applicant's Motion, is any reference to the only instructive recommended decision that a hearing officer has prepared for the LRC in which the hearing officer permitted the introduction and consideration of evidence on claims and issues strikingly similar to the Briefing Issues.³ The Recommended Decision in *Magruder* is very instructive as it relates to the Briefing Issues and the issue of Petitioners' standing.

Magruder has a very long and tortured history – numerous hearings, decisions, and appeals. In fact, the hearings are so numerous that it would be impossible to set forth the entire procedural and substantive history in these Suggestions. However, there are several determinations and issues in *Magruder* that are corollary or on point with the matter at hand.

In *Lake Ozark v. Department of Natural Resources*, *Magruder* applied for a mining permit and residents lodged complaints relating to their health, safety, and livelihood that are similar to those at issue in this matter.⁴ In the Recommended Decision, the hearing officer laid out those complaints regarding the health, safety, and livelihood of the residents. Recommended Decision, 6-14. A thorough analysis of the Recommended Decision reveals that the hearing officer never once questioned her jurisdiction, or that of the LRC, to consider health, safety, and livelihood claims that petitioners raised that were not related to a DNR environmental law or regulation governing the quarry site. In fact, Petitioners' counsel cannot find a single citation to 10 C.S.R. 40-10.080.2(B) in the Recommended Decision, or any reference that this regulation limits the jurisdiction of the hearing officer or the LRC to receive and consider evidence on

³ *Lake Ozark v. Department of Natural Resources*, No. 11-0903 LRC ("*Magruder*"), Recommended Decision (June 27, 2013) [hereafter "**Recommended Decision**"].

⁴ See *Lake Ozark v. Department of Natural Resources*, Opinion Filed August 31, 2010 (Mo. App. W.D. 2010).

issues almost identical to the Briefing Issues.

Magruder is persuasive authority supporting Petitioners' analysis of 10 C.S.R. 40-10.080.2(B). This regulation is a prefatory requirement that Petitioners had to meet prior to the LRC granting them the Hearing. That determination rested solely with the LRC. By Applicant's own admissions and arguments in its brief, the DNR, and in turn, the LRC, have original and exclusive jurisdiction to interpret and apply their own rules and regulations. The LRC has done so in this case. By granting Petitioners the Hearing, the LRC first determined that Petitioners have standing. Moreover, in voting to grant the Hearing to Petitioners, the LRC did so without any restriction or limiting conditions on the issues that the Petitioners were advancing, including, without limitation, the Briefing Issues.

Based on the foregoing, the LRC, in conferring standing status on Petitioners and granting the Hearing, has already ruled on the Jurisdictional Issue. As noted above, the sole argument that Applicant advances in support of its position that the LRC cannot entertain evidence on the Briefing Issues is that the Petitioners lack standing under 10 C.S.R. 40-10.080.2(B). Applicant's reliance on the Standing Regulation is misplaced at this stage of the proceedings. The Motion is nothing more than an appeal of a prior LRC determination, and as such, is brought in the wrong forum. The LRC, through the Hearing Officer, has jurisdiction to receive, entertain, and consider evidence on the Briefing Issues at the Hearing. Therefore, the Hearing Officer should enter its Order overruling the Motion.

III. APPLICANT'S MOTION IS AN IMPROPER APPEAL.

At its core, the Motion is nothing more than an improper appeal of a LRC regulatory determination, and, therefore, the Hearing Officer should reject and overrule the Motion out of hand. Essentially, Applicant, through the Motion, appeals the LRC's decision to confer standing

status on the Petitioners.

A thorough reading of the Motion reveals that the Jurisdictional Issue that Applicant advances focuses solely on whether the Petitioners have standing to present the Briefing Issues at the Hearing. As set forth above in detail, the LRC has already determined that Petitioners have standing. Applicant apparently disagrees with the LRC's determination. It makes no attempt to cloak its impermissible request for appellate review of the LRC's standing determination in this matter. In the Motion, Applicant expressly states that:

“[i]n arguing that they were entitled to a formal public hearing, Petitioners claimed standing on [the Briefing Issues]. As these concerns are not within the authority of the DNR – air, water, and land reclamation – they could not contribute to the determination that the Petitioners had standing and the Petitioners must be excluded from presenting this evidence at the formal public hearing.”

See Motion, at 3. The LRC's governing regulations on this issue require that prior to the LRC granting a formal public hearing to a petitioner, he must first establish that he has standing. *See* 10 C.S.R. 40-10.080.2(A). In granting Petitioners the Hearing, the LRC decided the issue of Petitioners' standing. The Hearing is not the proper forum to revisit the LRC's standing determination. Accordingly, the Hearing Officer should not allow Applicant to disguise its appeal as a new issue challenging the jurisdiction of the LRC to entertain the Briefing Issues. The Hearing Officer should not allow the Applicant to bypass the required forum for such appeals – the Missouri courts.

In failing to appeal the LRC's determination of Petitioner's standing, Applicant waived its opportunity to challenge Petitioners' standing to advance the Briefing Issues as part of the Hearing Process. The Applicant has not cited a single LRC regulation for the proposition that an LRC determination in granting a hearing, and the requisite finding of standing status, can be challenged at the Hearing. Therefore, the instant forum, the Hearing, is not the proper place for

such appeal. The LRC's decision as it relates to Petitioners' standing and the Hearing thus remains intact. Consequently, the LRC, through the Hearing Officer, possesses the requisite jurisdiction to receive, entertain, and consider Petitioners' evidence on the Briefing Issues, and as such, the standard of review changes. The controlling issue during the hearing and in the Hearing Officer's recommended decision will be whether Petitioners meet their burden of production and Applicant meets its burden of persuasion relating to all of the issues and claims that Petitioners advance during the Hearing, including, without limitation, the Briefing Issues.

IV. THE STANDING REGULATION DOES NOT CONTROL OR LIMIT THE LRC, THROUGH THE HEARING OFFICER, ON THE EVIDENCE RECEIVED, CONSIDERED, OR ENTERTAINED DURING THE HEARING.

As set forth above, the Standing Regulation is a jurisdictional inquiry made prior to the LRC granting Petitioners the Hearing, and, therefore, does not control or limit the LRC, through the Hearing Officer, on what evidence is received, entertained, or considered during the Hearing on any of the issues that Petitioners present, including, without limitation, the Briefing Issues. In fact, the bed-rock of the LRC's existence lies in its primary purpose – the balancing of the mining industry against the health, safety and livelihood of the public. Pursuant to the Act, the Missouri Legislature declared that:

It is hereby declared to be the policy of this state to strike a balance between surface mining of minerals and reclamation of land subjected to surface disturbance by surface mining, as contemporaneously as possible, and for the conservation of land, and thereby to preserve natural resources, to encourage the planting of forests, to advance the seeding of grasses and legumes for grazing purposes and crops for harvest, to aid in the protection of wildlife and aquatic resources, to establish recreational, home and industrial sites, to protect and perpetuate the taxable value of property, and to protect and promote the health, safety and general welfare of the people of this state.

R.S. Mo. § 444.762. Accordingly, the Missouri Legislature expressly set forth the LRC's purpose – balancing the need for the surface mine against, among other things, its impact on the health, safety, and livelihood of the State's citizens (the “**Purpose**”).

In fact, the DNR recognizes the LRC's Purpose by stating on the LRC portion of its website that “these mining statutes protect public health, safety *and* the environment from the adverse effect of mining...” (emphasis added). Department of Natural Resources, www.dnr.mo.gov/env/lrp/commission/lrc.htm#info, October 16, 2013. Notably, the DNR does not state that the purpose of the LRC is to protect the public's health and safety only through the environmental laws it administers. Rather, the DNR recognizes that the Purpose involves much more: namely, protection of the citizenry and environment from adverse effects related to surface mining.

Through an enabling statute, the Missouri Legislature expressly enumerates certain factors for the LRC to consider in determining whether to grant a quarry permit. One of these guidelines is set forth in R.S. Mo. § 444.773.4, which provides that “[i]n 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.” By giving the LRC the power to deny a permit if it determines that undue impairment exists concerning a citizen's health, safety, or livelihood, the Missouri Legislature expressly set forth the importance of these protections in any determination that the LRC makes regarding the issuance of a permit.

Moreover, the Missouri Legislature has not prohibited the LRC's consideration of these issues. A thorough reading of the Act reveals that the Missouri Legislature has in no way limited LRC's power in considering a quarry's impact on the impairment to a citizen's health, safety, or

livelihood. Specifically, the Missouri Legislature has not limited these protections to only those instances where such impairment arises solely from an environmental law or regulations that the DNR administers.

Applicant does not appear to dispute, and in fact seems to admit, that impairments to the Petitioners' health, safety, and livelihood will occur if the LRC grants Applicant the requested permit. Applicant's argument goes only to whether Briefing Issues are outside of the LRC's jurisdiction, thereby admitting that Petitioners' claimed impairments will occur. The ludicrous idea that the LRC should sit idly by and allow impairments to the public health and safety go unresolved simply because the alleged impact is unrelated to a DNR environmental law or regulation runs counter to the Legislature's intent.

In the Recommended Decision, the hearing officer makes a point of showing that the LRC should be concerned with taxable values of property, as well as the health, safety and welfare of the people of the state. It can be understood that the LRC has a duty to perpetuate the taxable value of the neighboring properties, which Petitioners will prove at the Hearing.

Once Petitioners have provided scientific evidence of impairment to health, safety or livelihood of any kind, the burden falls on Applicant to persuade the LRC that the impact of Applicant's actions do not unduly impair Petitioner's health, safety or livelihood, **and not** that the impairments should not be considered. In fact, the court in *Lake Ozark* stated:

Petitioners bore only the burden of producing sufficient scientific evidence to establish an issue of fact that the permitted quarrying operations would impact their health, safety, or livelihood. As the applicant, Magruder bore the burden of persuading the [LRC] to rule in its favor *by proving that the impact from the permitted quarrying operations would not unduly impair Petitioner's health, safety, or livelihood*" (emphasis added).⁵

⁵ See *Lake Ozark v. Land Reclamation Commission*, 326 S.W.3d at 44 (Mo. Ct. App. 2008).

While the sentence dealing with the burden was removed from § 444.773 in 2011, the LRC has not changed its regulations.⁶ The LRC made a point to note that it would be applying the regulations as opposed to the new language in § 444.773, effectively keeping the burden of production on the Petitioners and the burden of persuasion on the Applicant.⁷ Therefore, Applicant's current attempts to dissuade the LRC from considering the scientific evidence that Petitioners propose to bring forth is improper and Applicant should instead be attempting to show how the Petitioners' health, safety and livelihoods are not in fact unduly impaired.

In the Recommended Decision, the hearing officer considered every issue that the Petitioners' advanced relating to health, safety, and livelihood, all of which are strikingly similar to the Briefing Issues. The hearing officer did not dismiss a single claim that the petitioners advanced on these issues because the hearing officer determined she, or the LRC, did not have jurisdiction to decide the issues. Rather, she found that, even though petitioners met their burden of production, applicant also met its burden of persuasion. Therefore, the hearing officer recommended that the LRC grant applicant the requested permit.

For all of the reasons set forth above, the LRC, and, in turn, the Hearing Officer, possesses the authority and jurisdiction to entertain evidence on whether the Briefing Issues unduly impair the Petitioners' health, safety, and livelihood. Accordingly, the Petitioners' respectfully request that the Hearing Officer enter his Order overruling the Motion.

⁶ *Supra* n. 2, Recommended Decision, 31 (citing § 444.762 RSMo 2000).

⁷ *Id.*

V. **BY GRANTING PETITIONERS THE HEARING, THE LRC, THROUGH THE HEARING OFFICER, MAY DETERMINE WHETHER THE BRIEFING ISSUES UNDULY IMPAIR THE PETITIONERS' HEALTH, SAFETY, AND LIVELIHOOD EVEN IF THESE ISSUES FALL OUTSIDE ENVIRONMENTAL LAWS AND REGULATIONS THAT THE DNR ADMINISTERS.**

Applicant argues that an administrative agency “only has those powers which the Missouri Legislature has expressly or impliedly conferred.”⁸ As set forth above, the Missouri Legislature, through the Act, has conferred power on the LRC to consider the Briefing Issues. Moreover, Applicant has failed to cite any case law on point, and in fact, fails to even note that there is no case law interpreting the LRC’s powers. As such, this is a case of first impression.

In *Saxony Lutheran v. Missouri Department of Natural Resources*, 404 S.W.3d 902, 905 (Mo. App. 2013), the court states that “[w]here there is no express power granted to an agency for a particular action, such power is properly implied ‘only...if it necessarily follows from the language of the statute.’”⁹ The court then goes on to note that language such as the Act “should be broadly and liberally construed to effect its plain purpose.”¹⁰

The LRC is an administrative body created to achieve the goals of the Act. And, as stated above, according to the rules of statutory interpretation, in order for the LRC to achieve its plain purpose, the provisions of the Act must be broadly and liberally construed.¹¹ In *Poe v. Missouri Hazardous Waste Management Comm’n*, the Court noted that that “the legislature’s overriding concern in enacting the Act was to establish the framework to insure the safe management of

⁸ See *Applicant’s Motion*, 6, citing *Curdt v. Missouri Clean Water Comm’n*, 586 S.W.2d 58 (Mo. App. 1979).

⁹ See *Saxony Lutheran v. Missouri Department of Natural Resources*, 404 S.W.3d 902, 905 (Mo. App. 2013) (citing *Scheble v. Mo. Clean Water Comm’n*, 734 S.W.2d 541, 556 (Mo. App. E.D. 1987).

¹⁰ *Id.*

¹¹ See *Poe v. Missouri Hazardous Waste Management Commission*, 904 S.W.2d 552, 554 (Mo. App. 1995) (stating “Our duty to broadly and liberally construe the Act extends to provisions that concern the Commission, including §260.370.3(5). This follows because the Commission is part of the administrative machinery designed to achieve the purposes and goals of the Act.”).

hazardous wastes and preserve the public health and environment.”¹² Here, as with hazardous waste, the Legislature’s concern in enacting the Act was to balance the mining industry against the health, safety and livelihood of the public. Therefore, public health is of the upmost priority and should not be limited to the narrow set of circumstances which Applicant believes it to be.

The court in *Saxony* distinguished their matter with that of *Mueller v. Missouri Hazardous Waste Management Commission*, 904 S.W.2d 552 (Mo. App. S.D. 1995), in which the court found that the Missouri Hazardous Waste Management Commission had no authority granted to it by statute to modify permit during the appeals process.¹³ In that case, the court found that it was the legislature’s intent that the public be involved in the permitting process and to consider information at a later point after the permit had been granted would undermine the public’s participation, as well as the legislature’s intent.¹⁴ In the present case, just as in *Mueller*, failure to consider the evidence brought forth by the public would in effect undermine the public’s participation in the permitting process, and thus not fulfill the intent of the legislature.

Where there is a question of whether a Commission has exceeded its authority, it is for the courts, rather than the Hearing Officer, to decide whether that authority has been breached. Additionally, where “the empowering statute is not explicit, but confers powers in general terms, appellate courts may resort to the necessary implications and intendments from the language to determine legislative intent.”¹⁵

Because the Act is not specific, but instead confers general powers to the DNR, implied powers provide the basis for the LRC to reach a decision on the issues at hand. “An implied

¹² See *Poe v. Missouri Hazardous Waste Management Commission*, 904 S.W.2d 552, 557 (Mo. App. 1995) (citing *State ex rel. Webster v. Missouri Resource Recovering Inc.*, 825 S.W.2d at 923-24 (Mo. App. 1992)).

¹³ See *Saxony Lutheran v. Missouri Department of Natural Resources*, 404 S.W.3d 902, 907 (Mo. App. 2013)(discussing the holding in *Mueller v. Missouri Hazardous Waste Management Commission*, 904 S.W.2d 552 (Mo. App. S.D. 1995).

¹⁴ *Id.*

¹⁵ *Id.* at 556 (citing *AT&T v. Wallemann*, 827 S.W.2d 217, 223-24 (Mo. App. 1992) (citing *State ex rel. McKittrick v. Wymore*, 345 Mo. 169 (banc 1939))).

power within this meaning is a power necessary for the efficient exercise of the power expressly conferred.”¹⁶ Therefore, powers falling within the scope of those necessarily expressed by the legislature, which are essential to accomplishing the purpose of the Act, are allowed.

To say that the LRC should not consider the safety of the public with respect to the Applicant’s activities with transporting limestone from the quarry and the blasting that is necessarily implied from the acceptance of the permit, is to effectively state that the LRC has no duty to the public whatsoever, and that after a permit application is deemed complete it is as good as accepted because no system of checks and balances exists to protect the citizens of this State. Applicant seeks to effectively tie the hands of the LRC behind its back and force it to accept or deny permits without any regard to the health, safety and livelihood of the public.

This position ignores the true purpose of the LRC as the agency in charge of dealing with more than just the DNR regulation of a quarry site. The LRC is also tasked with insuring the health, safety, and livelihood of the citizens of this state and with maintaining some semblance of balance between the mining industry and the people. Take falling home values for instance: The quarry only affects the initial sale of the home by those home owners in place when the quarry commences. After the initial sale of the home, the adjustment for the quarry is factored in, meaning that not only do the existing residents suffer, but they also have no redress under Applicant’s narrow view. Housing is a part of a person’s livelihood, their wealth, and their self-worth, but Applicant seeks to exclude that fact from the decision-making process.

The LRC cannot look at the quarry in a vacuum, as Applicant tries to persuade the LRC to do. To look at the quarry in a vacuum would essentially cause the LRC to turn a blind eye to the overall effect of the quarry on the health, safety, and livelihood of the residents surrounding the quarry. By strictly interpreting the statute to include only the four corners of the quarry

¹⁶ *Id.* (citing *AT&T v. Wallemann*, 827 S.W.2d at 224).

property, the LRC is basically saying that the permit is accepted upon completion of application and any problems that arise later are the problem of other state agencies. This line of thinking practically mandates state agencies like the Missouri Department of Transportation (“MODOT”) to come in after the fact and build sufficient roads to accommodate truck traffic, or forces a municipality to pass ordinances dealing with noise pollution. This comes after Petitioners have argued, and put the LRC on notice at an early stage in the hearing process, that as a result of the quarry such issues will arise.

Applicant further argues that the LRC cannot base its permit decision on considerations such as the Briefing Issues even if Petitioners can meet their burden of production. In fact, the LRC has considered traffic previously. In *Lake Ozark*, the LRC considered the effect of gravel trucks running with respect to their ability to degrade underground pipes.¹⁷ In that instance, the LRC did not attempt to place the duty to inquire about the quarry’s impact on traffic upon another state agency, as Applicant has tried to do with regard to passing review of Applicant’s trucks to MODOT.

Additionally, in that matter, the LRC also considered the effect of blasting vibrations on the outlying areas – areas outside the quarry boundaries.¹⁸ After admitting that under its standards the “scientific evidence” burden for showing undue impairment to their health, safety, or livelihood was difficult to meet for individual petitioners, the LRC stated that the petitioners’ concerns should be taken seriously, and considered their claims. In fact, in that matter, petitioners had appeared for every hearing and the hearing officer found that they had expended sufficient energy in the matter to deserve to be heard. “Therefore, we assume for the purposes of the following discussion that they have met their burden of production, and determine whether

¹⁷ *Supra* n. 2, Recommended Decision, 42.

¹⁸ *Id.* at 43.

Magruder met its burden of persuasion to show that its quarry will not unduly impair their health, safety, or livelihood.”¹⁹ Likewise, Petitioners in this matter have expended substantial resources in combating the quarry permit at issue. They have attended all LRC meetings and hearings on Applicant’s permit application, as well as held community meetings of their own. Their voice deserves to be heard on the record.

When discussing whether the Commission was “empowered to consider the evidence in front of it” the court in *Saxony* stated: “When read in context of the Act’s purpose to ‘strike a balance’ between the interest of operators and the interest of the public to have affected land restored, it is clear the legislature intended that the Commission would exercise judgment and craft a decision that would balance those interests.”²⁰

As noted in *Saxony*, the purpose of the contested permit hearing is to resolve the issues brought forth by the public.²¹ “This indicates the Commission will consider the views of the operator *as well as those of anyone whose health, safety, or livelihood may be in danger* and will determine an appropriate course of action.”²² Therefore, the *Saxony* case serves to inform the Commission of their duty to consider the evidence brought forth by the public as it pertains to the general welfare of the citizens of the state.

Applicant is relentless in its argument that the Petitioners cannot meet their burden of production. Petitioners deny that they cannot to meet their burden of production concerning the harm to their health, safety, and livelihood.

There has never been a mineral permit denied on the basis of impaired health, safety or livelihood. This is because no protections of citizens can possibly be afforded where the statutory

¹⁹ *Id.* at 48.

²⁰ See *Saxony Lutheran v. Missouri Department of Natural Resources*, 404 S.W.3d 902, 909 (Mo. App. 2013)

²¹ *Id.*

²² *Id.*

language is so narrowly construed. In order for the Land Reclamation Commission to make an informed decision regarding the Applicant's permit, they must necessarily consider what Applicant deems "collateral issues." Petitioners must be allowed to present their scientific evidence that such impairments will occur should the permit be accepted. Once accepted, the Department of Natural Resources does not have the authority to revoke the permit, should the impairments to health, safety or livelihood occur in the future. Therefore, it is crucial that the Land Reclamation Commission have the opportunity to view the evidence beforehand, or else a miscarriage of justice will occur.

In the alternative, even if the Hearing Officer rejects Petitioners' argument that the LRC, and, in turn, the Hearing Officer cannot receive and consider evidence on the Briefing Issues in determining whether to recommend granting Applicant the requested permit, evidence on the Briefing issues should be allowed at the Hearing. In doing so, Petitioners would offer the evidence to "maintain the record as an offer of proof," even if they were not considered for the issue of denying the permit.²³ Therefore, all parties' interests are best served in allowing Petitioners' to offer evidence on the Briefing Issues during the hearing in order to preserve the record.

CONCLUSION

As set forth above, the LRC, through the Hearing Officer, has full and complete jurisdiction to receive, entertain, and consider evidence on the Briefing Issues at the Hearing. Since the LRC has made its determination that the Petitioners have standing, and granted them a Public Hearing, the Jurisdictional Issue that Applicant raises has been decided. Moreover, the Motion is nothing more than Applicant's attempt to appeal the LRC's standing determination on

²³ *In the Matter of Magruder Limestone Co., Inc. v. Land Reclamation Program*, Decision and Order Ruling on Collateral Issues, 4 (Jan. 28, 2008).

the Briefing Issues. Such appeal does not rest in this forum. Having determined that the Petitioners have standing on the Briefing Issues, and, in granting the Hearing, the LRC, through the Hearing Officer, can receive, entertain, and consider all evidence that the Petitioners introduce at the Hearing on the Briefing Issues even if these issues are unrelated to a regulation or law that the DNR administers at the quarry. For all of the above stated reasons, the Hearing Officer should enter his Order overruling the Motion.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I certify that on November 4, 2013, I served a true and accurate copy of the above via electronic mail on:

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