BEFORE THE OKLAHOMA DEPARTMENT OF MINES
STATE OF OKLAHOMA

IN RE:	The Matter of Application of: **ARBUCKLE AGGREGATES, LLC,** for a permit to engage in surface mining and reclamation operations in an area of 575 acres, more or less, located in Sections 23 and 24, Township 1 South, Range 4 East, Johnston County, State of Oklahoma.	**Case No. PAN 10-05-IC** **PAN 10-05-IC2** Permit No. L.E.-2361

PAN 11-03-FH

CPASA'S REQUEST FOR FORMAL HEARING AND BRIEF IN SUPPORT

COMES NOW, Citizens for the Protection of the Arbuckle-Simpson Aquifer (herein "CPASA"), by and through counsel, and hereby requests a formal hearing and review of the departmental decision made by the Oklahoma Department of Mines (herein "ODM") to conditionally grant Arbuckle Aggregates, LLC's (herein "Arbuckle Aggregates") mining permit application number 2361. ODM's departmental decision was issued on November 14, 2011. This Request for Formal Hearing is timely filed by hand delivery on December 14, 2011. *See* Okla. Admin. Code § 460:10-17-15.

CPASA is a grassroots citizens' organization whose mission is to protect and preserve springs and streams emanating from the Arbuckle Simpson Aquifer (herein the "ASA" or "Aquifer"), as well as protecting the ASA itself, by preventing the waste, pollution or transfer of the Aquifer's invaluable water resources. The vast majority of CPASA members reside over the ASA and depend on the Aquifer's springs and streams for drinking water, industrial purposes, and/or agricultural purposes.

CPASA's Request for Formal Hearing and Brief in Support is structured in the following manner: Section I provides background information about the ASA and details

relevant statutes and case law. Section II recounts ODM's duties and obligations under Oklahoma statute and regulations. Section III highlights relevant mining permit application requirements. Section IV sets forth the criterion considered in permit approval. Section V discusses issues relating to ODM's permit conditions, including fundamental inconsistencies between ODM's permit conditions and Arbuckle Aggregates' Monitoring Program. Section VI focuses on the substantive shortcomings of Arbuckle Aggregates' revised mining permit application[1]. Section VII discusses a number of procedural deficiencies and due process issues related to Arbuckle Aggregates' revised mining permit application. Lastly, Section VIII establishes that ODM failed to properly process and review Arbuckle Aggregates' revised permit application.

I. Arbuckle-Simpson Aquifer Background Information and Applicable Law

Arbuckle Aggregates seeks to place its proposed surface mine over the ASA, which is a fractured-karst aquifer underlying over 500 square miles in south-central Oklahoma. The ASA is the cornerstone of the region's economy—not only does the ASA provide water for agricultural and industrial purposes, it also attracts millions of tourists to the area. Indeed, the Chickasaw National Recreation Area *alone* boasts over 1.2 million visitors each year. *See* Exhibit 1, Impacts of Visitor Spending on the Local Economy: Chickasaw National Recreation Area (2005). In addition, the very existence

[1] Arbuckle Aggregates submitted its permit to ODM on May 7, 2010. However, it subsequently revised its application on January 14, 2011. The revised permit application is allegedly the controlling application and will be referred to for purposes of this Request for Formal Hearing as the "revised permit application" or the "revised application."

of the Tishomingo National Wildlife Refuge and the Tishomingo National Fish Hatchery hinge on the continuous and unpolluted flow of springs and streams fed by the ASA.

Other local and state entities similarly rely on the ASA. For example, Turner Falls Park is a tourist destination that features a spectacular 77-foot waterfall, which is fed by Honey Creek and other ASA streams. Numerous charitable organizations, such as the Slippery Falls Scout Ranch, Camp Simpson Boy Scout Camp, Camp Bond Church Camp and Falls Creek Baptist Church Camp, also utilize the ASA in furtherance of their altruistic missions.

Most importantly, the ASA is the primary water resource for the region, supporting approximately 150,000 Oklahoma citizens with potable water.[2] Regardless of whether said drinking water comes from surface flow or from groundwater, it is ultimately supplied by the ASA. The Oklahoma Supreme Court recognized this fact by noting the interconnection between groundwater levels in the Aquifer and the flow of springs and streams in the region. *See Jacobs Ranch et al. v. Smith et al*., 2006 OK 34, ¶ 12 (determining it undisputable that "a decline in groundwater level of the Arbuckle-Simpson Groundwater Basin could jeopardize the flow of springs and streams, such as the spring that is the source of the water for the City of Ada").

[2] The following municipalities depend upon the ASA for drinking water: Ada, Ardmore, Bromide, Davis, Dougherty, Durant, Fittstown, Homer, Mill Creek, Roff, Springer, Stonewall, Sulphur, Tishomingo, and Wynnewood. Moreover, the following water suppliers also depend upon the ASA for drinking water supplies: Arbuckle Master Conservancy District, Bryan Co. RWD No. 2, Bryan Co. RWD No. 5, Garvin Co. RWD No. 6, Johnston Co. RWD No. 3, Murray Co. RWD No. 1, Murray Co. RWD No. 2 (Buckhorn RWC), Pontotoc Co. RWD No. 6, Pontotoc Co. RWD No. 7, Pontotoc Co. RWD No. 8, Pontotoc Co. RWD No. 9, Ratliff City Water Trust Authority, Southern Oklahoma Water Corporation, Tupelo Public Water Authority, W. Carter Co. RWS & SW No. 1.

Additionally, the U.S. Environmental Protection Agency (herein the "EPA") designated the Hunton Anticline[3] of the ASA as a Sole Source Aquifer on September 25, 1989. *See* Exhibit 2, 54 FR 39230. As defined by the EPA, a Sole Source Aquifer is an aquifer that provides at least 50 percent of the drinking water consumed in the overlying area and to which no feasible alternative source of potable water exists should the aquifer become contaminated. *See* Section 1424(e) of the Safe Drinking Water Act, 42 U.S.C. §§ 300F, 300H-3(E). The EPA found that:

> A portion of the Arbuckle-Simpson Aquifer system is the **sole or principal source of drinking water** for an area comprising portions of Johnston, Murray, and Pontotoc counties in south-central Oklahoma, and that this aquifer, **if contaminated would create a significant hazard to public health.**

54 FR 39230 (emphasis added).

It is therefore established as a legal fact that if the ASA ever becomes contaminated, tens of thousands of Oklahoma citizens will be completely without drinking water[4]. Currently, the ASA is the only Sole Source Aquifer in Oklahoma. In recognition of the ASA's importance, the Oklahoma Legislature passed Senate Bill 288 (herein "SB 288"), which designated the entire ASA as a Sensitive Sole Source Groundwater Basin. *See* Exhibit 3, Senate Bill 288, codified at 82 O.S. §§ 1020.9A and 1020.9B.

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[3] The Arbuckle-Simpson Aquifer is divided into three anticlines. The western lobe is the Arbuckle Anticline, the central lobe is the Tishomingo Anticline, and the eastern lobe is the Hunton Anticline. The vast majority of water use occurs in the Hunton Anticline.

[4] Many additional areas would be negatively affected by the pollution of the Arbuckle-Simpson Aquifer, such as economic development and industrial growth. However, the Federal Safe Drinking Water Act created the EPA's Sole Source Aquifer designation and only focuses on drinking water.

SB 288 defines a Sensitive Sole Source Groundwater Basin as:

> a major groundwater basin or subbasin all or a portion of which has been designated as a "Sole Source Aquifer" by the United States Environmental Protection Agency pursuant to the Safe Drinking Water Act, as of the effective date of this act, including any portion of any contiguous aquifer located within five (5) miles of the known areal extent of the surface outcrop of the sensitive sole source groundwater basin.

82 O.S. § 1020.9A(B)(1).

SB 288 imposes moratoria on (1) issuing temporary permits[5] allowing municipal or public use of water from *outside* the ASA; and (2) contracting by municipalities and other political subdivisions located outside a sensitive sole source groundwater basin for water inside the ASA. 82 O.S. §§ 1020.9A(B)(1) and 1020.9B(A). Said moratoria are in effect until the Oklahoma Water Resources Board (herein the "OWRB") completes a hydrological study of the Aquifer *and* determines a maximum annual yield for the sensitive sole source groundwater basin. 82 O.S. §§ 1020.9A(B)(2) and 1020.9B(B). Moreover, before the OWRB may issue a permit to withdraw water from a sensitive sole source groundwater basin, it must determine that the proposed use is not likely to degrade or interfere with springs and streams emanating in whole or in part from water originating from the sensitive sole source groundwater basin. 82 O.S. § 1020.9(A)(1)(d). As of 2011, the ASA is the only Sensitive Sole Source Groundwater Basin in Oklahoma.

[5] Temporary permits are authorized for the same purposes as a regular permit, but are granted prior to the completion of the hydrologic survey and the maximum annual yield determination. 82 O.S. § 1020.11(B)(1). Regular permits may only be granted after completion of the hydrologic survey and maximum annual yield determination. 82 O.S. § 1020.11(A).

Additionally, in 2011 the Oklahoma Legislature passed Senate Bill 597 (herein "SB 597"), which regulates the use of pit water[6] by a mine located over a sensitive sole source groundwater basin. *See* Exhibit 4, Senate Bill 597, codified at 82 O.S. § 1020.2. Until SB 597, mines enjoyed the ability to take, use and dispose of pit water without oversight or regulation by the OWRB. Now, mines—both existing and new—are required to prepare a site-specific water management and conservation plan in consultation with the OWRB to manage the taking, use and disposal of pit water in a responsible manner.

Additionally, the ASA contains some of Oklahoma's High Quality Waters. High Quality Waters (herein "HQWs") are those found to "possess existing water quality which exceeds those levels necessary to support propagation of fishes, shellfishes, wildlife, and recreation in and on the water". *See* OAC 785:45-3-2(b). HQWs are further defined as:

> those waters of the state whose historic water quality and physical habitat provide conditions suitable for the support of sensitive and intolerant climax communities of aquatic organisms whether or not that waterbody currently contains such a community, support high levels of recreational opportunity, and are designated "HQW" waters in Appendix A of this Chapter. These waters will generally have higher quality habitat, a more diverse and more intolerant biotic community and, as a result, may provide more ecological refuges and recreational opportunities than other waters in the same ecoregion with similar chemistry and physical conditions[.]

Okla. Admin. Code § 785:45-3-2(b).

[6] Pit water is defined as water trapped in a producing mine. As mines dig into an aquifer and subsequently remove aggregate material from below the water table, water fills the pit, in much the same manner as water fills a water well.

Pennington Creek—located less than one-half mile from Arbuckle Aggregates proposed mine site—has been designated by the Oklahoma Water Resources Board as a HQW. *See* Exhibit 5, Okla. Admin. Code § 785:45 Appendix A.3, Designated Beneficial Uses of Surface Waters Water Quality Management Basin 3, Upper Red River Basin. Pennington Creek is also the sole source of water for the City of Tishomingo. *See* Exhibit 6, City of Tishomingo Resolution 2010-16 (resolution calling for the Oklahoma Mining Commission to deny Arbuckle Aggregates' permit application in order to protect the future well-being and quality of life of Tishomingo's citizens).

The ASA and the rivers and streams flowing from it are finite resources that support the entire South-Central Oklahoma region. Both the federal government and the Oklahoma legislature have acknowledged the Aquifer's sensitivity to pollution and the dire consequences associated with such contamination. Accordingly, ODM must view any mining permit application within the Arbuckle-Simpson Aquifer under the lenses of the Sole Source Aquifer provision in the Federal Safe Drinking Water Act, SB 288, SB 597, Oklahoma's High Quality Water protections, and the Oklahoma Supreme Court's findings in *Jacobs Ranch*.

II. Duties And Responsibilities Of The Department Of Mines

ODM regulates non-coal surface mining and reclamation operations and is responsible for protecting Oklahoma's natural resources from mining activities. Okla. Admin. Code § 460:10-104. Specifically, it is the duty of ODM to

> provide for the reclamation and conservation of land subjected to surface disturbance by mining and thereby to preserve natural resources, to encourage the productive use of such lands after mining, **to aid in the protection of wildlife and aquatic resources**, to encourage the planting of trees, grasses and other vegetation, to establish recreational, home and industrial sites, **to protect and perpetuate the taxable value of property, to aid in the prevention of erosion, landslides, floods and the pollution of waters and air, to protect the natural beauty and aesthetic values in the affected areas of this state, and to protect and promote the health, safety and general welfare of the people of this state**.

45 O.S. § 722 (emphasis added).

Moreover, ODM is considered a "groundwater protection agency" and a "state environmental agency" under Oklahoma law. *See* 27A O.S. §§ 1-1-201(5)(f) and 1-1-201(13)(f). As a state environmental agency, ODM shall:

1. **Be responsible for fully implementing and enforcing the laws and rules within its jurisdictional areas of environmental responsibility**[7];
2. **Utilize and enforce the Oklahoma Water Quality Standards established by the Oklahoma Water Resources Board**;
3. Seek to strengthen relationships between state, regional, local and federal environmental planning, development and management programs;
4. Specifically facilitate cooperation across jurisdictional lines of authority with other state environmental agencies regarding programs to resolve environmental concerns;
5. **Cooperate with** all state environmental agencies**,** other state agencies and **local or federal governmental entities to protect, foster, and promote the general welfare, and the environment and natural resources of this state**;
6. Have the authority to engage in environmental and natural resource information dissemination and education activities within their respective areas of environmental jurisdiction; and

[7] ODM's jurisdictional areas of environmental responsibility are (1) Mining regulation; (2) Mining reclamation of active mines; (3) Groundwater protection for activities subject to the jurisdictional areas of environmental responsibility of the Commission; and (4) Development and promulgation of a Water Quality Standards Implementation Plan. *See* 27A O.S. § 1-3-101(G).

> 7. Participate in every hearing conducted by the Oklahoma Water Resources Board for the consideration, adoption or amendment of the classification of waters of the state and standards of purity and quality thereof, and shall have the opportunity to present written comment to the members of the Oklahoma Water Resources Board at the same time staff recommendations are submitted to those members for Board review and consideration.

27A O.S. § 1-1-202(A) (emphasis added).

In addition, each state environmental agency shall promulgate a Water Quality Standards Implementation Plan for its areas of environmental responsibility. *See* 27A O.S. § 1-1-202(B)(1). Prior to ODM issuing a permit, its Water Quality Standards Implementation Plan (herein "WQSIP") requires the applicant submit approved copies of other state, federal, and local government permits or licenses, including stream water permits and copies of notifications sent to state and federal fish and wildlife agencies. *See* Exhibit 7, ODM's Water Quality Standards Implementation Plan, p. 13.

As discussed herein, ODM's proposed order regarding Arbuckle Aggregates' revised permit application systematically fails to comply with these statutory mandates, replacing legal obligations with "suggestions" and "recommendations." Pursuant to Oklahoma law, ODM is obligated to enforce those duties and obligations entrusted to it by the legislature, rather than proposing optional "recommendations" and "suggestions."

III. Relevant Mining Permit Application Requirements

All mining permit applications must contain an accurate mining map of a scale that clearly depicts the following:

(1) Outline of the area to be permitted detailing the affected areas, incremental mining areas, planned future reserves if requested by the applicant, buffer zones, easements, and rights-of-ways, for the number of years the permit is requested.
(2) Outline of stockpile areas.
(3) Outline of overburden disposal areas.
(4) Outline of settling ponds.
(5) Location of plant sites or processing areas.
(6) Location of roads both existing and planned on-site.
(7) Location of planned and existing on-site buildings.
(8) Location and name of streams or lakes.
(9) Boundary of the 100 year floodplain, where appropriate.

Okla. Admin. Code § 460:10-9-6.

In addition, proposed mining operations affecting High Quality Waters must submit the following information:

(1) A survey outlining the area to be permitted detailing the following:
    (A) Affected areas;
    (B) Buffer zones with respect to river bed proximity;
    (C) Ingress and egress areas;
    (D) Incremental and normal sequences pattern;
    (E) Location of plant site, stockpile, and processing areas;
    (F) Location of roads;
    (G) Location of river or stream;
(2) A removal plan to include but not limited to the following:
    (A) Designation of gravel tonnage to be removed;
    (B) Description of the depth to which the gravel will be removed.
(3) A stream water monitoring plan which shall include upstream and downstream monitoring sites (each monitoring point shall be designated on the site maps). Stream water samples shall be collected during the time of mining operation. Parameters for monitoring shall be established to include, but are not limited to, turbidity and sediment particle size distribution. If a monitoring plan is required under the jurisdiction of other environmental permitting agencies, the applicant should submit the approved monitoring plan with the mining application to the Department.

Okla. Admin. Code § 460:10-13-3.

A reclamation plan is also required in a mining permit application in order to establish, on a continuing basis, "a vegetative cover, soil stability, and water and safety conditions appropriate to the area." Okla. Admin. Code § 460:10-15-1. As discussed herein, Arbuckle Aggregates' revised application fails to satisfy any of the above requirements.

IV. Criteria For Permit Approval

ODM cannot approve a permit or revision "unless the application **affirmatively demonstrates**" with documented evidence that:

> (1) The permit application is **accurate** and **complete** and **in compliance with all requirements** of 45 O.S. (1981), Section 721 et seq., and this Chapter.
> (2) The applicant has **demonstrated** that non-coal surface mining and reclamation operations, as required by 45 O.S. (1981), Section 721 et seq., and this Chapter can be feasibly accomplished under the mining and reclamation operations plan contained in the application.
> (3) The applicant or the operator, if other than the applicant, does not control and has not controlled mining operations with a demonstrated pattern of willful violations of this Chapter of such nature, durations, and with such resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of this Chapter.
> (4) The applicant will submit the performance bond or other equivalent guarantee required under these regulations, prior to the issuance of the permit.

Okla. Admin. Code § 460:10-17-10 (emphasis added).

While the responsibility of providing ODM with all the information required falls on the applicant, *see* Okla. Admin. Code § 460:10-11-3, ODM must nonetheless "ensure that all non-coal surface mining and reclamation operations are conducted only under permits issued in accordance with the requirements of the State regulatory program. . . ."

Okla. Admin. Code § 460:10-9-2. Thus, ODM has an independent obligation to verify the substantive content of Arbuckle Aggregates' revised application.

ODM must base its permit approval or denial actions on "(1) Complete applications for permits and revisions or renewals and transfers or sales thereof; and (2) Public participation; and (3) Process and review of application as required by this Subchapter." Okla. Admin. Code § 460:10-17-11(a). As set forth herein, Arbuckle Aggregates' revised mining permit application fails each of these three conjunctive requirements.

V. ODM's Conditions On Arbuckle Aggregates' Permit Are Fraught With Inconsistencies and Optional Language

A. Arbuckle Aggregates' Monitoring Program Contains Terms Contrary to and Inconsistent with ODM's Permit Conditions

ODM's departmental decision to conditionally issue Arbuckle Aggregates' revised permit application adopts Arbuckle Aggregates' Outline of Proposed Monitoring Program (herein "Monitoring Program") "as submitted." Findings, p. 21. Adopting the Monitoring Program "as submitted," however, raises substantial inconsistencies between the Conditions and the Program. More importantly, Arbuckle Aggregates' Monitoring Program contains numerous factual inaccuracies. Fully implementing the Monitoring Program "as submitted" is doubtful, at best.

For instance, the Monitoring Program "is conceptual in development" and Arbuckle Aggregates qualifies its compliance with the Monitoring Program's conceptual terms upon "Arbuckle's receipt of its mining permit and further defined in Section II." Monitoring Program, p. 1. Section II contains Arbuckle Aggregates' "General

Conditions of Monitoring Program," which carve out additional conditions and exceptions to the applicability of the Monitoring Program. *See* Monitoring Program, ps. 2-3, Section II.

Section II.A. of the Monitoring Plan states in part that the "General Conditions are limited to the time when Arbuckle is actively mining the Site. The Monitoring Program [is] subject to obtaining legal access from landowners to drill and/or monitor, and the geographical and scientific feasibility of monitoring groundwater wells." Such statements are directly adverse to ODM's Condition that "a minimum of **12 months of baseline data** from **all the proposed water monitoring locations** . . .be obtained and submitted to ODM **prior to the commencement of mining** . . . ." Findings, p. 21 (emphasis added).

Below are additional portions of the General Conditions demonstrating Arbuckle Aggregates' unwillingness to operate responsibly:

- "monitoring locations and the parameters collected **may be modified by Arbuckle.**" Monitoring Program, ps. 2-3 (emphasis added);
- "**Arbuckle does not agree to be bound by any stricter requirements than is set forth by law** regulating pit water." Monitoring Program, p. 3 (emphasis added);
- "Arbuckle will develop Best Management Practices (BMPs) to protect the water quality and will be **adapted and implemented as necessary at the discretion of Arbuckle** or to comply with state or federal law or permits." Monitoring Program, p. 3 (emphasis added); and

- "Arbuckle will develop BMPs to conserve water **when beneficial and prudent at the discretion of Arbuckle**." Monitoring Program, p. 3 (emphasis added).

These General Conditions make clear that Arbuckle Aggregates wants nothing other than to make money—regardless of the cost to our environment. Arbuckle Aggregates' halfhearted "Monitoring Program" is simply a ploy to placate ODM so that it may begin destroying—or rather, profiting from—the unique Arbuckle-Simpson Aquifer area.

Moreover, a number of representations made by Arbuckle Aggregates in its Monitoring Program are factually incorrect. For example, Meridian is under no obligation to fund the monitoring of the Williams 86822 Well. *See* Monitoring Program, p. 5 ("Pursuant to the Meridian Agreement, the Williams 86822 [Well] is to be monitored by the OWRB and the cost associated with the monitoring is to be paid by Meridian"). Nor is Meridian required to pay for the entire cost of monitoring the Pennington Creek gage. *See* Monitoring Program, p. 7 ("Pursuant to the Meridian Agreement, Exhibit A Section 1.C, the Pennington Creek Gage is to be monitored by the OWRB and the cost associated with the monitoring is to be paid by Meridian."). Additionally, Arbuckle Aggregates incorrectly asserts that Carol Sutton owns the property upon which the Williams 86822 Well is located. In truth, the Ida Sutton Williams Trust, who is represented by Laurie Williams, owns the property. *See* Exhibit 8, OWRB Well Plugging Report.

Other representations made by Arbuckle Aggregates in its Monitoring Program omit material facts. For example, Arbuckle Aggregates states Meridian is contractually

obligated to monitor Gay Well and that all monitoring of the Gay Well ceased in December 2010. *See* Monitoring Program, p. 4, Section III.A.2.a. These statements are correct. However, it failed to mention that monitoring of the Gay Well ceased after *Arbuckle Aggregates* imposed restrictions on Meridian's access to the site making its assertion that it "has been working with OWRB to encourage Meridian's compliance with the Meridian Agreement" insincere. Arbuckle Aggregates cannot impose conditions upon Meridian's access to the site while, at the same time, professing to work with the OWRB to fix the problem.[8]

Still other representations made by Arbuckle Aggregates in its Monitoring Program are patently false. For instance, Arbuckle Aggregates states Meridian has neither monitored nor reported information on the Williams 86822 Well as required in the Meridian Agreement. *See* Monitoring Program, p. 5, Section III.A.2.b. Nonetheless, Arbuckle Aggregates states it "is committed to **continue to work** with the OWRB on the reporting and monitoring of the Williams 86822 [Well]." *See* Monitoring Program, p. 5, Section III.A.2.b. However, in 2009 the Williams 86822 Well was removed from the Meridian Agreement and replaced with OWRB Well 92477. All the parties to the Meridian Agreement—**including the OWRB**—agreed to this substitution. Thus, Arbuckle Aggregates' statement that it will "continue to work with the OWRB" is untruthful and contrived.

[8] Such behavior makes Arbuckle Aggregates' statements about being a "good neighbor" hollow. Moreover, it illustrates Arbuckle Aggregates' disregard for the long-term sustainability of the ASA—despite their assertions to the contrary. Particularly in this context, actions speak louder than words.

Arbuckle Aggregates will only assume monitoring for Gay Well, Williams 86822 Well, and Williams 92479 Well "[f]ollowing the completion and satisfaction of Meridian's obligations . . . ." Monitoring Program, p. 5, Section III.A.2.a; p. 6, Section III.A.2.c. Moreover, Arbuckle Aggregates **never** agreed to assume payment for the Mill Creek Gage or the Pennington Creek Gage. *See* Monitoring Program, p. 7, Section III.C.1 and III.C.2. It is obvious from reading Arbuckle Aggregates' "Monitoring Program" that it is amenable to monitoring—so long as it does not cut into its profit margin.

Additionally, for the Williams Wells, Arbuckle Aggregates states if it cannot obtain an easement from the landowner, it will pay the OWRB to monitor the wells "at an average annual cost not to exceed $1,600.00" per well. *See* Monitoring Program, p. 5, Section III.A.2.b and III.A.2.c. Monitoring costs far more than $1,600.00 per well—a fact Arbuckle Aggregates intimately understands[9].

Arbuckle Aggregates has yet to approach the landowner of the Williams Wells. As stated by Laurie Williams at the initial Informal Conference,

> I am a neighbor to this facility. My family has had an 8,000-acre ranch in the same location since the nineteen – early 1900s. Mr. Dawson nor Mr. Rich nor Mr. Vilhauer have ever come to speak with me. They know I'm there. I've seen Mr. Dawson in hearings throughout the Martin Marietta mine and the water issues related to that. I will object immediately to an indication by Mr. Dawson that [Arbuckle Aggregates] is a good neighbor. A good neighbor would come to talk with us.

[9] Pete Dawson, Arbuckle Aggregates' President, formerly operated Meridian Aggregates Company, which is a mining operation directly north of Arbuckle Aggregates' proposed location. While at Meridian, Dawson entered into an agreement with various state and federal agencies relating to water monitoring and management. However, numerous arguments between the parties have resulted from Meridian's price cap on monitoring.

Initial Informal Conference Tr. 26 at. 9-18.

Because of these fatal inconsistencies, ODM erred when adopting Arbuckle Aggregates' Monitoring Program "as submitted."

B. ODM's Permit Conditions are Optional and Carry Little Regulatory Enforceability

In its Recommendations, which were incorporated as Permit Conditions, ODM "encourages" local stakeholders to work together to develop a general water monitoring plan. *See* Findings, p. 21. As stated by CPASA in its Supplemental Brief in Opposition to Arbuckle Aggregates' Mining Permit Application and at the supplemental informal conference, CPASA attempted to do just that. *See* CPASA's Supplemental Brief in Opposition to Arbuckle Aggregates' Mining Permit, ps. 3-4; *see also* Exhibit 9, Supplemental Informal Conference Tr. 48-49 at 23-13. However, Arbuckle Aggregates was unwilling to engage in any meaningful discussion and refused to accept terms similar to the agreement CPASA reached with Hanson Aggregates. Moreover, the burden should not be on Oklahoma's citizens to ensure Arbuckle Aggregates does not decrease spring and stream flow from the ASA. Rather, ODM is responsible for mandating Arbuckle Aggregates' compliance with state laws and regulations.

ODM also "recommended" that a minimum of 12 months of baseline monitoring data be collected before mining commenced. *See* Findings, p. 21. This suggestion has no enforceability, however, and does nothing to protect the ASA from pollution, contamination, or degradation. As such, ODM's "optional conditions" violate its

statutorily mandated duties and obligations to the people of this state and to the state's natural resources.

VI. Arbuckle Aggregates' Revised Permit Application Does Not Satisfy ODM's "Minimum General Criteria" for Permit Applications

Arbuckle Aggregates' revised permit application does not satisfy even the "minimum general criteria" for permits and permit applications. Okla. Admin. Code § 460:10-9-1. The burden of providing all the information required by ODM regulations rests solely on Arbuckle Aggregates. Okla. Admin. Code § 460:10-11-3. ODM erred by conditionally granting Arbuckle Aggregates' permit application because Arbuckle Aggregates wholly failed to comply with the minimum general criteria set forth in ODM's regulations.

C. Arbuckle Aggregates' Revised Mining Permit Application Does Not Include a Site-Specific Water Management and Conservation Plan as Mandated by S.B. 597, and the Proposed Order Does Not Require One

SB 597, codified at 82 O.S. § 1020.2, regulates the taking, using and disposal of water from a producing mine pit over a sensitive sole source groundwater basin or subbasin.[10] In order for an existing mine to use pit water and have such use considered as a permitted beneficial use, it must be done pursuant to a site-specific water management and conservation plan prepared in consultation with the Oklahoma Water Resources Board. *See* 82 O.S. § 1020.2(C). As defined by SB 597, existing mines are those mines:

[10] SB 597 encompasses *all* water that is taken, used, and disposed of from a producing mine pit over a sensitive sole source groundwater basin, not just consumptively used water. However, as stated by Arbuckle Aggregates' legal counsel, Arbuckle Aggregates "is committed to the development of water source accounting program that will meter the *consumptively used pit water*." Despite Arbuckle Aggregates' "commitment," Oklahoma law nonetheless requires it to implement a site-specific water management and conservation plan that meters all water taken, used, or disposed from a producing mine pit.

> (1) That overlie a sensitive sole source groundwater basin or subbasin and have been permitted by the Oklahoma Department of Mines as of August 1, 2011;
>
> (2) That overlie a sensitive sole source groundwater basin or subbasin for which an initial application for a permit shall have been filed with the Oklahoma Department of Mines as of August 1, 2011; or
>
> (3) That overlie a sensitive sole source groundwater basin or subbasin and for which a permit revision is approved by the Oklahoma Department of Mines.

82 O.S. § 1020.2(C).

Arbuckle Aggregates' initial permit application was filed with ODM on May 7, 2010 and was revised on January 14, 2011. Thus, Arbuckle Aggregates is considered an existing mine for purposes of SB 597 and must have a site-specific water management and conservation plan in order to use pit water in its operations. However, no site-specific water management and conservation plan is included in Arbuckle Aggregates' revised permit application –let alone a site-specific water management and conservation plan prepared in consultation with the OWRB. Nor do the Findings of the Conference Officer (herein the "Findings") require, or even contemplate, a site-specific water management and conservation plan.

The Findings partially address SB 597 and its effect on Arbuckle Aggregates. *See* Findings, ps. 14-15. However, the Findings wholly omit the requirement of a site-specific water management and conservation plan. Despite the Findings' silence on the matter, Oklahoma law requires Arbuckle Aggregates to prepare a site-specific water management and conservation plan in consultation with the Oklahoma Water Resources

Board. Because no such plan is included in the application, Arbuckle Aggregates' revised mining permit application no. 2361 is incomplete as a matter of law.

D. Arbuckle Aggregates' Revised Permit Application Fails to Comply with ODM's Mining Requirements Regarding High Quality Waters

Arbuckle Aggregates' revised application fails to include the information required under ODM regulations when the proposed mine may affect High Quality Waters (herein "HQW"). Proposed mining operations within HQW areas must submit, *inter alia*, additional surveys, a removal plan, and a stream water monitoring plan. *See* Section II., *infra*; *see also* Okla. Admin. Code § 460:10-13-3. Arbuckle Aggregates' revised application fails to include *any* of these requirements and therefore ODM erred when conditionally granting its revised permit application.

1. ODM Erred When Assuming Groundwater Flows and Surface Watershed Flows Coincide

Although concerns about Arbuckle Aggregates' impact on Pennington Creek were raised by a number of protestants, including CPASA, ODM rebuffed such concerns by stating throughout its Findings that the proposed mine site is "located in the Mill Creek Watershed" rather than the Pennington Creek Watershed. *See* Findings, p. 12, VIII.A.; p. 13, VIII.A.1.; p. 13, VIII.A.2.; and p. 16, VIII.A.4. Such conclusion runs afoul of basic hydrology.

The Findings ***assume*** groundwater flow mirrors the flow of surface water. However, surface water and groundwater watersheds commonly do ***not*** coincide. *See* Exhibit 10, Thomas C. Winter, Donald O. Rosenberry, and James W. LaBaugh. 2003. Where Does the Ground Water in Small Watersheds Come From? *Ground Water—*

Watersheds Issue 41, No. 7: 989-1000. Indeed, the fact that groundwater flow often does not follow surface water flow "is well known, and has been documented for a wide range of scales." *Id*. at 991. Potentiometric maps prepared during the OWRB's multi-million dollar hydrologic study clearly establish the Aquifer's continuity and show groundwater flows are not consistent with surface water flows. Thus, Arbuckle Aggregates need not mine in the Pennington Creek Watershed to irreparably alter and diminish Pennington Creek's flow.

Despite this well-known fact, Arbuckle Aggregates' environmental consultant, Geoff Canty, stated at the initial Informal Conference that Arbuckle Aggregates "[is] not in the Pennington Creek watershed," but is "as close as you can get." *See* Exhibit 11, Initial Informal Conference Tr. 96 at 19-21. Despite Canty's vague and scientifically unsupported statements, Arbuckle Aggregates—who, as the applicant bears the burden—failed to affirmatively demonstrate its proposed mining operation would not affect the high quality waters of Pennington Creek.

Conversely, CPASA offered to present expert testimony that Arbuckle Aggregates' proposed mine site is within Pennington Creek's *sub*surface watershed. *See* Exhibit 12[11], CPASA's Brief In Opposition Of Arbuckle Aggregates' Permit Application, p. 7; *See also* Informal Conference Exhibit No. 43, Supplemental letter from Bruce Noble, Superintendent of the NPS Chickasaw National Recreation Area, p. 1 ("In the

[11] CPASA submitted its Brief In Opposition Of Arbuckle Aggregates' Permit Application on January 14, 2011. However, it is not listed on the Exhibit List. Nor does it appear that ODM took its contents into consideration when deciding to conditionally issue Arbuckle Aggregates' revised permit application.

Arbuckle Simpson aquifer, the aquifer is continuous beneath the Pennington Creek and adjacent Mill Creek watersheds. There is no groundwater basin boundary or geologic structure in this area that will prevent the effects of pumping or dewatering from crossing the Mill Creek and Pennington Creek watershed boundary. . .The cone of depression created by groundwater pumping and dewatering will not stop at the watershed boundary.").

Because Arbuckle Aggregates' proposed operation would substantially and negatively affect the high quality waters of Pennington Creek it must adhere to ODM's regulations regarding mining in High Quality Waters. Instead of complying with ODM's regulations, however, Arbuckle Aggregates chose to ignore prevalent hydrologic data. Such intentional blindness to the issue does not excuse the absence of required information pertaining to High Quality Waters in Arbuckle Aggregates' revised permit application. Because Arbuckle Aggregates' revised permit application is incomplete, ODM erred in conditionally granting its permit.

As a state environmental agency, ODM has a responsibility to ensure Arbuckle Aggregates' proposed mine operation will not impact Pennington Creek. The Findings state Arbuckle Aggregates "will not be directly mining in the Pennington Creek Watershed and OWRB has not required [it] to make such a demonstration." Findings, p. 16, VIII.A.4. However, this is an administrative proceeding before the Oklahoma Department of Mines—not the Oklahoma Water Resources Board. It comes as no surprise that the OWRB has not "required" such a demonstration. Moreover, ODM's WQSIP states that "[a]reas outside established ODM jurisdictional areas or expertise will

be forwarded to the appropriate agency(s) for review assistance or information." *See* Exhibit 7, p. 14. Thus, ODM was obligated to seek the OWRB's expertise on the issue.

Furthermore, ODM is a *state environmental agency*—making such a determination is squarely a matter under its jurisdictional area of environmental responsibility. Indeed, one of ODM's jurisdictional areas of environmental responsibility is "[g]roundwater protection for activities subject to the jurisdictional areas of environmental responsibility of the Commission." *See* Exhibit 7, p. 8. ODM is statutorily obligated to "protect, foster, and promote . . . the environment and natural resources of this state." 27A O.S. § 1-1-202(A)(5). As established above, ODM failed to require Arbuckle Aggregates affirmatively demonstrate its proposed operation would not negatively affect Pennington Creek. Unless and until scientific studies prove that no damage will result from Arbuckle Aggregates' proposed mining activities to Pennington Creek, ODM cannot legally grant—or even conditionally grant—Arbuckle Aggregates' revised permit application.

E. Arbuckle Aggregates has not Obtained All Permits Necessary to Conduct Its Proposed Mining Operation

Pursuant to Oklahoma law, "[e]ach application for a new operation shall contain, where applicable, a list of all other licenses and permits needed by the Applicant to conduct the proposed mining operation." 45 O.S. § 724(I). Said requirement discloses how a proposed mine will affect the environment and "assists [the applicant] and the Department in determining if any other permits or licenses are needed." Exhibit 13, ODM Non-Coal Permitting Guidelines and Summary, p. 2, Protection of Natural Resources, Section 3. No inquiry was made into whether Arbuckle Aggregates satisfied

these requirements. Rather, ODM noted "[t]he Applicant's application includes such a list," Findings, p. 12, VIII.A, before dismissing the issue altogether.

ODM has an independent obligation to verify the substantive content of Arbuckle Aggregates' revised application. Simply checking for a list of permits does not satisfy such obligation. For example, had ODM scrutinized Arbuckle Aggregates' revised permit application it would have found conflicting reports as to Arbuckle Aggregates' obligation to obtain a Clean Water Act Section 404 permit. CPASA presented evidence in its supplemental brief indicating Arbuckle Aggregates misrepresented material facts to the U.S. Army Corps of Engineers (herein "Corps") when seeking a jurisdictional determination under Section 404 of the Clean Water Act. *See* CPASA's Supplemental Brief In Opposition Of Arbuckle Aggregates' Permit Application, ps. 4-6. However, the Findings simply note, "Applicant also presented a letter dated April 26, 2011, from Danny A. Manning of the [Corps] stating that Applicant does not need a 404 permit." Findings, ps. 16-17, VIII.C.

Such curt dismissal of this issue does not satisfy ODM's responsibility to ensure the accuracy of Arbuckle Aggregates' revised permit application. CPASA maintains that Arbuckle Aggregates must obtain a Section 404 permit in order to legally mine and has presented legal analysis supporting its position. Accordingly, Arbuckle Aggregates' revised permit application no. 2361 is incomplete and ODM erred in conditionally granting its permit. ODM cannot legally grant—or even conditionally grant—Arbuckle Aggregates' revised permit application unless and until ODM thoroughly investigates the need for permits under Section 404 of the Clean Water Act.

F. Arbuckle Aggregates' Revised Permit Application Fails to Identify a Definite Mining Map

Oklahoma law requires all mines to maintain an accurate map, no smaller than on a scale of two hundred (200) feet to an inch, of its operation. *See* 45 O.S. § 501. Additional requirements for an operation's mining map are set forth in Section III, *infra*. Arbuckle Aggregates, while submitting numerous maps, has no one map that accurately depicts its entire mining operation. Moreover, it is impossible to ascertain Arbuckle Aggregates' true mining plan because of inconsistencies in the various maps.

Initially, Arbuckle Aggregates filed mining permit application no. 2361 on May 7, 2010.[12] Included in this application were two maps, a topographical map with a scale of 0.5 miles per one and three-eighths (1 3/8) inch, and a site diagram with a scale of three hundred (300) feet per one inch. Neither map was set to the statutorily required scale. Additionally, neither map showed Arbuckle Aggregates' incremental mine areas.

Arbuckle Aggregates supplied additional maps, but none to the proper scale and none that accurately reflect Arbuckle Aggregates' entire mining plan. *See* Exhibits 14, 15, 16, 17, 18, and 19 (showing Arbuckle Aggregates' various maps). Because Arbuckle Aggregates failed to satisfy the explicit requirements of ODM's regulations, ODM erred in conditionally granting its permit. ODM has a duty to ensure applicants, such as Arbuckle Aggregates, comply with the necessary requirements. Here, ODM violated this

[12] This application replaced Arbuckle Aggregates' previous mining permit application no. 2314 and its corresponding maps. Application no. 2314 was filed April 3, 2009 and was withdrawn May 7, 2010.

duty by conditionally approving Arbuckle Aggregates' incomplete revised mining permit application.

G. Arbuckle Aggregates' Revised Permit Application Fails To Satisfy ODM's Reclamation Plan Requirements

ODM identifies the foundational purpose of any reclamation plan as being the continuous establishment of "vegetative cover, soil stability, and water and safety conditions **appropriate to the area**." Okla. Admin. Code § 460:10-15-1 (emphasis added). Both federal and state law recognizes the Arbuckle-Simpson Aquifer is an important and unique area of Oklahoma. *See* Exhibit 2, 54 FR 39230 (designating the Arbuckle-Simpson Aquifer as a Sole Source Aquifer under the Safe Drinking Water Act); *see also* Exhibit 3, SB 288 (designating the Arbuckle-Simpson Aquifer as a Sensitive Sole Source Groundwater Basin under Oklahoma law), Exhibit 4, SB 597 (regulating the taking, use, and disposal of pit water over a Sensitive Sole Source Groundwater Basin); *Jacobs Ranch LLC v. Smith*, 2004 OK 34 (acknowledging a connection between the level of the groundwater and surface water flows in the Arbuckle-Simpson Aquifer).

The area in which Arbuckle Aggregates proposes to mine is extremely sensitive to water use. Moreover, verified scientific data establishes that mining conducted in karst geologic structures, such as the Arbuckle-Simpson Aquifer, have far more pronounced negative impacts than mining in other geologic formations. *See generally* Exhibit 20, William H. Langer, Potential Environmental Impacts of Quarrying Stone in Karst—A Literature Review, p. 1, U.S. Geological Survey Open-File Report OF-01-0484, (hereinafter "Potential Environmental Impact of Quarrying Stone in Karst"). Thus, ODM

must analyze Arbuckle Aggregates' reclamation plan with heightened scrutiny, as is appropriate for such an environmentally delicate area. Thus far, ODM has not complied with this requirement.

ODM requires reclamation be conducted simultaneously with mining when feasible. Okla. Admin. Code § 460:10-15-2. Feasibility is the product of numerous factors, such as efficiency, productivity, harm to the environment, and cost. A mine may not claim simultaneous reclamation is infeasible simply because it costs money. Similarly, a mine is not exempt from simultaneous reclamation by claiming it is inconvenient. Feasibility, then, must weigh all the relevant factors; including environmental damage and conditions unique to the area.

With respect to its reclamation plan, Arbuckle Aggregates failed to comply with the black letter regulations, let alone the spirit behind requiring reclamation strategies. Specifically, ODM regulations require the applicant to provide the "methods to prevent or eliminate conditions that will be hazardous to animal or fish life in or adjacent to the affected land." Okla. Admin. Code § 460:10-15-3(a)(2). Affected land, as defined by ODM, is any land or water upon which surface mining activities are located and/or conducted. Okla. Admin. Code § 460:10-3-5. Adjacent land refers to land "located outside the affected area or permit area . . . where air, surface or ground water, fish, wildlife, vegetation, or other resources protected by this Title may be adversely impacted by surface mining and reclamation operations." Okla. Admin. Code § 460:10-3-5. Thus, Arbuckle Aggregates is required to set forth its proposed methods to prevent or eliminate

harmful conditions to wildlife and aquatic organisms found not only in its permitted area, but for any area which may be adversely affected.

1. *Arbuckle Aggregates' Reclamation Plan Fails to Provide Protections for Wildlife and Aquatic Species within the Affected Area*

Arbuckle Aggregates fails to identify the protections it will implement in order to prevent or eliminate harmful conditions to wildlife during its mining activities. The area of operation alone is over 500 acres, yet Arbuckle Aggregates cannot set forth any concrete steps it will take to ensure the wildlife in the area remain unharmed. Moreover, Arbuckle Aggregates will be mining away streams, springs and creeks, but no mention is made of techniques to be employed to prevent harm from being inflicted upon the aquatic species living in the affected areas. Because Arbuckle Aggregates did not provide the techniques it would use to prevent or eliminate conditions harmful to wildlife and aquatic species within the affected area during the mining operations, its reclamation plan is administratively incomplete and ODM erred in conditionally granting Arbuckle Aggregates' permit.

2. *Arbuckle Aggregates' Reclamation Plan Fails to Provide Protections for Wildlife and Aquatic Species in Adjacent Areas*

Absolutely no mention is made of methods to be employed in areas adjacent to the permitted land. This glaring omission invalidates the application. Scientific data has established that mining has a far-reaching effect in geologic formations such as the ASA. *See generally* Exhibit 20. Mining operations in the close vicinity of Arbuckle

Aggregates' proposed site have already had severe environmental impacts in the region.[13] Matt Mauck of the Oklahoma Department of Wildlife Conservation reminded ODM of recent modeling conducted by the OWRB, which "demonstrated that even mild reductions in stream flow can translate to significant loss of usable habitat for stream aquatic organisms." *See* Exhibit 21, Initial Informal Conference Tr. 61 at 4-7.

ODM regulations are quite clear—describe the methods to be used in preventing or eliminating potentially harmful conditions to fish and wildlife in the permitted area and in the area adjacent to or affected by the mining operations. Arbuckle Aggregates cannot feign ignorance to such explicit requirements, nor can it be allowed to escape the mandates of ODM by providing obtuse, uninformative answers. Because Arbuckle Aggregates failed to provide a detailed process for reclamation, as required by the 1994 revisions to the reclamation standards, ODM erred by conditionally granting its application.

Neither ODM's Departmental Decision nor its Findings even mention Arbuckle Aggregates' revised reclamation plan—let alone analyzed the reclamation plan for completeness. ODM violated its obligation to "protect, foster, and promote the general welfare, and the environment and natural resources of this state." 27A O.S. § 1-1-

[13] Operations in the area, such as Meridian Aggregates and U.S. Silica, have decreased the flow of Mill Creek to such an extent that it is often little more than a trickle. Additionally, dust has become increasingly a problem for residents of the area. These, and other pronounced effects, will only be compounded by adding yet another mining operation in the area. Indeed, scientific data predicts the environmental damage created by an additional mine will be disproportionately greater than the environmental impact of the first mine in the area.

202(A)(5). As such, ODM cannot legally grant—or even conditionally grant—Arbuckle Aggregates' revised permit application.

3. Arbuckle Aggregates Cannot Satisfy the Reclamation Plan Requirements Because It Has Not Properly Identified The Proposed Mine's Affected Area

Oklahoma law dictates "[a]ll affected land other than lands affected by coal mining operations shall be reclaimed . . . ." 45 O.S. § 725(A). Affected land is defined as areas in which overburden has been removed or on which overburden has been placed or deposited. *See* OAC 460:10-1-5. Arbuckle Aggregates' mine map is critical to its reclamation plan. Without knowing the area to be reclaimed, no reclamation plan can satisfy all of Oklahoma's mandatory requirements.

Although Arbuckle Aggregates may know where the affected areas will be, where the overburden will be placed, and where the stockpiles will be placed, neither ODM nor interested citizens know with any accuracy what areas must be reclaimed because Arbuckle Aggregates' various maps are ambiguous with respect to where mining will occur. Reclamation plans are intended to be proactive—Arbuckle Aggregates' ploy of spreading its proposed mine operation over a series of maps and changing its proposed mining operation in an attempt to draw itself around various environmental laws is contrary to the idea of a reclamation plan and frustrates its very purpose. As such, ODM erred when conditionally granting Arbuckle Aggregates' mining permit application.

VII. The Public was Prohibited from Adequately and Meaningfully Participating in Arbuckle Aggregates' Administrative Permitting Process

A. Minimum Constitutional Standards of Notice are Guaranteed by Both the United States Constitution and the Oklahoma Constitution

Both the United States Constitution and the Oklahoma constitution guarantee a citizen's right to due process. *Daffin v. State ex rel. Oklahoma Department of Mines*, 2011 OK 22, ¶ 23 (herein "*Daffin*"). Substantive rights, such as the right to life, liberty and property, cannot be denied an individual, except by constitutionally sufficient measures. U.S. Constitutional Amend. 14 § 1; Okla. Const., Art. 2 § 7. The Due Process Clause requires notice and an opportunity to be heard prior to the government taking private property. *State v. Twenty-Eight Thousand Six Hundred Eighteen Dollars*, 2009 OK CIV APP 53, ¶ 7 (internal quotations omitted).

Notice is an "indispensable element" of due process, *Tucker v. New Dominion, L.L.C.,* 2010 OK 14, ¶ 14, and must be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections." *Shamblin v. Beasley,* 1998 OK 88, ¶ 12. The test for ascertaining if due process is met is "whether, under all the circumstances, the person being summoned would have recognized that she was being haled into court." *Tucker v. New Dominion, L.L.C.*, 2010 OK 14, ¶ 14 (citing *Collingsworth v. Hutchison*, 1939 OK 17, ¶ 7).

As ODM already acknowledged, individuals "have a protected property interest in their homes and real property." *Daffin* at ¶ 16. Conversely, an individual pursuing a license or permit has no constitutionally protected right, even after satisfying all

applicable requirements. *See Gonzales v. State*, 2010 OK CIV APP 62, ¶ 27. By law, an individual's constitutionally protected property interest far outweighs a company's expectation of permit.

Moreover, the Oklahoma Administrative Procedures Act (herein "OAPA") states that "all parties shall be afforded an opportunity for hearing after reasonable notice." 75 O.S. § 309(A). Parties, as defined in the OAPA, mean "a person or agency named and participating, or properly seeking and entitled by law to participate, in an individual proceeding." 75 O.S. § 250.3(12)

B. Notice of ODM's Departmental Decision was Not Given to All Parties to the Proceeding

Each citizen who submitted a written objection or attended an informal conference is considered a "party" to the individual proceeding. Party, as defined by both the OAPA and ODM, means "a person or agency named and participating, or properly seeking and entitled by law to participate, in an individual proceeding." 75 O.S. § 250.3(12); *see also* Okla. Admin. Code § 460:1-1-3. Accordingly, each individual who submitted a written comment or attended an informal conference qualify as a "party" and are entitled to receive individual notice of the Departmental Decision.

ODM, however, ultimately chose to limit those receiving personal notice of its Departmental Decision and of its Findings to "those qualified protestants who actually attended either the first or second informal conference (and who signed in).[14]" *See* Exhibit 22, Letter from Mark Secrest, General Counsel, Oklahoma Department of Mines,

[14] The term "qualified protestants" is not defined in either ODM's regulations or in the OAPA.

to Krystina Hollarn, Counsel, Citizens for the Protection of the Arbuckle-Simpson Aquifer (Nov. 2, 2011). ODM interprets Okla. Admin. Code § 460:10-17-7(b)(2) as requiring one to be present at an informal conference in order to submit "oral or written statements." Such and interpretation, however, ignores Okla. Admin. Code §§ 460:10-17-6(a) and 460:10-17-9(a). Section 460:10-17-6(a) allows "any person who resides or owns property within one mile of the proposed non-coal mining operation shall have the right to file **written objections** to an initial or revised application for a permit with the Department. . . .[15]" (emphasis added). Moreover, when deciding whether to issue a permit application, ODM must review "the complete application and written comments, **written objections** submitted, and **records of any conference** held under Section 460:10-17-6 and 460:10-17-7." Okla. Admin. Code § 460:10-17-9(a) (emphasis added).

CPASA finds no statutory or regulatory authority authorizing ODM's unilateral decision to exclude parties to its administrative proceeding—indeed, ODM's own regulations state that both written objections (filed under Section 460:10-17-6) and records of any conference (submitted pursuant to Section 460:10-17-7) must be included in its review. Thus, it is insincere to assert protestors filing written objections are not parties to the proceeding and should not receive notice of ODM's departmental decision. Moreover, the Informal Conference Officer stated that **"[e]veryone who sent in a protest letter** and everyone – and **anybody else who was here today** and signed up and

[15] The Oklahoma Supreme Court held ODM's one mile limitation an unconstitutional violation of citizens' due process rights in the *Daffin* decision issued March 29, 2011. CPASA understands ODM intends to revise its regulations in the upcoming legislative session in order to reflect said holding.

gave us their address **will receive a copy of [ODM's decision]**." Exhibit 23, Initial Informal Conference Tr. 103 at 7-10 (emphasis added); *see also* Initial Informal Conference Tr. 6-7 at 21-2 (statement by the Informal Conference Officer that "if you have **sent a protest letter** in or **you signed up today**, you will be given a copy of that and you have a right – a right to – to appeal. So that's the only way you're going to get [a copy of the departmental decision] is if **you've signed up** or if **you're under – under protest**, or if you call and request that.") (emphasis added).

1. Notice by Publication is an Insufficient Substitute for Actual Service of Notice to the Parties

ODM plans to publish its Departmental Decision in the Johnston County Capital Democrat, however, such publication cannot overcome ODM's failure to provide individual notice to parties of the proceeding. "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best." *City of New York v. New York, N. H. & H. R. Co.,* 344 U.S. 293, 296 (1953). Additionally, the Oklahoma Supreme Court stated

> Publication notice is not reasonably calculated to provide actual knowledge of instituted proceedings. It is hence inadequate as a method to inform those who could be notified by more effective means such as personal service or mailed notice. Mail service is an inexpensive and far more efficient mechanism to enhance the reliability of notice than either publication or posting. When a party's name and address are reasonably ascertainable from sources available at hand, communication by mail or other means certain to insure actual notice is deemed to be a *constitutional prerequisite in every proceeding which affects either a person's liberty or property interests.*

> Because resort to publication service is constitutionally permissible *only* when all other means of giving notice are unavailable, we hold today that the face of an administrative proceeding must affirmatively show a diligent but unsuccessful effort to reach [affected parties] by better process. *In short, courts may not presume publication service alone to be constitutionally valid when the judgment roll or record of an administrative proceeding fails to show that the means of imparting better notice were diligently pursued but proved unavailable.*

Carlile Trust v. Cotton Petroleum Corp., 732 P.2d 438, 444 (1986) (emphasis in original).

Here, ODM already had each party's name and address. In fact, ODM mailed notice of the informal conference to all parties who submitted written objections. ODM cannot claim it had no other means of providing notice. Rather, ODM simply *refused* to provide all parties with constitutionally valid notice.

C. ODM Gave No Consideration to CPASA's Written Comments

ODM must review all written comments, written objections, and records of any informal conference. *See* Okla. Admin. Code § 460:10-17-9(a). In addition, oral or written statements and any other relevant information may be submitted to the Informal Conference Officer during the Informal Conference. *See* Okla. Admin. Code § 460:10-17-7(b)(2). However, neither the Departmental Decision nor the Findings considered a number of concerns raised in CPASA's briefing. Indeed, CPASA's initial Brief in Opposition of Arbuckle Aggregates' Permit Application is not even an exhibit on ODM's exhibit list.

For example, CPASA's Initial Brief in Opposition provided a U.S. Geological Survey report that established mining in a karst geologic formation, such as the Arbuckle-Simpson Aquifer, is especially damaging to the environment due to karst's unique

physical composition. *See* Exhibit 12 at p. 3, I.A. CPASA's Initial Brief in Opposition also set forth concerns about the cumulative impact of yet another mine in an already mine-burdened area. *See Id*. at ps. 4 and 6. Neither of the above concerns were so much as *mentioned* in ODM's Departmental Decision or Findings. The majority of concerns raised in CPASA's Initial Brief in Opposition were wholly ignored by ODM—despite the fact that CPASA presented verified scientific data supporting its position. Such actions are in violation of CPASA's due process.

D. Arbuckle Aggregates' Failure to Properly Identify Its Mining Map Denies Citizens the Opportunity for Meaningful Participation in the Administrative Process, in Violation of the Due Process Clause

Both the United States Constitution and the Oklahoma Constitution guarantee a citizen's right to due process. *Daffin . State ex rel. Oklahoma Department of Mines,* 2011 OK ¶ 23 (herein "*Daffin*"). Substantive rights, such as the right to property, cannot be denied an individual, except by constitutionally sufficient measures. U.S. Constitutional Amend. 14 § 1; Okla. Cont., Art. 2 § 7. Additionally, the Oklahoma Administrative Procedures Act affords all parties to an individual proceeding the right to "respond and present evidence and argument on all issues involved." 75 O.S. § 309(C).

Because Arbuckle Aggregates' true mining plan cannot be easily ascertained in a mine map, Oklahoma citizens are denied their right to respond and present evidence and argument on all the issues. CPASA thoroughly reviewed all maps submitted by Arbuckle Aggregates and still cannot clearly determine where Arbuckle Aggregates plans to place its ponds, overburden, and stockpiles. As such, CPASA was prohibited from adequately

and meaningfully participating in the administrative process. Accordingly, ODM erred when conditionally granting Arbuckle Aggregates' revised mining permit application.

E. ODM's Permitting Procedures Deny Oklahoma Citizens Due Process

ODM states that the purpose of its non-coal practice and procedure rules is to "ensure public access to the administrative legal process and to ensure due process of law to the citizens of the state of Oklahoma." Okla. Admin. Code § 460:3-1-1. Yet its permit application process denies individuals the opportunity to adequately and meaningfully participate in the administrative process. Furthermore, ODM procedures functionally deny Oklahoma citizens their constitutionally protected due process rights.

Normally, an agency makes a decision after taking into account all evidence and testimony presented at a hearing—indeed, the entire purpose of a formal hearing is to elicit evidence and create a record from which an educated and informed decision may be made. However, ODM makes its decision *before* holding a hearing and only after deciding whether to issue a permit.

ODM's Findings conflict with current state law. The agency decision-maker relies on the Findings when making the decision; however, the decision is based solely on a report created by an individual with complete control over the information to include. There is an inherent risk that the Findings misconstrue or exclude relevant information—indeed, it is more than simply a risk in this case. The Findings issued regarding Arbuckle Aggregates both misconstrues citizens' concerns and wholly omits material information.

Although a formal hearing is eventually conducted, practically speaking the ODM's decision is already made. Such a practice denies CPASA the ability to fully and

completely present evidence in support of its position. Additionally, this process improperly shifts the burden to CPASA to prove that the permit should not be issued rather than requiring Arbuckle Aggregates to establish the permit should be granted. CPASA is at an immediate disadvantage in this process—not only must evidence be presented in support of its case, but CPASA must also present sufficient evidence to overturn ODM's decision. In essence, ODM makes its decision without any evidence and then leaves CPASA with the formidable task of proving to the agency that the agency was wrong.

Further, ODM regulations do not allow CPASA to engage in discovery prior to the informal conference. In fact, CPASA is never guaranteed the right to conduct discovery. Discovery is contingent on two factors: first, an individual cannot engage in discovery unless and until the ODM determines a formal hearing is necessary. Second, discovery is only allowed at the hearing examiner's discretion. It is entirely possible that, even if a formal hearing is granted, a protester will be denied the right to conduct discovery or will be severely limited in the scope of discovery.

In this case, ODM made its decision after only the informal conference and without the aid of a complete record containing evidence and testimony on the issues. Moreover, CPASA did not have the benefit of discovery when presenting its objections. Arbuckle Aggregates is clearly in the best position to know all the facts relating to its application. Many of those facts could significantly impact the protests CPASA made. However, ODM processes prevent CPASA from learning those relevant facts before

presenting its protests at the informal conference. Indeed, ODM made its decision in this matter before CPASA ever have a chance to learn of all the facts relevant to this matter.

The Supreme Court of Oklahoma held that individuals whose property rights may be substantially affected by the issuance of a permit are guaranteed by the due process clauses of both the federal and state constitutions to notice and "an opportunity to be heard through an individual proceeding . . . ." *DuLaney v. Okla. St. Dept. of Health*, 868 P.2d 676, 680 (Okla. 1994). The opportunity must be one for a meaningful hearing, informed by all the relevant facts.

CPASA raised several property-oriented concerns, including the depletion and pollution of water resources, the deposit of dust and other particulates on nearby private properties, the decrease in area property values, and the contamination of the Arbuckle Simpson Aquifer—a water source utilized by many members of CPASA as a water supply—in its protest and at the Informal Conferences. Despite this fact, CPASA was prohibited from gathering facts relevant to its protest. Accordingly, ODM's administrative process does not afford CPASA its constitutionally protected right to meaningfully and adequately participate in the administrative process.

VIII. ODM Failed To Properly Process And Review Arbuckle Aggregates' Revised Permit Application

A. ODM Did Not Comply with Its Statutorily Mandated Duties and Obligations when Deciding to Conditionally Issue Arbuckle Aggregates' Revised Permit Application

ODM is responsible for the review of permit applications and must ensure compliance with 45 O.S. § 721 et seq., and other ODM regulations. *See* 45 O.S. § 721 et

seq. and Okla. Admin. Code § 460:10-3-4. However, as set forth throughout Section VI, *infra*, ODM failed to comply with its statutorily mandated duties and obligations when deciding to conditionally issue Arbuckle Aggregates' revised permit application. Specifically, ODM failed to (1) require Arbuckle Aggregates to include a site-specific water management and conservation plan as required by SB 597; (2) ensure Arbuckle Aggregates' proposed mining operation will not adversely impact the High Quality Waters of Pennington Creek; (3) ensure Arbuckle Aggregates obtained all permits necessary to conduct its proposed mining operation; (4) require Arbuckle Aggregates to produce a definite mining map; and (5) ensure Arbuckle Aggregates' revised reclamation plan satisfied the necessary elements.

1. ODM Improperly Allowed Arbuckle Aggregates to Revise Its Permit Application after the Individual Proceeding had Begun

Public notice of a mining permit application is given "at the same time the ***complete*** permit application is filed with the Department. . . ." OAC 460:10-17-5 (emphasis added). Notice is required only after a permit application is complete because citizens could not adequately and meaningfully participate in an individual permitting proceeding if the underlying permit application continually changed, as Arbuckle Aggregates' permit application has changed.

Arbuckle Aggregates' legal counsel declared at the initial informal conference that "[a]s we sit here today, the application by Arbuckle Aggregates for the Mill Creek facility is administratively complete and technically correct as deemed by the department of mines." *See* Exhibit 24, Initial Informal Conference Tr. 12-13 at 24-2. Nonetheless,

Arbuckle Aggregates revised its application during the initial informal conference. Despite its regulations, ODM improperly allowed Arbuckle Aggregates to make changes to its permit application after the individual proceeding had begun.

2. Regurgitating Issues Raised By Concerned Citizens With Addressing Said Issues Fails To Satisfy ODM's Legal Obligations

As stated in Sections XII.B and C., *infra*, ODM improperly excluded hundreds of written objections when reviewing Arbuckle Aggregates' revised permit application. Thus, the issues raised in those citizens' objections were not considered by ODM when making its decision. Instead, ODM created a new "qualified protestors" category to narrow the field. Even then, ODM's Departmental Decision and Findings do not adequately address the issues raised by said "qualified protestors."

ODM lumps all of the "qualified protestors" claims into the following categories[16]:

A. Water
    1. Water Quality
    2. Water Availability
    3. Water Regulations
        a. New Legislation
        b. Monitoring
    4. Beneficial Use Designations
B. Fish and Wildlife
C. Wetlands
D. Highway/Traffic
E. Dust and Fumes
F. Noise and Night Activities
G. Tourism and Recreation
H. Mine Records and Personnel Accessibility
I. Property Values
J. Aesthetic Values

[16] CPASA objects to protestors' wide array of concerns being forced into such bland categories. Moreover, many more issues were presented to ODM than reflected in the Findings. CPASA contends that *all* concerns must be adequately addressed by ODM.

K. Environmental Impact Statement (EIS)
L. Administrative Processes

Findings, p. 4, VI.

However, ODM's Recommendations address only four (4) issues: contact information and call list, pre-blast survey, water monitoring, and use of surface or stream water. ODM cannot satisfy its duties to Oklahoma citizens and to the environment by simply stating concerns raised by parties to the proceeding without adequately addressing said concerns.

CONCLUSION

As a state environmental agency, ODM must protect Oklahoma's natural resources—including the Arbuckle-Simpson Aquifer. However, as shown above, Arbuckle Aggregates' revised permit application is incomplete and thus cannot legally be issued—conditionally or otherwise—until it affirmatively demonstrates compliance with all necessary requirements. Moreover, ODM failed to uphold the requirements of numerous state statutes and regulations. Such failure is unacceptable and contrary to ODM's statutory duties.

The Arbuckle-Simpson Aquifer is extremely sensitive to pollution and contamination. It is also critical for the continued viability of South-Central Oklahoma's economy. Scientific studies establish Arbuckle Aggregates' proposed mining operation will likely have catastrophic effects on the region's wildlife, aquatic organisms, economic development, and drinking water supply. CPASA seeks to compel the Oklahoma

Department of Mines to adhere to its statutory directives and require Arbuckle Aggregates to fully comply with all of Oklahoma's laws and regulations.

For these reasons CPASA requests a formal hearing.[17]

Respectfully submitted this 14th day of December, 2011,

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[17] CPASA expressly reserves the right to supplement and/or amend this Request to include additional issues, errors, and omissions throughout the Formal Hearing process.