No. WD71299

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

LAKE OZARK / OSAGE BEACH JOINT SEWER BOARD, et al.,

Respondents,

v.

MISSOURI DEPARTMENT OF NATURAL RESOURCES, LAND RECLAMATION COMMISSION, and MAGRUDER LIMESTONE CO., INC.,

Appellants.

Appeal from the Miller County Circuit Court
The Honorable Frank Conley, Judge

BRIEF OF APPELLANTS MISSOURI DEPARTMENT OF NATURAL RESOURCES and LAND RECLAMATION COMMISSION

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JURISDICTIONAL STATEMENT

This case is a civil action for judicial review of a decision issued by the Missouri Land Reclamation Commission to modify a land reclamation permit held by Magruder Limestone Company, Inc. ("Magruder"). As modified, the permit would allow the company to operate a limestone quarry in Miller County. This matter involves a contested case authorized by § 444.789, RSMo Supp. 2009. Under § 444.773.4, RSMo Supp 2009, the Commission's decision is subject to judicial review as provided in chapter 536, RSMo.

The Joint Sewer Board for the cities of Lake Ozark and Osage Beach ("the Board Petitioner" before the Commission) and thirty-two individuals (twenty-one of which were "the Individual Petitioners" before the Commission) jointly filed a petition in the Circuit Court of Miller County against the Missouri Department of Natural Resources, the Commission and Magruder, seeking judicial review of the Commission's decision. The Circuit Court reversed the Commission's decision and ordered a new hearing. The Department and Commission filed a notice of appeal to this Court. The Individual Petitioners and the Board Petitioners, Respondents here, are referred to collectively as "the hearing petitioners."

This appeal is authorized by § 512.020(5), RSMo Supp. 2009. This appeal lies in the general jurisdiction of the Missouri Court of Appeals because this appeal involves no matter over which the Supreme Court has exclusive jurisdiction under Article V, § 3, of the Missouri Constitution, 1945. Miller County is within the jurisdictional territory of the Western District under § 477.050-477.070, RSMo 2000.

INTRODUCTION

This is a judicial review of a decision by the Missouri Land Reclamation Commission to allow Magruder Limestone Company, Inc., to operate a limestone quarry in Miller County. The decision was based upon the recommendation of a hearing officer appointed by the Commission to conduct a contested case hearing requested by the hearing petitioners. The hearing officer heard testimony from twenty-one witnesses and admitted sixty-seven exhibits during a hearing that lasted approximately seven days spread over several months. He issued several interim orders and a final recommendation. The Commission, after reviewing the record and hearing oral presentations from the hearing officer and counsel for the parties, adopted the recommendation. The Commission imposed conditions to protect sewer lines that transect the quarry property and a nearby municipal sewage treatment plant.

This Court should affirm the decision under the standards of § 536.140, RSMo Supp. 2009. The Commission evaluated the weight and credibility of every witness and each admitted exhibit. The decision is supported by competent and substantial evidence on the record as a whole and was not influenced by the hearing officer's reference to an internet encyclopedia. The Commission followed statutory and regulatory criteria applicable as to the burden of proof. The Commission was not required to dismiss the permit application, nor cancel the hearing, nor add parties to the hearing merely because Magruder provided another site detail map after the Commission ordered the hearing.

STATEMENT OF FACTS

A. Case Summary

The hearing petitioners asserted that the permit will "unduly impair" their "health, safety or livelihood" and that Magruder's past noncompliance with environmental laws shows a reasonable likelihood that Magruder will violate such laws in the future. (These are grounds for requesting a hearing pursuant to § 444.773, RSMo Supp. 2009.) The Board Petitioner, which operates a sewage treatment plant, alleged that quarry operations will damage the plant and City of Osage Beach sewer lines that transect the property where the quarry will operate. The Commission granted the permit, and the Circuit Court of Miller County reversed.

Because this Court reviews the decision of the Commission, rather than the decision of the Circuit Court, Respondents filed the first brief as required by Supreme Court rule 84.05(e). They assert three issues: (1) whether the Commission incorrectly assigned the burden of proof; (2) whether the hearing officer improperly used information that he found on the internet website *Wikipedia*; (3) whether the Commission was required to either dismiss Magruder's application as incomplete or add parties because Magruder provided a more detailed map of the site to the Commission after publishing notice of the application.

B. Organization of the Commission's Decision

The Commission's decision appears in Volume VI of the Legal File, at pages 868 through 951, and in the appendix of this brief (pages A- 1 – 84). The decision discusses all the testimony and exhibits received in the record. It provides detailed findings of fact

and conclusions of law. It also incorporates by reference pre-hearing orders issued by the hearing officer.

The hearing officer identified four parties to the contested case (A-2), and provided summaries of their testimony and exhibits as follows:

(1) The "Applicant" was Magruder Limestone Company, Inc. The summary of Applicant's witness testimony and received exhibits (marked "APP") can be found at A-12 – 15.

(2) The "Respondent" was the staff director for the Land Reclamation Commission, who recommended that the Commission issue the permit. The Commission deferred final action on the recommendation until after the hearing. The summary of testimony received on behalf of the Respondent and the description of staff director's only admitted exhibit (marked "RP-1") appear at A-11 – 12.

(3) The "Individual Petitioners" were twenty-one individual persons who opposed issuance of the permit and timely requested the hearing.[1] Individual Petitioners are

[1] The hearing officer dismissed eleven pro-se petitioners because they did not appear at a pre-hearing conference and did not comply with pre-hearing orders to identify witnesses and describe exhibits that supported their requests to participate in the hearing. *See* Finding of Fact # 29 at A-18 and L.F. 885. The Order Dismissing Certain Individuals as Petitioners and Changing Citation of Case, dated February 7, 2008, appears at L.F. 344 – 345. Although the eleven individuals were not parties, they joined in the petition for judicial review filed with the circuit court and are listed among the

sometimes referred to as the "McGovern Petitioners" because attorney Brian McGovern represented them as a group at the hearing. The summary of their testimony and admitted exhibits (marked "MP") appears at A-3 – 7.

(4) The "Board Petitioner" was the Joint Sewer Board for the cities of Lake Ozark and Osage Beach. The Board operates a sewage treatment plant shared by both cities. The plant is located on property adjacent to the quarry property. Osage Beach owns two pipelines that are buried in an easement that transects the quarry property. The pipelines deliver raw sewage to the treatment plant. The summary of the Board Petitioner's witness testimony and exhibits (marked "BP") appears at A-7 – 11.

The Commission listed its Findings of Fact in 104 numbered paragraphs. The first 71 paragraphs set out the procedural history of the administrative case (A-15 – A-21). Specific Findings of Fact on the merits are set forth in ¶¶ 72 – 104 (A-21 – 31). Under "Conclusions of Law and Decision" the Commission addressed contested procedural matters and weighed the value and credibility of each witness and exhibit (A-31 – 82).

C. Statutory and Regulatory Role and Powers of the Commission

The Land Reclamation Commission is established at § 444.520, RSMo 2000. Under that statute, the Commission's domicile is the Department of Natural Resources, for administrative purposes. The Commission consists of seven persons: the state geologist, the director of the Department of Conservation, the staff director of the Clean

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Respondents to this appeal. The hearing petitioners' brief, however, does not challenge the Commission's dismissal of these individuals.

Water Commission, and four persons who possess qualifications described in the statute and are selected from the general public and appointed by the governor with the advice and consent of the senate. The Commission's general duties and responsibilities are found at § 444.530, RSMo 2000.

The Commission implements and enforces several mining related laws that are found in Chapter 444, RSMo 2000, as amended. Among these is the Land Reclamation Act, §§ 444.760 – 444.790, as amended – the law that governs the subject of this case, a permit for a limestone quarry. The Commission is authorized by § 444.767(3) to examine and pass on all applications and plans and specifications for an operation. Permit requirements are specified by § 444.772, RSMo Supp. 2009, and investigations and hearings related to such applications are governed by § 444.773, RSMo Supp. 2009. The Commission, as authorized by § 444.767, RSMo Supp. 2009, has adopted rules to administer this law. The rules applicable to this case are found at 10 CSR 40-10.

D. Commencement of the Case

Magruder Limestone Company operates several quarries under Land Reclamation Permit # 0086. On April 23, 2007, the company filed an application to expand the permit to include a new site in Miller County. The site, referred to as Bowlin Hollow Quarry, is a tract of 212 acres located off Woodriver Road, owned by Eolia Development. The potential mining area is 205 acres, set back 50 feet from the boundaries of the tract. By letter dated May 14, 2007, the Commission's staff notified Magruder that the application was considered complete and advised Magruder to provide public notice as required by 10 CSR 40-10(2)(H). Magruder published notice for four consecutive weeks in the

Miller County Autogram-Sentinel, a weekly newspaper published in Tuscumbia, the Miller County seat.[2]

On June 15, 2007, the Land Reclamation Program began receiving letters from the public requesting either a public meeting or formal hearing in regard to Magruder's application.[3] On June 26, 2007, the Land Reclamation Program sent reply letters, advising that Magruder had declined to hold an informal public meeting and that recipients had an additional 15 days to request a formal hearing.[4] On July 3, 2007, the Land Reclamation Program sent letters to persons who timely requested a hearing to advise that their requests would be considered by the Land Reclamation Commission at its meeting on September 27, 2007.[5]

Land Reclamation Commission Staff Director Larry P. Coen issued a memorandum with Notice of Recommendation and Attachment 1, Response to Public Comments Regarding the Proposed Permit Expansion Application for Magruder Limestone Company, Inc., Miller County, Missouri.[6] He recommended granting a

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[2] *See* Findings of Fact, ¶ 75, at A-21 (L.F. 888) and Exhibit MP-5, which includes the permit application, the Commission's letter, and the affidavit of publication of the notice.

[3] The letters were admitted as Exhibit BP-2.

[4] Exhibit BP-1.

[5] *Id*.

[6] Exhibit BP-3.

permit, but advised the Commission to hold a hearing. At its regular meeting on September 27, 2007, the Land Reclamation Commission considered and granted the requests for a formal hearing.[7] The Commission appointed a hearing officer, who conducted a pre-hearing conference on November 21, 2007.[8] The hearing officer ruled on motions and developed schedules. The hearing officer issued his Decision and Order Ruling on Collateral Issues identified the persons with standing and the substantive issues to be addressed in his final recommendation.[9]

E. Motions to Dismiss and Add Parties (Related to Point III)

On January 23, 2008, Mr. McGovern, on behalf of an entity called Concerned Citizens of Miller and Camden Counties, LLC, which was not a party at the time, filed a Motion to Add Petitioners.[10] The four proposed additional petitioners were: Ted Bax – an individual; the Miller County Board for Services for the Developmentally Disabled; Lakeview Christian Academy; and Golden Age Activity Center. Attached to the motion were letters that the latter three entities had filed with the Commission's staff. The letters

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[7] L.F. 176, minutes of the Commission's meeting.

[8] L.F. 192, notice of appointment and order. The pre-hearing was recorded and the transcript is part of the record.

[9] This was a ruling on a motion filed by Magruder. It can be found at L.F. 315 – 319 and in the appendix to this brief at A- .

[10] Finding of Fact # 22, at L.F. 884 and A-17. The motion appears at L.F. 287 – 297.

expressed concerns about increased truck traffic related to the quarry. The letters were filed outside the time allowed for requesting a hearing, and none requested a hearing. Nothing was offered to show that Mr. Bax had requested a hearing. The hearing officer denied the motion on January 28, 2008, noting that the movant was not a party entitled to file the motion, and also because the motion failed to state a legal basis for the joinder of these persons.[11]

In February of 2008, Magruder filed with the Land Reclamation Program a revised map that shows easements for utilities on the proposed quarry site. On March 4, 2008, the Board Petitioner moved to dismiss the application on grounds that Director Coen incorrectly considered it complete before this map was filed.[12] The hearing officer denied the motion on March 21, 2008.[13] The hearing began three days later on March 24, 2008. On April 3, 2008, the Board Petitioner and the Concerned Citizens of Miller and Camden Counties, LLC, jointly moved the hearing officer to reconsider the Board Petitioner's motion to dismiss. Although this motion did not include a request to add parties, movants argued that parties should not have been excluded while the application

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[11] Finding of Fact # 25, at L.F. 884 and A-17. The order and letters appear at L.F. 321 – 326 and in the Appendix, A-90 – 95.

[12] L.F. 885, A-18: Finding of Fact # 31; L.F. 349 – 379: motion with suggestions and exhibits.

[13] The order was incorporated in the final decision (Finding of Fact # 41; the order appears at L.F. 461 – 470 and in the Appendix, A-96 – 105.)

was not complete.[14] The hearing officer denied the motion as to the Concerned Citizens of Miller and Camden Counties, LLC, because it was not a party; he granted the Board Petitioner's motion to reconsider, to take evidence during the hearing on factual claims asserted in the Board's motion to dismiss.[15]

Before the hearing was completed, on May 22, 2008, the Board Petitioner and Individual Petitioners jointly filed another Motion to Dismiss and, in the alternative, a second Motion for Leave to Add Parties. The Motion to Dismiss again asserted that Magruder's application should have been dismissed as incomplete when it was filed in May of 2007. The alternative motion asserted that Ted Bax, the Miller County Board for Services for the Developmentally Disabled, Lakeview Christian Academy, and Golden Age Activity Center should have been allowed to join because the application was not complete when those persons were earlier not allowed to join. The motion also sought joinder of the City of Osage Beach and the Concerned Citizens of Miller and Camden Counties, LLC.[16] The Commission denied the alternative motions in its final decision.[17]

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[14] The motion appears at L.F. 485 – 502.

[15] The order appears at L.F. 506 – 507.

[16] Finding of Fact # 55 and # 56, at L.F. 887 and A-20. The motions with exhibits appear at L.F. 550 – 570.

[17] L.F. 898 – 914; A-31 – 47.

F. Facts Concerning the Merits and Burden of Proof (Related to Point I)

(i) Claims of Individual Petitioners on Health, Safety and Livelihood

In his initial order setting a pre-hearing conference, during the conference, and in a post pre-hearing conference order, the hearing officer announced that the burden of proof on establishing an issue of fact regarding the impact, if any, of the permitted activity on a hearing petitioner's health, safety or livelihood shall be on that petitioner by competent and substantial scientific evidence on the record.[18] The hearing officer and Commission determined that none of the Individual Petitioners met that burden.[19] The final decision includes an analysis of why the testimony and evidence presented by each witness for the Individual Petitioners did not meet the burden of proof on issues properly identified in the hearing officer's Decision and Order Ruling on Collateral Issues.[20]

(ii) Claims of Board Petitioner on Health, Safety and Livelihood (Related to Points I and II)

The hearing officer also determined that the Board Petitioner had not met its burden of proving that permitted activities will unduly impair the sewer lines or treatment plant, in a detailed analysis of every witness and exhibit presented.[21] The Board

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[18] L.F. 194, pre-hearing order; 201-202, pre-hearing conference memorandum; 208-209, post pre-hearing conference order.

[19] Findings of Fact nos. 79 – 85, L.F. 891 – 892; A-24 – 25.

[20] L.F. 914 – 923; A-47 – 56.

[21] L.F. 923 – 940; A-56 – 73.

Petitioner presented several fact witnesses and one expert, Donald Dressler, P.E. The hearing officer found that the fact witnesses provided no competent and substantial scientific evidence that mining operations will damage the sewage treatment plant or sewer lines. The hearing officer determined that Mr. Dressler's opinions, particularly that the sewer pipes will have a "zero tolerance" for the blasting that Magruder planned to do, were unsupported by reliable studies or other experts.

(iii) Magruder's Case in Chief (Related to Points I and II)

The hearing officer determined that Magruder did not have the burden to prove that the proposed quarry will not unduly impair the health, safety or livelihood of the hearing petitioners.[22] Nevertheless, the hearing officer evaluated the evidence that Magruder presented, through the testimony of experts and exhibits upon which they relied, on the issue whether blasting will endanger the safety of the sewage treatment plant and sewer lines.

A major point of contention among the parties was whether Magruder's plan for blasting will unduly impair the sewage treatment plant or sewer lines. The plan had been developed by Paul Worsey, Ph.D., a professor at the Missouri University of Science and Technology.[23] The hearing officer accepted the conclusions of Magruder's experts, including Dr. Worsey, that vibrations produced by blasting under the plan will not exceed

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[22] L.F. 944; A-77.

[23] A summary of his testimony, with references to transcript pages and exhibits, appears at L.F. 879 – 880; A-12 – 13.

limits imposed by the Missouri Blasting Safety Act (§§ 319.300 – 319.345, RSMo Supp. 2009). The hearing officer concluded from Magruder's case-in-chief that the vibration levels allowed by that Act are more restrictive than levels that would damage the pipes or treatment plant.[24]

The hearing officer, in Finding of Fact # 76, described the sewer pipes, a 24-inch ductile iron pipe, and an 18-inch polyvinyl chloride pipe (PVC) pipe, which are both commonly used and are well suited for water and sanitary sewer pipe applications. He derived the information, in part from an internet encyclopedia, *Wikipedia*.[25]

(iv) Claims that Magruder's Pattern of Noncompliance with Environmental Laws Indicates Likely Noncompliance in the Future

The hearing officer determined that the evidence failed to demonstrate a reasonable likelihood of future acts of noncompliance.[26] The hearing petitioners' brief does not address this conclusion.

[24] L.F. 948; A-81.

[25] L.F. 889; A-22.

[26] L.F. 940 – 943; A-73 – 76.

G. The Commission's Decision

In meetings conducted on July 23-24, 2009, the Commission discussed the recommendation with the hearing officer and heard arguments from representatives of the parties. The Commission voted to authorize a permit with special conditions. Changes were made to the written recommendation to reflect the decision, which the members of the Commission signed.

ARGUMENT

Standard for Judicial Review

Judicial review of a "contested case" is governed by §§ 536.100 - 536.140, RSMo. *Furlong Companies, Inc. v. City of Kansas City*, 189 S.W.3d 157, 165 (Mo. banc 2006). The court may not disturb a commission's factual findings if they are supported by competent and substantial evidence upon the whole record, viewing the evidence in the light most favorable to the findings, including all reasonable inferences that support them. *Hermel, Inc. v. State Tax Com'n*, 564 S.W.2d 888, 894 (Mo. 1978). If there is no competent and substantial evidence to support a commission's findings, or if the findings are clearly contrary to the overwhelming weight of the evidence, then the court may reverse or order further appropriate action. *Scott Tie Co. v. Missouri Clean Water Com'n*, 972 S.W.2d 580 (Mo. App. S.D. 1998).

The court is not bound by the commission's conclusions of law. The court's review may extend to whether the commission's action violated constitutional provisions; was in excess of its statutory authority or jurisdiction; was otherwise unauthorized by

law; was made upon unlawful procedure or without a fair trial; was arbitrary, capricious or unreasonable; or involved an abuse of the commission's discretion. *See* § 536.140.2, RSMo Supp. 2009.

I.

The Commission correctly applied the burden of proof because § 444.773.4, RSMo Supp. 2009 and 10 CSR 40-10.080(3)(B)(D) and (E) allow the Commission to deny a permit only upon competent and substantial scientific evidence. On each issue of fact, the Commission determined either that the hearing petitioners presented no credible, competent, and substantial scientific evidence to support permit denial, or that Magruder rebutted their evidence. (Responds to Respondents' Point I.)

A. The statute and rule authorize a shifting burden of proof.

The burden of proof on the question of whether the permit will unduly impair any person's health, safety or livelihood is set forth in § 444.773.4, RSMo Supp. 2009 (*See* Appendix, A-107), which provides:

> In any hearing held pursuant to this section the burden of proof shall be on the applicant for a permit. 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.[27] If the commission finds,

[27] This sentence is implemented in 10 CSR 40-10.080(3)(D):

based on competent and substantial 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.[28]

In construing a statute, all provisions must be read together and harmonized. *Community Federal Sav. & Loan Ass'n v. Director of Revenue*, 752 S.W.2d 794, 798 (Mo. banc 1988). The hearing petitioners emphasize only the first sentence, which, if read alone, would appear to place on Magruder, the permit applicant, a burden of proving a negative proposition – that the permit will not unduly impair any person's health,

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(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* Appendix, A-109.)

[28] This sentence is implemented in 10 CSR 40-10.080(3)(E):

(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 [subject to conditions listed in subparts 1 and 2]. (*See* Appendix, A-109.)

safety, or livelihood. But that impression is dispelled when the two sentences are read together. The second sentence allows the Commission to deny a permit only upon an affirmative finding, based upon competent and substantial scientific evidence, that a person's health, safety or livelihood will be unduly impaired. If the Commission were to deny the permit when opponents fail to produce such evidence, the second sentence would require a reviewing court to reverse the decision.

The Commission has promulgated a rule that harmonizes both sentences of the statute by providing that the burden of proof shifts. *See* 10 CSR 40-10.080(3)(B):

> (3) Application Hearings.
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> * * *
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> (B) The burden of establishing an issue of fact regarding the impact, if any, of the permitted activity on a hearing petitioner's health, safety or livelihood shall be on that petitioner by competent and substantial scientific evidence on the record. Furthermore, the burden of establishing an issue of fact whether past noncompliance of the applicant is cause for denial of the permit application shall be upon a hearing petitioner and/or the director by competent and substantial scientific evidence on the record. Once such issues of fact have been established, the burden of proof for those issues is upon the applicant for the permit. [*See* Appendix, A-109.]

The hearing petitioners have not challenged the promulgation of this rule. Properly promulgated rules have the force and effect of law. *Wilkey v. Ozark Care Center Partners, L.L.C.*, 236 SW3d 101 (Mo. App. S.D. 2007) (upholding the Labor and

Industrial Relations Commission's dismissal of a workers' compensation appeal that did not state sufficient grounds as required by that commission's rule, 8 CSR 20-3.030(3)(A)). An agency's interpretation of a statute is given deference if its interpretation is reasonable and consistent with the statutory language. *State ex rel. Webster v. Missouri Resource Recovery, Inc.* 825 S.W.2d 916, 931 (Mo. App. S.D. 1992). "Deference to the agency action is even more clearly in order when interpretation of its own regulation is at issue." *Id.* Here, the Commission's action and its rule are consistent with the statute.

B. The Commission determined the weight and credibility of all witnesses and exhibits.

The Commission consistently applied the statutory requirement of competent and substantial scientific evidence to all testimony and exhibits admitted into the record. The Commission's decision includes a detailed analysis of the competence of the evidence and the weight and credibility it deserved. In the Commission's analysis, where a witness for the hearing petitioners offered a leap from a proposition to a conclusion without meeting the "competent and substantial scientific evidence" standard, Magruder was not required to disprove the missing links because no threshold issue of fact had been established. Furthermore, on the question whether the blasting could damage the sewer pipes or treatment plant, the Commission expressly accepted the testimony of experts that Magruder presented in its case-in-chief, even though the Commission consistently stated that the hearing petitioners had not met the threshold burden of establishing an issue of

fact that triggered Magruder's burden of proof. This approach followed the statute and rule.

Where the hearing petitioners and Magruder offered conflicting expert testimony on a point, the Commission determined credibility and whether an opinion was supported by an adequate foundation. For example, on the particular issue whether blasting can be conducted without damage to the sewer collection pipes and treatment plant, the Commission gave greater weight to Magruder's experts than to the Board Petitioner's expert.[29] The Commission rejected the hearing petitioners' evidence of the threat as conjecture, and specifically found that inconsistencies in the testimony of the Board Petitioner's expert (Dressler) pushed one of the Board Petitioner's claims "to the edge of the absurd."[30] Conversely, the Commission found that Magruder's experts based their opinions "upon facts and data generally recognized in the field of blasting."[31]

Determining witness credibility was the Commission's role, and the Court may not substitute its determination. *ABB Power T & D Company v. Kempker*, 236 S.W.3d 43, 51-52 (Mo. App. W.D. 2007). The weight given to expert opinions was within the sole discretion of the Commission and may not be disturbed on appeal, especially where, as here, the credibility determinations of the hearing officer and Commission coincided. *Id*.

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[29] *See* the contrasting analysis between L.F. 936 – 940 (A-69 – 73) and L.F. 944 – 948 (A-77 – 81).

[30] L.F. 938; A-71.

[31] L.F. 948; A-81.

The Court also defers to agency expertise, particularly in evaluating scientific and technical data. *Scott Tie Co. v. Missouri Clean Water Com'n*, 972 S.W.2d 580 (Mo. App. S.D. 1998), citing *Citizens for Rural Preservation, Inc. v. Robinett,* 648 S.W.2d 117, 124 (Mo. App. 1982). Therefore, where the evidence would warrant either of two opposing conclusions, the Court is bound by the Commission's findings. *Id.*

The facts found by the Commission are supported by the record and the Commission's understanding of the burden-of-proof comports with the applicable statute and the Commission's rules.

C. The hearing petitioners did not establish issues of fact as required by the rule through the testimony of individuals concerned about the impacts of future quarry operations.

The hearing petitioners argue that they sufficiently established "issues of fact" as required by the rule, and that Magruder, therefore, had the burden of proof. But the Commission did not find that any of the Individual Petitioners established issues of fact. In an introduction to the specific analysis of the evidence presented by the individual petitioners, the Commission provided this summary:

> It is certainly understandable that individuals living or owning property in close proximity to the quarry that would operate under the expansion of permit #0086 have a variety of concerns of how the existence of the quarry would impact their lives and property. However, the Commission is bound by the statutory and regulatory standards that establish the basis for denying the permit. The Commission may only deny the expansion of the Magruder

> permit upon findings consistent with the burden of proof establish[ed] (*sic*) by the controlling statutes and regulations. The Commission does not have the prerogative to ignore the burden of proof standard laid down and deny the permit based simply upon concerns of individual petitioners. There must be competent scientific evidence that moves a concern to an undue impairment impacting upon health, safety or livelihood of the petitioner. As is discussed below, the evidence received on the record from the Individual Petitioners did not cross the required threshold for denial of the expansion of the permit.[32]

In an effort to show that individual quarry opponents did cross the threshold, the hearing petitioners' brief cites testimony and evidence presented by Mary Denton and Vicki Stockman. The Commission evaluated the testimony and evidence offered by all concerned quarry opponents, including these two.

Mary Denton has suffered for years from respiratory difficulties triggered by her allergic reactions to dust and pollens commonly found where she resides a quarter mile from the quarry site. (March 24, 2008 transcript, pp. 136-158). She read into evidence a letter provided by her physician. The letter stated, "Exposure to both dust and diesel or other exhaust fumes are known triggers for this patient. A rock quarry in close proximity will certainly cause exacerbation and long-term worsening of her disease." The Commission found that the letter failed to establish that the opinion of the physician was based upon any personal knowledge relating to the operation of the proposed quarry.

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[32] L.F. 916 – 917; A-49 – 50.

Also, the Commission found no evidence that dust from truck traffic from operation of the quarry would disburse or migrate to Ms. Denton's home. (L.F. 918.)

The hearing petitioners cite *Knapp v. Missouri Local Government Employees Retirement System*, 738 S.W.2d 903, 912 (Mo. App. W.D. 1987) in support of their argument that the letter from Ms. Denton's doctor established an issue of fact. The court concluded that Mr. Knapp established a prima facie case of a disability from a work-related cause in support of his claim. That case is distinguishable. There, the defendants did not dispute that Mr. Knapp suffered injuries to his ankle in the course of his employment, and a panel of three medical experts unanimously agreed that Mr. Knapp was permanently and totally disabled by the injuries from continuing to pursue his job as a journeyman lineman. But here, Magruder does not concede that dust from the proposed site will affect Ms. Denton's respiratory illness, and the general opinion of her doctor that a quarry "in close proximity" will aggravate her illness does not establish that Magruder's operation, which will be a quarter mile away, will unduly impair her health.

Vicki Stockman expressed concern that the Magruder operation will, in a number of ways, harm her livelihood. She and her husband own a recreational vehicle park business located six-tenths of a mile from the proposed quarry, and about one mile from where mining will begin. Separating Magruder's site and the RV park is a ridge. The height of the ridge is more than 170 feet above the elevation of both the RV park and the Magruder's mining area. The Commission found that Vicki Stockman did not offer competent and substantial scientific evidence that dust from the quarry would migrate over the ridge and cause an undue impairment to the RV park. She offered no evidence

that the quarry would damage the sewer lines and treatment plant and impair her livelihood. Mrs. Stockman expressed concern that the quarry will create noise pollution and unpleasant surroundings, but these matters are not cognizable because they are beyond the regulatory powers of the Department of Natural Resources.

The Board Petitioner presented other fact witnesses, in an effort to prove that quarry operations would damage the sewer mains, but their testimony on that point amounted to mere conjecture. For example, Richard C. King, the Public Works Superintendent for Osage Beach, and Gary Hutchcraft, manager of the sewage treatment plant, both testified about the pipes and plant from personal knowledge. They described their fears about the effects if the lines on Magruder's property ruptured. But the Commission found that "there were not facts in evidence upon which Mr. King could properly conclude the quarrying would in fact rupture the lines."[33] The Commission also found that Mr. Hutchcraft did not establish that Magruder's operation would cause damage or a temporary shutdown of the plant and found his testimony "irrelevant to establish in any form or fashion any potential undue impairment to the health, safety or livelihood of any petitioner in this proceeding."[34]

[33] L.F. 925; A-58.

[34] *Id*.

The Board Petitioner also offered the testimony of an expert, Donald Dressler, P.E., but the Commission rejected his opinions that Magruder's operation would damage either the plant or the sewer lines. The Commission's evaluation of his testimony is discussed in detail below.

D. The decision is supported by Magruder's experts, who analyzed the blasting plan under the Missouri Blasting Safety Act.

Raw sewage from Osage Beach is pumped to the treatment plant through a 24-inch ductile iron pipe and an 18-inch polyvinyl chloride (PVC) pipe, which both transect Magruder's property. Magruder's experts testified that the plan allows peak particle velocity (PPV) from blasts (measured in inches per second – "ips") at levels that will not damage materials commonly used in structures – including drywall. Dr. Paul Worsey testified that the United States Bureau of Mines had conducted an empirical study in which PVC pipe withstood the effects of production blasting that was 13 to 20 times greater in impact than Magruder's blasting plan would allow. Larry Mirabelli and Keith Henderson compared Magruder's plan with several case studies to explain that blasting at the quarry would not cause damage. (*See* A-77 – 81.)

Based on the above considerations, and their actual experience in blasting near pipelines and buildings, Magruder's experts concluded, within a reasonable degree of scientific and engineering certainty, that the blasting plan will comply with the Missouri Blasting Safety Act (§§ 319.300 – 319.345, RSMo Supp. 2009). The Commission cited their testimony in support of its findings that the blasting will not damage the sewer treatment plant or pipes. (*See* Findings 98 – 103, L.F. 896-897; A-29 – 30.)

E. The Commission rejected the opinion of The Board Petitioner's expert witness because of inconsistencies and failed logic in his testimony, and because his views were neither supported by any scientific study, nor accepted by any other experts in the field. The Commission also found that he did not understand the Missouri Blasting Safety Act.

In contrast to the Commission's acceptance of opinions offered by Magruder's experts, the Commission expressly rejected most of the opinions offered by The Board Petitioner's expert, Donald Dressler, P.E., who testified that the sewer pipes have "zero tolerance" for vibration. His testimony was not supported by any study – indeed, he claimed that his "zero tolerance theory" was supported by the fact that there is no vibration tolerance standard. He found no studies concerning the impact of vibrations on PVC or ductile iron pipes used to convey raw sewage, and there was no evidence that his "zero tolerance theory" was generally accepted by any other experts. The theory was inconsistent with common experience, including that of Magruder's experts and Dressler himself, who have conducted blasting near pipes made of these materials without damaging them. The theory was contradicted by construction work near Osage Beach's sewer lines in other locations. Finally, the Commission found that Dressler's estimation of a safe blasting distance from the pipes and plant was based upon his misunderstanding of the Missouri Blasting Safety Act. (*See* discussion at L.F. 928 – 930; A-61 – 63 and Finding of Fact # 103 at L.F. 897; A-30.)

Magruder's witnesses, unlike Dressler, were professional enough to acknowledge that their knowledge about "pipe capabilities" is limited. But the Commission found that

Dressler also has limited knowledge on the subject. He testified that there are no studies that narrowly address the capacity of ductile iron pipe or PVC to withstand specific levels of PPV and that he learned this in a phone conversation with an unnamed engineer at the Ductile Iron Association. Dressler tried to use the absence of any such studies as proof of his zero-tolerance theory. (*See* L.F. 928; A-61.) He was disingenuous in doing so, and the Commission rightfully found the effort fatal to his credibility. Moreover, the Commission specifically found that "the zero-tolerance theory was rebutted by Applicant's experts" in Magruder's case-in-chief (L.F. 930; A-63).

Having rejected Dressler's "zero tolerance" theory, there is no evidence on the record from which the Commission was compelled to find that the sewer lines are susceptible to damage from vibration that may be produced from blasting or any other mining activities at this site. The Commission found that Magruder's blasting plan, which was designed by experts to comply with the Missouri Blasting Safety Act, will prevent undue impairment. No credible evidence was presented to show that Magruder's compliance with the Missouri Blasting Safety Act will not adequately protect the sewer lines and the treatment plant.

F. Relying upon Magruder's experts, the Commission included in the permit special conditions to protect the pipes and sewage treatment plant.

The Commission incorporated the blasting plan into the permit as a requirement, but also made the permit stricter than Magruder's experts deemed necessary.[35] The

[35] L.F. 948 – 949; A-81 – 82.

Commission included the following special conditions in the permit:

1. Blasting must be planned, directed, and monitored by a person licensed under the Missouri Blasting Safety Act. Blasting is further limited to weekdays between 8:00 a.m. and 5:00 p.m.
2. Blasting shall be conducted no closer than 200 linear feet from the nearest sewer easement line, even though Magruder's experts considered the plan's 150-foot distance to be greater than necessary to ensure safety to structures.
3. The plan, as part of the permit, may be modified as necessary according to site conditions.
4. The permit requires seismographs to monitor effects of blasting on the sewer lines and plant, and the records shall be available to both the Joint Sewer Board and the Land Reclamation Program. Magruder also is required to file an annual report of seismograph data to the Program.
5. Magruder must maintain the quarry floor and blast-hole depths above the buried sewer lines.

The requirements of the mine floor elevation and 200-foot blast distance from the sewer line easement ensure that the sewer plant and lines will be exposed to PPV far below levels that could cause damage. These conditions eliminate any threat of damage from ground displacement.

As a further measure of protection, the Commission approved the permit for only a portion of the site covered by the application, denying the permit expansion to the area

east of the sewer line easement.[36] This restriction gives Magruder further incentive to comply with the law and avoid creating harm. If Magruder applies for a permit to expand mining operations at this site in the future, the Department and Commission will have a record of the company's performance to evaluate. The permit is more restrictive, and thus more protective, than the one that Magruder requested and the Department recommended. The conditions are supported by competent and substantial scientific evidence.

II.

The Commission's decision did not rely upon unscientific evidence in determining that the permit will not damage the sewer pipes. (Responds to Respondents' Point II.)

The Commission cited the internet encyclopedia website, *Wikipedia*, for the limited purpose of describing PVC and ductile iron pipe. The Commission concluded merely that both types of pipe are commonly used in the water and sewer industries and are suitable for such use. *See* Finding of Fact # 76 (L.F. 889; A-22). *Wikipedia* was not the sole source of evidence that supported that conclusion. The Board Petitioner's expert, Dressler, testified that ductile iron is "a very superior sewer pipe for forced mains." (Transcript, June 6, 2008, p. 39, lines 24-25). As already mentioned, Magruder's expert, Dr. Paul Worsey, testified that PVC pipe has been shown to withstand blasting impacts substantially greater than Magruder's blasting plan would cause.

[36] *Id*.

The hearing petitioners complain the information from *Wikipedia* was unscientific and not properly admitted as part of the hearing. But they exaggerate the significance of the information. The Commission did not cite *Wikipedia* as a basis for concluding that the permit, with specified conditions, will not harm the pipes and sewage treatment plant. Instead, the Commission expressly relied upon trained and experienced blasting experts who demonstrated familiarity with scientific studies and accepted safety standards. The Commission did not cite *Wikipedia* as grounds for accepting or rejecting any expert's opinion.

The standard of judicial review is not whether the Commission's decision is utterly flawless regarding rulings on evidence; rather, the test is whether the decision is supported by competent and substantial evidence on the record as a whole. *Wikipedia* has been criticized as unreliable, particularly in light of the website's own disclaimers, as discussed in *Badasa v. Mukasey*, 540 F.3d 909 (8th Cir. 2008), the case upon which the hearing petitioners rely. But courts have not universally and absolutely rejected *Wikipedia* as a resource for definitions and background information, which was the hearing officer's purpose here.

The minutes of the Commission's meeting during which the hearing officer and attorneys for the parties made presentations reflect that the hearing officer "was trying to provide some information for the Commissioners, since the experts provided little in this area."[37] He indicated that the reference could be removed from the order. According to

[37] L.F. 857.

the minutes, he further explained that the important issue in the record is

> . . . that the peak particle velocity is low enough that the blast plan will not damage the pipelines unless those lines are as fragile as drywall. In summary there is just no evidence that vibrations from blasting have ever caused breakage of any pipelines and therefore the final recommendation must be to issue the permit.[38]

The hearing officer determined that the peak particulate velocity that will be produced by following Magruder's blasting plan will pose no risk of harm to the pipes. His conclusions were based upon the testimony and opinion of experts in the field of blasting who were aware of no incident in which vibration from blasting had caused a pipeline to break. He relied upon the testimony of experts who evaluated the Magruder blasting plan under approved standards developed through appropriate testing to conclude that the sewer pipes and plant would be exposed to peak particle velocities that are even lower than necessary to ensure safety. As support for his direct conclusions about the likely impact (more accurately, the lack of impact) of the blasting upon the pipelines and treatment plant, the hearing officer cited the expert testimony on point, and never the *Wikipedia* website.[39]

Courts have used *Wikipedia* as a resource for basic background information and to give context to witness testimony. One such court happens to be the Eighth Circuit, the

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[38] *Id*.

[39] Findings of Fact numbers 86 – 103, L.F. 892 – 897, A-25 – 30.

same court that decided the *Badasa* case. In *United States v. Bazaldua*, 506 F.3d 671, n. 2 (8th Cir. 2007), that court used *Wikipedia* to explain that a "pit maneuver" is a technique used by police to stop a fleeing vehicle, and that "PIT" can mean either "Precision Immobilization Technique," "Pursuit Intervention Technique," or "Parallel Immobilization Technique," depending upon the police department using it. This Court, also, has referred to *Wikipedia* to explain a term that was used, but apparently not explained, in the case record. In *State v. Smothers*, 297 S.W.3d 626, n. 1 (Mo. App. W.D. 2009), this Court referred to *Wikipedia's* definition of "whizzinator" as a device designed to fraudulently defeat a drug test, with a graphic description of the typical components.

In *Badasa*, the Eighth Circuit remanded the administrative decision, but not simply because the administrative law judge used *Wikipedia* as a reference. The court recognized that *Wikipedia* may be unreliable, but also ruled that its use by a tribunal can be harmless. The reason for the remand was that the court could not determine whether the *Wikipedia* reference was harmless to the conclusion by the Immigration Judge and the Board of Immigration Appeals. The Board criticized the Immigration Judge's use of *Wikipedia*, but held that the use was not "clear error." The court could not determine from the Board's application of that standard whether the Immigration Judge would have reached the same conclusion without *Wikipedia*, or whether the reference to *Wikipedia* was "harmless" in the sense that it did not influence the Immigration Judge's decision.

Here, the Commission's decision leaves no such ambiguity. The Commission's decision includes ample discussion about the weight and credibility given the testimony

of each witness. The Commission has provided an independent basis – the analysis of Magruder's blasting plan by experts relying upon established testing standards and the Missouri Blasting Safety Act – for concluding that mining operations will not harm the pipes or sewer plant. In addition, the Commission imposed operating conditions that are more stringent than Magruder's experts considered necessary to protect the pipes and sewage treatment plant. The hearing officer's use of *Wikipedia* was harmless because the reference did not affect the outcome.

III.

The alleged deficiencies in the map that Magruder filed with its application did not cause the administrative hearing to be invalid, did not harm any interest of the hearing petitioners, and did not harm the interests of any persons who failed to timely request a hearing. The fact that Magruder filed a more accurate map after the hearing process commenced did not trigger a new public notice requirement. (Responds to Respondents' Point III.)

A. The hearing petitioners were not harmed by the site detail map Magruder initially filed with its application.

Several times the hearing petitioners have argued that the Commission was required to dismiss their hearing.[40] They claim that Magruder's application was not

[40] Finding of Fact # 31 (L.F. 885; A-18) – the first motion to dismiss was filed by the Board Petitioner on March 4, 2008, at L.F. 349 – 379; it was denied March 21, 2008 and incorporated in the final decision (Finding of Fact # 41; the order appears at L.F. 461

complete when filed in May of 2007, because the site detail map filed with the application did not show easements for Osage Beach sewer pipes and AmerenUE power transmission lines. The hearing petitioners argue that until this information was provided, the application did not trigger public notice requirements in 10 CSR 40-10.030(2)(H) and (I). The application form did not call for reporting easements on the land to be mined, so this information was not included anywhere else in the application. The staff routinely did not require easements to be shown on such maps. The staff accepted the application as complete with the original site detail map, and authorized Magruder to publish notice of the application. Upon learning from public comments about the existence of utility easements on Magruder's property, the staff asked Magruder to provide an updated map that depicted them. In February of 2008, Magruder did so.

According to the hearing petitioners, when Magruder filed the revised map, the application was complete for purposes of triggering a public notice. The argument implies that any public notice of the application in May and June of 2007 was invalid and did not trigger a clock for requesting a hearing. In effect, the hearing petitioners argue that they had no right to the hearing the Commission granted them. The hearing

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– 470 and in the Appendix, A- 96 – 105.) The second motion was filed jointly by Respondents with an alternative motion to add parties on May 22, 2008. The Commission denied the alternative motions in its final decision – L.F. 908 – 914; A-41 – 47.

petitioners' argument is flawed because a new public notice would provide the same information that was included in the initial notice, and the map is not required to be published. It is also flawed because they were not prejudiced by either the omission of information on the original map or the inclusion of the information on a map filed with the Commission after the hearing was granted.

The hearing petitioners learned during discovery that the map Magruder filed with its application did not show the utility easements. The Board Petitioner filed a motion to dismiss the application on that basis on March 4, 2008, just two weeks before the hearing commenced. The hearing officer denied the motion on March 21, 2008. The hearing petitioners were not prejudiced by the original map because when they requested the hearing they raised the concern that mining operations might damage the pipes; indeed, the hearing and the Commission's decision were largely devoted to that issue. The hearing petitioners were also aware of the transmission power lines, but during the hearing, which commenced March 24 and concluded June 6, 2008, the hearing petitioners offered no competent scientific evidence that mining will damage power transmission lines and thereby unduly impair their health, safety or livelihood.

B. Non-parties were not prejudiced by site detail map.

The hearing petitioners have no standing to assert the interests of others who were not parties to the case, yet they have several times attempted to do so. On January 23, 2008, Mr. McGovern, on behalf of an entity called Concerned Citizens of Miller and

Camden Counties, which was not a party at the time, filed a Motion to Add Petitioners.[41] The hearing officer denied the motion on January 28, 2008.[42] During the course of the hearing, the hearing petitioners jointly filed a Motion for Leave to Add Parties as an alternative to their Joint Motion to Dismiss filed on May 22, 2008.[43] The Commission denied the alternative motions in its final decision.[44]

The hearing officer reviewed each untimely hearing request and ruled upon each one individually, taking into consideration whether standing was established, whether the request had conformed to the administrative process for requesting a hearing, and whether the proposed party was prejudiced by the absence of information on the map filed with the initial application. The hearing officer reviewed letters that the proposed additional parties had sent to the Commission. (The letters were attached to the motions.) In each case, the hearing officer found no legal basis to add these persons as parties to this case. The record supports the denial of the motions.

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[41] Finding of Fact # 22, at L.F. 884 and A-17. The motion appears at L.F. 287 – 297.

[42] Finding of Fact # 25, at L.F. 884 and A-17. The order and letters appear at L.F. 321 – 326 and in the Appendix, A-90 – 95.

[43] Finding of Fact # 55 and # 56, at L.F. 887 and A-20. The motion appears at L.F. 550.

[44] L.F. 908 – 914; A-41 – 47.

C. The hearing petitioners' argument relies upon an incorrect construction of § 444.773.1, RSMo Supp. 2009.

The question is whether the Commission was required by law to deny the application, without reaching the merits of Respondent's concerns about mining impacts. The hearing officer found no statute or regulation that compelled dismissal (L.F. 904; A-37). The final decision included a thorough explanation of why dismissal of the application was not required or appropriate (L.F. 898-908; A-31 – 40). The final decision specifically addressed the insignificance of the map (L.F. 903-906; A-36 – 39):

> None of the alleged deficiencies asserted in either the Board's Motion to Dismiss or the Joint Motion to Dismiss would result in the publication of a different notice than that shown by Exhibit APP-4. The publication regulation has no requirement with regard to the detail map. None of the five elements required for the public notice reference the detail map or the other claimed errors asserted by Petitioners.[45]

The hearing petitioners argue that § 444.773.1, RSMo Supp. 2009, provides that if the director determines that the application has not fully complied with any rule, the director "shall" recommend dismissal. They argue that the director should have determined that the application was incomplete because the map did not show easements for utilities. When used in a statute, the word "shall" is not always mandatory as the

[45] L.F. 902; A-35. The five elements found in the publication regulation, 10 CSR 40-10.020(2)(H), are listed in the Commission's decision at L.F. 901 – 902; A-34 – 35.

hearing petitioners assume. The meaning of the word "shall" is a matter of statutory context, and a statute that uses the word is not mandatory unless it expressly provides a consequence or sanction if the official does not do what the statute says the official "shall" do. Otherwise, the word "shall" indicates a mere directive. *Citizens for Environmental Safety v. Missouri Department of Natural Resources*, 12 S.W.3d 720 (Mo. App. S.D. 1999). For example, § 444.772.10, RSMo Supp. 2009 (included in Appendix, A-112 – 114) provides that the director "shall" respond to a permit application within forty-five calendar days, and that if he fails to do so, the application is deemed complete. The statutory time requirement is "mandatory" because it provides a consequence if the director misses the deadline – he must accept the application as complete.

In contrast, § 444.773.1, RSMo Supp. 2009 (included in Appendix, A-108 – 109), provides that the director "shall" dismiss an application that he determines is incomplete. But there is no automatic consequence if he authorizes public notice despite determining that an application is incomplete. Nor does the statute provide a consequence if the director, as here, accepts an application as complete, authorizes public notice, but subsequently asks the applicant to provide more information about the site. In this case, the director's staff requested a more detailed map after learning, through comments received after Magruder published notice of the application, about the sewer and power transmission lines on Magruder's property. The notice and comment process accomplished an important purpose – it gave the Commission and staff information to help them make a better decision about whether to issue a permit. The Commission found that the statute does not require automatic dismissal of the application, after the

director found it complete and authorized public notice, just because he learned additional information about the site as a result of the public notice and asked for a more detailed site map. As pointed out earlier, the Commission's interpretation of the statute and application of its own rules should be given deference. *State ex rel. Webster v. Missouri Resource Recovery, Inc.* 825 S.W.2d 916, 931 (Mo. App. S.D. 1992).

Conclusion

This Court should reverse the Circuit Court's judgment and remand with directions to reinstate the permit issued to Magruder by the Land Reclamation Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing and a labeled, virus-free disk containing the same, has been sent by U.S. mail, first-class, postage prepaid, to counsel shown below on this day of March 29, 2010:

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RULE NO. 84.06(c) CERTIFICATION

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 8,377 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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