

health effects on themselves, their children, the elderly, and those members having pre-existing health problems including asthma, chronic obstructive pulmonary disease, sinusitis, and sinus infections. In addition, a Medical Doctor, who is a board-certified pathologist who has performed many autopsies on persons who formerly worked in limestone quarries, testified that air pollution and dust emissions from limestone quarries cause health problems for susceptible populations, including children, the elderly and those with pre-existing health problems. Also, a Missouri registered geologist testified regarding the environmental problems associated with limestone quarries such as air pollution and dust emissions from quarries and related operations and that prevailing winds in this area generally blow from a southerly direction.

On February 7, 2011, the Commission decided that Saxony had presented good faith evidence regarding the Strack application and ordered an evidentiary hearing to be conducted to determine whether the mining permit should be issued. However, the Commission decided that Saxony did not present good faith evidence concerning the Heartland application. In addition, the Commission decided that SOCH did not present good faith evidence and denied its request for an evidentiary hearing for both Strack and Heartland. The Commission then issued the mining permit to Heartland.

This action under § 536.150, RSMo., seeks judicial review of three decisions made by the Commission on February 7, 2011: (1) the denial of Saxony's request for an evidentiary hearing regarding the Heartland application; (2) the denial of SOCH's request for an evidentiary hearing regarding the Strack and Heartland applications; and (3) the issuance of the mining permit to Heartland.

Parties

1. Petitioner - Saxony Lutheran High School is an accredited, private Lutheran high school, located at 2004 Saxony Lane, along County Road 601 in Jackson, Missouri. Saxony has an enrollment of 187 students for the 2010-2011 school year. Saxony has a net worth of less than \$7 million and has

less than 500 employees.

2. Petitioner - Save Our Children's Health, Inc. is a not-for-profit corporation in good standing in Missouri, with its principal place of business located at 431 Eli Drive, Jackson, Missouri. SOCH has a net worth less than \$7 million and has less than 500 employees.

3. Respondent – Missouri Land Reclamation Commission is a state agency created by § 444.520, RSMo., and is domiciled within the Missouri Department of Natural Resources (“MDNR”).

Jurisdiction and Venue

4. This Court has subject matter jurisdiction pursuant to § 536.150, RSMo., and Supreme Court Rule 100.01.

5. Venue is appropriate in this Court in that Respondent is a state agency with its principal place of business in Cole County, Missouri.

Statement of Facts

6. On October 4, 2010, Heartland submitted an open pit limestone mining application for a proposed 161-acre limestone quarry located directly south of Saxony across County Road 601 just south of Fruitland, Missouri.

7. The Heartland application included a map showing the proposed Mine Plan, which the Commission posted on the Internet at <http://www.dnr.mo.gov/env/lrp/docs/heartland-detail-quarry-detail.pdf>. A copy of the Mine Plan map is attached hereto and incorporated herein as Exhibit 1.

8. The “Mine Plan Boundary” is shown as a black line along the entire perimeter of the 161 acre parcel.

9. Heartland's proposed Reclamation Plan provides for a 88-acre industrial area on the northern half of the Heartland property, directly across County Road 601 from Saxony, and a 58-lake along the southern half of the Heartland property.

10. On October 19, 2010, Strack submitted an open pit limestone quarry mining application for

a proposed 99 acre limestone quarry east of Highway 61 and along County Road 601.

11. The Strack application, at pages 11 and 13, shows the proposed long-term mine area will be within approximately 200' of the southern property line of the Strack property. A copy of Strack's long-term mine area maps are attached hereto and incorporated herein as Exhibit 2.

12. Members of SOCH live in subdivisions and other residences in close proximity to the Strack and Heartland property.

13. Saxony's property is located directly in between the Strack and Heartland properties.

14. A parcel map showing the locations of the Strack quarry ("Site #1"), the Heartland quarry ("Site #2"), Saxony (the red dot in between Site #1 and Site #2), North Elementary School (the red dot north of Site #1), the City of Jackson, Missouri, the City of Fruitland, Missouri, County Road 601 and Interstate 55 is attached hereto and incorporated herein as Exhibit 3.

15. The Commission conducted 45-day public comment periods on the Strack and Heartland permit applications and received over 5,000 letters and comments opposing the proposed quarries.

16. The Commission sent letters asking both Strack and Heartland to conduct public meetings regarding their permit applications to allow the public to ask questions and make comments. However, both Strack and Heartland refused to conduct public meetings.

17. The Commission scheduled a public hearing on the quarries on its January 2011 agenda.

18. In a January 7, 2011 memorandum, on page 2, the Commission's Staff stated: “. . . The Missouri Department of Natural Resources provides protection concerning sediment and run off in to the creek system, air pollution and dust emissions that originate from within the property of the proposed mine site. . . .”

19. The Commission posted the January 7, 2011 memorandum on the Internet at <http://www.dnr.mo.gov/env/lrp/docs/heartlandmatlrppkt1-11.pdf>.

20. On January 27, 2011, the Commission conducted a public hearing pursuant to § 444.773,

RSMo to afford parties the opportunity to show they have “standing” to request the Commission to conduct a full evidentiary hearing on whether the Heartland permit should be issued.

21. “Standing” is defined in § 444.773, RSMo., such that persons opposed to the proposed permit must “present good faith evidence that their health, safety or livelihood would be unduly impaired by the issuance of the mining permit.”

22. Prior to the start of the public hearing, the Commission Chairman excused himself and departed the hearing due to personal reasons.

23. During the public hearing on January 27, 2011, both Saxony and SOCH presented witness testimony showing:

(a) many members of SOCH live near the proposed Strack and Heartland limestone quarries and believe they will suffer adverse health effects from the air emissions from the quarry;

(b) many students attending Saxony, other students, parents and guests participate in outside events at Saxony and believe they will suffer from adverse health effects from the air and dust emissions from the Strack and Heartland quarry operations;

(c) several residents living near the site of the proposed Strack and Heartland quarries testified they suffer from chronic obstructive pulmonary disease, sinusitis, sinus infections, asthma and other medical conditions and believe the air emissions from the quarry operations will exacerbate their medical problems;

(d) several residents living near the site of the proposed Strack and Heartland quarries are either elderly or have young children and believe that the air emissions from the quarries will have adverse health effects on them; and

(e) Dr. Paul Horn, M.D., a Board-certified pathologist, testified that he has personally conducted hundreds of autopsies in the Cape Girardeau area, many of which were on persons who formerly worked in the many limestone quarries in the area. He also testified the dust in the air

emissions from a limestone quarry can enter into a person's lungs and cause adverse health effects, particularly in susceptible populations such as children under 18, elderly people, and persons already suffering from chronic obstructive pulmonary disease, asthma, sinusitis, sinus infections and other medical problems.

24. During the public hearing on January 27, 2011, both Saxony and SOCH presented the testimony of Daniel Price, a registered geologist in Missouri, who is employed by ENVIRON International. Mr. Price testified that limestone quarries generate significant amounts of dust and air emissions from the mine pit, haul roads, conveyors, rock crushing and all the other related equipment. Mr. Price also testified that in this area, the prevailing winds generally blow from a southerly direction, which means that dust and air emissions from the proposed limestone quarry would blow to the north directly toward Saxony and SOCH's members.

25. During the public hearing on January 27, 2011, Heartland made a presentation regarding seismic and blasting concerns, which are matters outside the Commission's and MDNR's jurisdiction. During the hearing, Heartland did present two maps, Figure 1 and Figure 2.

26. Heartland's Figure 1 is the same map referenced as Exhibit 1 in paragraphs 7 and 8, herein, and was included in Heartland's permit application to show the Mine Plan Boundary.

27. Heartland's Figure 2 is a site map that was not contained in Heartland's permit application and is not contained in any of the documents posted by the Commission on the Internet.

28. Copies of Heartland's Figure 1 and Figure 2 from the January 27 presentation are attached hereto and incorporated herein as Exhibits 4 and 5, respectively.

29. At various times during the public hearing on January 27, 2011, one member of the Commission – Commissioner Riffle – was observed to appear to be asleep in his wheelchair, and, at various times, a woman entered the hearing room from a side door and wheeled Commissioner Riffle out of the room and away from the public hearing.

30. On February 7, 2011, the Commission by a vote of 4 to 2 with one abstention decided that Saxony had presented good faith evidence that the proposed Strack quarry would unduly impair their health and livelihood and ordered an evidentiary hearing.

31. On February 7, 2011, the Commission decided that SOCH did not present good faith evidence that the members of SOCH will have their health or livelihood unduly impaired by the issuance of the surface mining permit to either Heartland or Strack.

32. On February 7, 2011, the Commission, by a 4 to 3 vote in closed session, initially decided that Saxony had presented good faith evidence that the issuance of the Heartland surface mining permit will unduly impair their health and livelihood.

33. After the closed session ended, Commissioner Riffle stated to the legal counsel for the Commission that “he had been confused regarding the wording of the motion and had intended to vote to deny a hearing, which would have required a no vote (he originally voted yes). He asked that it be changed to a no vote as that was his intention and to have his vote noted in the minutes.” A copy of the Commission's minutes is attached hereto and incorporated herein as Exhibit 6.

34. On February 7, 2011, after the closed session ended, the Commission did not conduct any further votes on the Saxony standing issue with respect to the Heartland quarry.

35. The Commission posted the basis for the denial of standing for the Heartland quarry on the Internet at <http://www.dnr.mo.gov/env/fruitland.htm>.

36. The Commission stated: “The commission denied the Saxony Lutheran High School’s hearing request for the Heartland Materials LLC mining permit application. The commission's ultimate decision regarding the hearing request was determined by examining the mining plans of the applicant. Heartland Materials mining plan included a self-imposed buffer distance of 1,100 ft. from the mining area to the school property line with a plan to mine in a direction away from the school.” A copy of the Commission's basis for its decision is attached hereto and incorporated herein as Exhibit 7.

37. On February 7, 2011, the Commission issued the mining permit to Heartland.

38. Petitioners have no administrative remedy or right to judicial review of the Commission's February 7, 2011 decisions in Chapter 444, RSMo., therefore they have a statutory right to seek judicial review in this Court under § 536.150, RSMo.

COUNT I

39. Petitioners reallege and incorporate by reference the allegations in paragraphs 1 through 38.

40. The Commission states the basis for its decision that Saxony failed to present good faith evidence that their health, safety or livelihood would be impaired by the issuance of a permit to Heartland is because Heartland's mining plan includes a 1,100 foot buffer distance from the mine pit.

41. Exhibit 1, which is part of Heartland's permit application and Mine Plan, shows a distance of 1,054 feet from the proposed mine pit to the north property line.

42. Exhibit 5, which is Figure 2 from Heartland's presentation on January 27, 2011, shows the location of the office, haul roads, stockpile area, conveyor system, rock screening plant, and primary rock crushing plant.

43. The haul roads, stockpile area, conveyor system, rock screening plant and primary rock crushing plant are all sources of dust and air emissions from the quarry and rock crushing operations.

44. Exhibit 5 shows the haul roads, stockpile area, conveyor system, rock screening plant and primary rock crushing plant are all located on the northern half of the Heartland property and come as close as 200' to the northern Mine Plan Boundary.

45. The haul roads, stockpile area, conveyor system, rock screening plant and primary rock crushing plant are all located within the "1,100 buffer distance" upon which the Commission based its decision.

46. Exhibit 5 was not set forth in the Heartland permit application and Mine Plan.

47. Because the haul roads, stockpile area, conveyor system, rock screening plant and primary

rock crushing plant are located as close as 200 feet to the northern Mine Plan Boundary, there is in fact no “1,100 buffer distance” that protects Saxony from the adverse effects of the Heartland quarry.

48. Because the Heartland permit application and Mine Plan did not contain Exhibit 5, the Heartland permit application and Mine Plan were incomplete.

49. Because there is in fact no “1,100 buffer distance,” the Commission's decision is arbitrary and capricious and lacks any substantial basis.

Wherefore, Petitioners pray that the Court:

A. Declare there is no “1,100 foot buffer distance” that is protective of the health, safety and livelihood of Saxony;

B. Declare Heartland's permit application and Mine Plan are incomplete because of the failure to include Exhibit 3 showing the locations of the haul roads, stockpile area, conveyor system, rock screening plant and primary rock crushing plant;

C. Declare the Commission's decision and issuance of the mining permit to Heartland is arbitrary and capricious and lacks any substantial basis;

D. Reverse and vacate the Commission's issuance of the mining permit to Heartland and remand this matter to the Commission with direction to conduct a full evidentiary hearing in accordance with § 444.773, RSMo.;

E. Award Petitioners their reasonable attorneys fees and costs in this matter; and

F. Award such further relief the Court deems just and appropriate.

COUNT II

50. Petitioners reallege and incorporate by reference the allegations in paragraphs 1 to 49.

51. The Commission decided that Saxony had standing with respect to the Strack quarry where the proposed activities would occur within approximately 200' of the southern Mine Plan Boundary, which borders Saxony's property.

52. The Commission decided, after changing Commissioner Riffle's vote, that Saxony lacked standing with respect to the Heartland quarry where the proposed activities would occur within approximately 200' of the northern Mine Plan Boundary, which is just across County Road 601 from Saxony's property.

53. Because both Strack's and Heartland's proposed activities would occur within approximately 200' of Saxony's property, there is no rational or substantial basis for the Commission to conclude that Saxony is unduly impaired by the Strack operation but not by the Heartland operation.

Wherefore, Petitioners pray the Court:

A. Declare that Petitioners, based on competent and substantial evidence, showed their health, safety and livelihood would be impaired by the issuance of a mining permit to Heartland, and, as a result, Petitioners established standing under § 444.773, RSMo.;

B. Declare the Commission's decision denying standing and issuance of the permit to Heartland is arbitrary and capricious and lacks any substantial basis;

C. Reverse and vacate the Commission's issuance of the mining permit to Heartland and remand this matter to the Commission with direction to conduct a full evidentiary hearing in accordance with § 444.773, RSMo.;

D. Award Petitioners their reasonable attorneys fees and costs in this matter; and

E. Award such further relief the Court deems just and appropriate.

COUNT III

54. Petitioners reallege and incorporate by reference the allegations in paragraphs 1 to 53.

55. On February 7, 2011, in closed session the Commission decided by a vote of 4 to 3 that Saxony established standing regarding the Heartland quarry and that an evidentiary hearing would be conducted.

56. After the vote was taken and announced by the Chairman, Commissioner Riffle asked the

Commission's legal counsel about changing his vote and requested that his vote be changed in the minutes of the meeting.

57. The Commission never conducted a subsequent vote on this question, but the record was altered to reflect Commissioner Riffle's changed vote.

58. According to Roberts Rules of Order, Article VIII, § 46, the general rule of parliamentary procedure is that a member may change his/her vote at any time before the final announcement of a vote by the chair.

59. Because the way in which the Commission changed Commissioner Riffle's vote violates the basic rules of parliamentary procedure, the initial vote conducted by the Commission on the Saxony standing issue should be enforced.

Wherefore, Petitioners pray the Court:

A. Declare that the initial vote conducted by the Commission on February 7, 2011 on the Saxony standing question was 4 to 3 in favor of Saxony's standing;

B. Declare the Commission has no legal authority to deviate from the rules of parliamentary procedure and to change a Commissioner's vote in the manner that occurred on February 7, 2011;

C. Declare that the Commission's action in altering the record to reflect Commissioner Riffle's changed vote is arbitrary and capricious and lacks any substantial basis;

D. Order the Commission to implement and enforce the actual vote that occurred on February 7, 2011 regarding the Saxony standing question;

E. Reverse and vacate the Commission's issuance of the permit to Heartland and remand this matter to the Commission with direction to conduct a full evidentiary hearing in accordance with § 444.773, RSMo.;

F. Award Petitioners their reasonable attorneys fees and costs in this matter; and

G. Award such further relief the Court deems just and appropriate.

COUNT IV

60. Petitioners reallege and incorporate by reference the allegations in paragraphs 1 to 59.

61. During the public hearing on January 27, 2011, Petitioners presented competent and substantial evidence on the record, including the evidence described in paragraph 23 herein, concerning health problems, the effects of dust and air emissions on those health problems, and that Heartland and Strack would have dust and air emissions originating from the property of the proposed mine sites which would blow toward Saxony and SOCH.

62. Based on the competent and substantial evidence presented by Petitioners, Petitioners showed their health, safety and livelihood would be unduly impaired by the issuance of the mining permit to Heartland and Strack.

63. Based on the substantial and competent evidence presented by Petitioners, Petitioners established standing in accordance with § 444.773, RSMo.

Wherefore, Petitioners pray the Court:

A. Declare that Petitioners, based on competent and substantial evidence, showed their health, safety and livelihood would be impaired by the issuance of a mining permit to Heartland, and, as a result, Petitioners established standing under § 444.773, RSMo.;

B. Declare the Commission's decision denying standing to SOCH with respect to Strack and Heartland is arbitrary and capricious and lacks any substantial basis;

C. Declare the Commission's decision denying standing to Saxony with respect to Heartland is arbitrary and capricious and lacks any substantial basis;

D. Reverse and vacate the Commission's issuance of the mining permit to Heartland and remand this matter to the Commission with direction to conduct a full evidentiary hearing in accordance with § 444.773, RSMo.;

E. Order that SOCH be made a party to the evidentiary hearing to be conducted by the

Commission concerning the Strack permit application;

F. Award Petitioners their reasonable attorneys fees and costs in this matter; and

G. Award such further relief the Court deems just and appropriate.

COUNT V

64. Petitioners reallege and incorporate by reference the allegations in paragraphs 1 to 63.

65. Commissioner DiPardo did not attend the January 27, 2011 public hearing and hear the evidence presented by the parties.

66. Commissioner Riffle was observed to appear to be asleep during portions of the January 27, 2011 public hearing and was observed to be absent from the public hearing for extended periods of time.

67. Based on their absences, Commissioners DiPardo and Riffle should have abstained from any participation in the votes on the questions of whether Saxony and SOCH established standing.

Wherefore, Petitioners pray the Court:

A. Declare that because of their absences from the public hearing, Commissioners DiPardo and Riffle should have abstained from participation in the votes on the questions of whether Saxony and SOCH established standing;

B. Declare the Commission's decision denying standing and issuance of the permit to Heartland is arbitrary and capricious and lacks any substantial basis;

C. Reverse and vacate the Commission's issuance of the mining permit to Heartland and remand this matter to the Commission with direction to conduct a full evidentiary hearing in accordance with § 444.773, RSMo.;

D. Award Petitioners their reasonable attorneys fees and costs in this matter; and

E. Award such further relief the Court deems just and appropriate.

Respectfully submitted,

JEFFERY LAW GROUP

By: _____
Stephen G. Jeffery, MBE 29949
231 S. Bemiston Avenue
Suite 800
Clayton, Missouri 63105
(314) 854-9180
(314) 714-6510 – Fax
E-mail: sjeffery@jefferylawgroup.com