IN THE SUPREME COURT OF MISSOURI
NO. SC85696

MISSOURI COALITION FOR THE ENVIRONMENT, THOMAS J. SAGER, JAMES E. KAUFMANN, AND HARRIET GRAHAM,

Plaintiffs-Appellants,

v.

THOMAS A. HERRMANN, Chair, COSETTE D. KELLY, DAVIS D. MINTON, KRISTIN PERRY, ARTHUR HEGI, JAMES GREENE, Members of the Missouri Clean Water Commission, MISSOURI CLEAN WATER COMMISSION, U.S. ARMY ENGINEERING CENTER, AND FORT LEONARD WOOD,

Defendants-Respondents.

On appeal from the Circuit Court of the City of St. Louis
Cause No. 004-02358
The Honorable Robert H. Dierker, presiding

Transferred post-opinion of the
Missouri Court of Appeals
Eastern District
No. ED 81790

APPELLANTS' SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an action for judicial review of a decision of the Clean Water Commission (hereinafter "commission") dismissing, for lack of jurisdiction, an appeal taken by plaintiffs-appellants from an NPDES permit issued on October 1, 1999, to the United States Army at Ft. Leonard Wood. The action was brought in the circuit court pursuant to Section 536.100, R.S. Mo., the parties having agreed that this case is a "contested case" pursuant to §§ 536.100-140, R.S. Mo.

The circuit court ordered that the petition for review be dismissed for lack of jurisdiction. App. 12[1], p. A68. Appellants appealed to the Missouri Court of Appeals, Eastern District. On June 30, 2003, the Eastern District issued its opinion, ordering the Commission to hold a hearing on the merits. App. 14, p. A83. Defendants Clean Water Commission and its members sought transfer in the Eastern District, which denied transfer on November 13, 2003. App. 15. Because the Eastern District's opinion directly conflicts with the Western District's opinion in the case of *Craven v. State, ex rel. Premium Standard Farms, Inc.*, 19 S.W.3d 160 (Mo. App. 2000), the same defendants sought transfer in this Court, which ordered transfer on December 23, 2003. Mo. Const. Art. V, Section 10.

THE RECORD

The administrative record which was filed in the circuit court pursuant to stipulation is in two parts:

1. As certified by Phil Schroeder (LF 10), chief of the permits section of the water pollution control program of the Missouri Department of Natural Resources (MDNR), Permit

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[1] "App. ___" refers to the Substitute Appendix to Appellants' Substitute Brief, filed separately.

No. MO-0117251, issued October 1, 1999 (LF 11), together with the retyped version of the permit dated October 5, 1999 (LF 24), and the amendment to that permit, bearing the same number, issued April 21, 2000 (LF 38). Although the appeal from the permit issued in 1999 was taken before the amendment of 2000, in the Stipulation as to the record the parties have stipulated that the appeal challenges the permit as amended, and references in the petition for judicial review to the permit include the amended permit as well as the 1999 permit. App. 11.

2. As certified by Diane Waidelich (LF 52), Secretary to the Clean Water Commission, the papers showing the relevant events which took place in the administrative proceedings (LF 53-87).

STATEMENT OF FACTS

On October 1, 1999, Fort Leonard Wood was issued a modification of its NPDES water discharge permit no. MO-0117251, which had been issued on February 17, 1995, and was to expire on February 16, 2000. LF 11-12. On October 5, 1999, this permit was replaced with a retyped version of substantially the same permit modification. LF 25. On April 21, 2000, a new modification, bearing the same permit number was issued, to expire five years later. LF 39.

All of the preceding sentences are in the passive voice, because there is disagreement as to who issued these permits. Each is signed by John A. Young, the Director of the Division of Environmental Quality of MDNR. Each is also signed by Ed Knight, the Director of Staff, Clean Water Commission. Both are appointees of the Director of MDNR, and are subject to his direction and control.

On October 28, 1999, the Missouri Coalition for the Environment and the three individuals who are plaintiffs-appellants here (hereinafter collectively referred to as "Coalition") filed with the commission a notice of appeal of the first two of these permit actions. By stipulation (App. 11), the parties agreed that the pending appeal would challenge the 2000 version of the permit as well as the two 1999 versions.

Until that notice of appeal was filed, the commission had no awareness of either of the

two existing permits. The four documents attached by Diane Waidelich, Secretary of the Commission, to her affidavit constitute "all minutes of the Clean Water Commission referring or relating to permit no. MO-0117251," as stipulated by the parties. See stipulation, App. 11. Except for the notice of appeal in October, 1999, all four of these documents are dated in the last half of 2000. LF 1. The uncontroverted record establishes that the commission did not issue any of the three forms of the permit, and was not even aware of them until a notice of appeal from the first two was filed.

On September 27, 2000, the commission dismissed the appeal because the commission lacks jurisdiction. LF 53, 77-78. The commission explained that its ruling was "Based upon the Missouri Court of Appeal's decision in Craven v. PSF, WD57339." LF 53. A timely petition for review was filed in the Circuit Court. LF 6. The parties stipulated as to the contents of the administrative record to be filed. App. 11. In due course the administrative record was filed. LF 10-87. The circuit court dismissed the petition. App. 12, p. A68. The circuit court stated that the court agreed with *Craven v. State, ex rel. Premium Standard Farms, Inc.*, 19 S.W.3d 160 (Mo. App. 2000). Idem. The circuit court ruled further that, because, according to *Craven*, the commission had no jurisdiction, therefore the court had none. Pp. A66-A67.

Appellants appealed to the Missouri Court of Appeals, Eastern District. App. 13. On June 30, 2003, the court of appeals issued its opinion and declined to follow *Craven*, and held that the commission possessed jurisdiction over appellants' appeal of the permit modifications and ordered the case remanded. *Missouri Coalition for the Environment, et al. v. Herrmann, et al*. No. 81790, slip op. at 11 (Mo. App., E.D., June 30, 2003). App. 14, p. A82. The court concluded that the position of executive secretary of the commission was eliminated by the Omnibus State Reorganization Act of 1974 (OSRA), and that the Director assumed his duties related to issuing permits (*Id.*, slip op. at 8, 9). App. 14, pp. A79-A80. Defendants Commission and members sought transfer in the Eastern District, which denied transfer on November 13, 2003. App. 15. On November 25, 2003, defendants applied for transfer in the

Supreme Court. App. 16. The Supreme Court granted transfer on December 23, 2003, and this substitute brief follows.

STANDARD OF REVIEW

This Court reviews the decision of the commission, not that of the Circuit Court. *E.g.*, *Scheble v. Missouri Clean Water Commission*, 734 S.W.2d 541, 550 (Mo. App. 1987); *Michler v. Krey Packing Co.*, 363 Mo. 707, 253 S.W.2d 136, 141 (Mo. banc 1952); *Edmonds v. McNeal*, 596 S.W.2d 403, 407 (Mo. banc 1980). Judicial review extends to a determination whether the action of the Commission:

(1) is in violation of constitutional provisions;

(2) is in excess of the statutory authority or jurisdiction of the agency;

(3) is unsupported by competent and substantial evidence upon the whole record;

(4) is, for any other reason, unauthorized by law;

(5) is made upon unlawful procedure or without a fair trial;

(6) is arbitrary, capricious or unreasonable; or

(7) involves an abuse of discretion.

§ 536.140, R.S. Mo.

QUESTIONS PRESENTED

1. Whether the Omnibus State Reorganization Act (OSRA) of 1974, together with the implementing departmental plan of the Missouri Department of Natural Resources (MDNR), successfully eliminated the position of "executive secretary" of the commission and transferred his authority and duties (including the duty to issue or deny water discharge permits) to the Director of MDNR, with the result that the commission would have jurisdiction over appeals from water discharge permits issued by him.

2. Even if the reorganization of state government failed somehow to lodge the authority to issue water discharge permits in the Director of MDNR, whether the Director had the *de facto* authority to issue such permits, when he had issued them without challenge for more than two decades in reliance upon OSRA and the implementing departmental plan, the commission had routinely exercised appellate review over such permits, and the Missouri Court of Appeals had ruled that water discharge permits issued by him were valid unless they were successfully appealed to the commission.

3. Even if the commission lacked jurisdiction over the appeal from the water discharge permit issued by the Director of MDNR, because OSRA had somehow failed to transfer to him the authority to issue such permits, whether the commission, in dismissing the appeal, should have vacated the unlawfully issued permit.

POINTS RELIED ON

1. The Clean Water Commission erred in dismissing for lack of jurisdiction the Coalition's appeal from the issuance of an NPDES permit to Ft. Leonard Wood by the Director of MDNR upon the ground that the Director had no authority to issue the permit, because § 640.010, R.S.Mo. confers on the commission jurisdiction to hear such appeals, and the Director has the authority and duty to issue or deny such permits, in that the Omnibus State Reorganization Act (OSRA), the departmental plan, and the applicable regulations all impose on the Director the duty and authority to issue or deny NPDES permits.

State ex rel. Lake Lotawana Development Co. v. Missouri Dept. of Natural Resources, 752 S.W.2d 497 (Mo. App. 1988)

Omnibus State Reorganization Act (OSRA) of 1974

§ 640.010, R.S.Mo.

10 CSR 20-6.010(1)

10 CSR 20-6.020

2. The Clean Water Commission erred in dismissing for lack of jurisdiction the Coalition's appeal from the Director's issuance of an NPDES permit to Ft. Leonard Wood upon the ground that the Director had no authority to issue the permit, because the Director in any event had *de facto* authority, in that, throughout the quarter century following the state reorganization, the commission, the Director and staff of MDNR, the courts, and the people had all understood that the Director had the authority to issue or deny permits, and had consistently acted on that understanding.

State ex rel. Lake Lotawana Development Co. v. Missouri Dept. of Natural Resources, 752 S.W.2d 497 (Mo. App. 1988)

School District of Kirkwood R-7 v. Zeibig, 317 S.W.2d 295, 300 (Mo.banc 1958)

City of Boonville ex rel. Cosgrove v. Stephens, 141 S.W. 1111, 1117 (Mo. 1911)

Heard v. Elliott, 92 S.W. 764 (Tenn. 1906)

Constantineau, *The De Facto Doctrine* 168-69 (Lawyers Co-op Pub. Co. 1911)

3. Even if the commission correctly dismissed the Coalition's appeal from the NPDES permit issued by the Director, the commission erred in failing also to vacate the permit, because on that theory the permit was unlawfully issued, in that it was issued by the Director, who lacked authority to issue it.

State ex rel. Chastain v. City of Kansas City, 968 S.W.2d 232, 243 (Mo. App. 1998)

State ex rel. County of Jackson v. Missouri Public Service Commission,

985 S.W.2d 400, 403 (Mo. App. 1999)

ARGUMENT

The commission furnished no explanation for its decision, only stating that it would follow *Craven*. *Craven* ruled that the commission in that case had no appellate jurisdiction over a permit signed by the Director of MDNR because he had no permit authority, that authority being lodged by statute in the executive director and the commission. The Eastern District Court of Appeals, however, declined to follow *Craven*. Appellants argue that the Eastern District's position is accurate and that the Supreme Court should resolve the conflict in favor of the Eastern District's opinion. Accordingly, the first section of the Argument will explain wherein the *Craven* court erred. The other two sections will explain other points not considered by *Craven*.

Although this Court does not review the decisions of the circuit court and court of appeals below, this Court may want to know how those courts responded to the arguments advanced by the Coalition. The following pages will from time to time report on the circuit court's and court of appeals' responses, if any.

I. THE OMNIBUS STATE REORGANIZATION ACT, TOGETHER WITH THE IMPLEMENTING DEPARTMENTAL PLAN OF MDNR, ELIMINATED THE POSITION OF "EXECUTIVE SECRETARY" OF THE COMMISSION AND TRANSFERRED HIS AUTHORITY AND DUTIES TO THE DIRECTOR OF MDNR; ACCORDINGLY, THE DIRECTOR HAD THE AUTHORITY TO ISSUE OR DENY THE WATER DISCHARGE PERMIT REQUESTED BY FORT LEONARD WOOD, AND THE COMMISSION HAD JURISDICTION OVER THE APPEAL PURSUANT TO § 640.010.1, R.S.MO.

This controversy is rooted in the Constitutional Amendment of 1972, the Omnibus State Reorganization Act of 1974 (OSRA), and the reorganization plans adopted to implement the amendment and OSRA. To put the matter in context, it is helpful to review briefly the situation as it existed before the reorganization, and the reorganization process, and the

experience of more than a quarter of a century after the reorganization.

A. The period prior to reorganization

In 1972, prior to the adoption of the constitutional amendment in that year, the Missouri General Assembly enacted the Clean Water Law, now codified as Chapter 644 of the Revised Statutes. The law was substantially modeled on the Air Conservation Law, of 1965, now codified as Chapter 643. Each law provided for an independent commission to be appointed by the governor, to determine policies and set standards. Each established an "executive secretary" to implement the policies, to issue permits, and generally to enforce the standards and permit conditions. The decisions of the executive secretary were generally appealable to the commission.

Notwithstanding the reorganization, much of the original framework of the Clean Water Law could still be found in the revised statutes in 2000, prior to its amendment in that year. The commission is still appointed in much the same way. § 644.021, R.S.Mo., App. 3.[2] Until adoption of Senate Bill 741 in 2000, one could still find references to the executive secretary, appointed by the commission to act as the commission's administrative agent. § 644.021.4, R.S.Mo. 1994, App. 3.[3] When he existed, he was authorized to issue permits, § 644.051.3,

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[2] References are to R.S. Mo. 2000 except where specific reference is made to earlier revisions.

[3] Statutes in effect when this permit was issued, October 1, 1999, are set forth in the Appendix if they were amended in 2000.

R.S.Mo. 1999, subject to appeal to the commission. § 644.051.6, R.S.Mo. 1999, App. 5. The commission regulations authorized an appeal from a permit by "any person with an interest which is or may be adversely affected." 10 CSR 20-6.020(5)(C)(1999), App.7.

B. The reorganization eliminated the executive director and transferred his authority and duties to the Director of MDNR

1. OSRA alone accomplished this transfer

In 1972 the people of Missouri approved a constitutional amendment to reorganize the state government into fourteen departments, consolidating all independent agencies into one department or another. To implement that amendment, the legislature adopted the Omnibus State Reorganization Act of 1974 ("OSRA"), and also amended some statutes. OSRA is printed as Appendix B in Volume 15 of the Revised Statutes of Missouri (2000) at pages 9392-97, and is also printed as Appendix B following Chapter 26 of Vernon's Revised Statutes of Missouri Annotated. It is reproduced as Appendix 1.

a. Sections 640.010.1 and .2, R.S.Mo. accomplished this transfer

Section 10 of OSRA is no longer printed in those locations, however, because it was transferred in 1986 to § 640.010, R.S.Mo., App. 2. That section transferred the Clean Water Commission by type II transfer to the Department of Natural Resources. It provided that the governor should continue to appoint the members of the commission. However, it further provided that the Director of MDNR "shall administer the programs" of the commission, "shall coordinate and supervise all staff and other personnel assigned to the department," and "shall faithfully cause to be executed all policies established by the" commission. Of especial significance here is the provision that the Director's "decisions shall be subject to appeal to the . . . commission . . . by affected parties." §640.010.1, App. 2.

Section 10 further provided that the Director of DNR "shall appoint directors of staff to service each of the policy making boards or commissions assigned to the department," and that "[a]ll other employees of the department and of each board and commission . . . shall be appointed by the director" of MDNR, and "shall be assigned and may be reassigned as required by the director" of MDNR. § 640.010.2, App. 2.

b. Other sections of OSRA confirm this transfer

OSRA, in § 1.7(1)b, App. 1, defined a type II transfer as "the transfer of a department, division, agency, board, commission, unit, or program to the new department in its entirety with all the powers, duties, functions, records, personnel, property, matters pending, and all other pertinent vestiges retained by the . . . commission . . . transferred subject to supervision by the director of the department." Supervision by the Director of MDNR is defined to include "the employment and discharge of division directors, . . . the employment and discharge of employees, . . . [and] allocation and reallocation of duties, functions and personnel."

Again, in § 1.6(2), OSRA provided that the Director of MDNR "is authorized to establish the internal organization of the department and allocate and reallocate duties and functions to promote economic and efficient administration and operation of the department."

In § 1.15(1) OSRA further provided: "Where this act changes titles or eliminates positions, . . . the office as changed or the position assuming the duties of abolished positions, . . . shall fulfill all duties, serve in all ex officio capacities and in every way be read into the law as the official . . . named as successor unless otherwise provided by this act." This sentence made it unnecessary to enact comprehensive amendments in 1974 to the Air Conservation Law, the Clean Water Law, and all the similar regulatory laws, and all laws which refer to any of them, to delete the phrase "executive secretary" and substitute "Director."

Thus the Director of MDNR was given all the authority of the executive secretary, and was further given the authority to reallocate duties and functions. He assigned to himself the duty of issuing permits, with the assistance of his staff, subject to appeal to the commission.

2. The implementing departmental plan reinforced this transfer

Section 1.6(2) of OSRA, App. 1, provided that the Director of MDNR "is authorized to establish the internal organization of the department and allocate and reallocate duties and functions to promote economic and efficient administration and operation of the department. A departmental plan shall be developed by the head of each department and approved by the

governor in accordance with the transfer by type provided in this act." The amended departmental plan was submitted to the Governor by Director James L. Wilson on December 30, 1974, and was approved by Governor Bond. App. C(1), R.S. Mo. 288, 290 (1976 Supp.), App. 8. That plan recited that the "executive secretary positions of the Air Conservation Commission, the Clean Water Commission, and the Inter-Agency Council for Outdoor Recreation have been abolished, and the Department Director appoints staff directors for the Clean Water Commission . . . . " The Plan further provided that the Director of MDNR "is the chief executive officer of the Department of Natural Resources . . . . [T]he Director is clearly empowered to allocate and reallocate duties and functions of existing agencies . . . ." The Plan created the Division of Environmental Quality, which "performs all statutory functions of [the] Clean Water Commission . . ." Further, "[b]oth the department Director and the divisional Director relate closely to these policy Commissions and provide the necessary staff services through the staff directors."

The duties of the executive secretary of the Clean Water Commission were transferred to the Director of MDNR. Section 1.6(2) of OSRA explicitly authorized the Director of MDNR to "allocate and reallocate duties and functions," and directed him to develop a "departmental plan." He did so, reallocating to himself the function of issuing permits.

3. The implementing regulations confirm that the Director issues the permit

The commission adopted regulations to implement the new procedures. The regulations in effect when this permit was issued are set forth in the Code of State Regulations of 1999. Those regulations spell out the permit process in detail.

10 CSR 20-6.010(1), App. 6, provides that persons who need permits "shall apply to the department for the permits required by the Missouri Clean Water Law and these regulations. The department issues these permits . . . ." Subparagraph 4(A) of the same section requires that any person discharging water contaminants must first receive "a construction permit issued by the department." Subsection (4)(E) provides that, after reviewing the application, the

"department will act . . . by either issuing a notice of operating permit pending, issuing the construction permit or denying the permit. The director in writing shall give the reasons for a denial to the applicant." Subsection (4)(G) notes that the department may extend construction permits only one time, and only under certain circumstances may the department issue a permit for a project requiring more than one year to construct.

Subsection (5)(A) provides that persons who need operating permits must obtain them "from the department" before any discharge occurs. Subsection (5)(B) provides: "The department will issue or deny the permit within sixty (60) days . . . . " Subsection (9)(B) provides that no permit shall be issued where the EPA regional administrator has objected "to the issuance of a permit by the director." Subsection (13)(A) itemizes the circumstances in which the "director may issue a general permit."

Section 6.020 of the same set of regulations concerns public participation, hearings, and notice to governmental agencies. App. 7. It repeatedly reaffirms the fact that permits are issued by the Director of MDNR, not by the commission in the first instance. For example, subsection (1)(A)(1) provides that the "department shall review applications for general permits, operating permits or the renewal of operating permits and other relevant facts to determine whether or not the permits should be issued . . . the department shall prepare . . . a draft operating permit . . . [and] a fact sheet."

Subsection (1)(B) provides that the department must prepare a public notice of permit pending, and in due course the "department will issue or deny the permit."

Subsection (1)(C)(1) provides that the department must prepare a public notice of any new or reissued general permit. Subsections (2)(A) and (B) provide that the department may incorporate into the permit recommendations submitted by environmental agencies and affected states, and "the director shall include the specified conditions" of the permit in the event that a district engineer of the Corps of Engineers advises that specified conditions are necessary. When a public hearing must be held, it is the department, not the commission, which holds the public hearing. See Subsection (4)(A)(1).

Subsections (5) and (6) deal with computing the 30-day time limit for filing various kinds of appeals to the commission. Subsection (5)(C) provides that the appeals "may be made by the applicant, permittee, person named in the order or any other person with an interest which is or may be adversely affected." Subsection 6(D) is substantially identical, and applies to appeals pursuant to § 640.010, like this one.

In sum, the reorganization, and implementing regulations adopted thereafter, explicitly provide, again and again, that permits are issued by the Director of DNR, subject to appeals to the commission.

C. The period after reorganization

For the next quarter century, the Director of MDNR issued the permits. See amended brief filed in *Craven* by the commission and MDNR, App. 9, at pages 10-11. Affected parties appealed to the commission. The commission, the regulated industries, and all interested persons understood that authority to issue the permits was in the Director. There was no executive secretary.

The courts, the general assembly, and the executive affirmed this procedure. In *State ex rel. Lake Lotawana Development Co. v. Missouri Dept. of Natural Resources,* 752 S.W.2d 497 (Mo. App. 1988), the Director issued a construction permit to Carriage Oaks Housing Development. The issuance of the permit was appealed to the Clean Water Commission by Lake Lotawana Development Co., an adjacent property owner. Without waiting for resolution of that appeal, Lake Lotawana filed a mandamus petition in the circuit court. MDNR moved to dismiss for failure to exhaust administrative remedies. The circuit court dismissed, and the court of appeals affirmed:

> The commission's regulations provide for administrative review of all the Department of Natural Resources' permit decisions. . . . No final decision for judicial review exists until the Clean Water Commission renders a decision on Lake Lotawana Development Company's administrative appeal.

752 S.W.2d at 498.

For a quarter century this practice, spelled out in the statutes, the departmental plan, and the regulations, and enforced by the courts, has been followed, and universally accepted.

D. The **Craven** *court was not aware of the relevant statutory provisions and departmental plan*

This established procedure was rudely upset by the Court of Appeals for the Western District in *Craven v. State, ex rel. Premium Standard Farms, Inc.*, 19 S.W.3d 160 (Mo. App. 2000). In that decision the Court made two novel rulings:

1. Claiming to following the "plain and ordinary meaning" of the statutes, the court concluded:

> the court cannot fathom how the position of Executive Secretary of the Clean Water Commission was eliminated or how the position's duties were transferred to the Director of the DNR. The OSRA and § 640.010 simply do not support such a proposition.

19 S.W.3d at 165. The court apparently never read § 1.6(2) of OSRA, which authorized the MDNR Director to reallocate duties and functions. See page 9, *supra*. And the court never was aware of the departmental plan, authorized by § 1.6(2) of OSRA, which recited that the position of executive secretary was "abolished," and his authority and duties transferred to the Director.

The court was also influenced by the fact that, until the law was amended in response to the circuit court decision in *Craven*, the term "executive secretary" was still found throughout the Clean Water Law. Although conceding that there no longer is any executive secretary, 19 S.W.3d at 164, the court ruled that this statutory language precludes transferring permit authority to the Director of MDNR. 19 S.W.3d at 165-66. The court did not indicate any awareness of § 1.15(1) of OSRA, which provides:

Where this act changes titles or eliminates positions, departments, . . . the office

> as changed or the position assuming the duties of abolished positions, departments, . . . shall fulfill all duties, serve in ex officio capacities and in every way be read into the law as the official . . . named as successor unless otherwise provided by this act.

Unaware of the controlling statute and departmental plan, the court extracted a few words from § 1.7(1)(b) of OSRA, which are not grammatically connected, and put them together with an improperly added "is," to read: "all . . . personnel . . . [is] retained by the . . . Commission." The court is re-writing OSRA. The sentence thus mangled reads:

> Under this act a "type II transfer" is the transfer of a department, division, agency, board, commission, unit, or program to the new department in its entirety with all the powers, duties, functions, records, personnel, property, matters pending, and all other pertinent vestiges retained by the department, division, agency, board, commission, unit or program transferred subject to supervision by the director of the department.

What this says is that all the powers, duties, functions, records, personnel, etc., are transferred to MDNR, and all other pertinent vestiges retained by the commission are also transferred, all subject to supervision by the Director of MDNR. "Retained" modifies "all other pertinent vestiges," not personnel. Even if "retained" were understood to modify each of the nouns enumerated above, it would be an adjective identifying those subjects which are "transferred" to MDNR. The operative verb in the clause is "transferred." If "retained" were an operative verb, there would have to be an "and" preceding "transferred" in order to make any sense at all of this sentence.

In short, the court has totally misunderstood the statute. In a type II transfer, what is retained by the commission up to the time of reorganization is "transferred" to MDNR, subject to supervision by the Director.

In the next two sentences, by defining "supervision," OSRA defines what the commission retains *after* reorganization. The first sentence sets forth the authority which the

commission loses, yielding to the Director, including "abolishment of positions, . . . employment and discharge of division directors, . . . employment and discharge of employees, . . . and allocation and reallocation of duties, functions and personnel."

The second sentence sets forth the authority which the commission retains after reorganization, with which the Director may not interfere: "substantive matters relative to policies, regulative functions or appeals . . . ." Although the court recited § 10 of OSRA, § 640.010, R.S.Mo., App. 2, the court gave no attention to the mandate that the Director of MDNR, not the ill-fated executive secretary, "shall faithfully cause to be executed all policies established by" the commission. § 640.010.1. How could he do that, if he kept tripping over the executive secretary every time he tried to execute the commission's policy? Nor did the court give any weight to the mandate that the Director of MDNR shall appoint the Director of staff to service the commission, that all other employees of the commission assigned to MDNR shall be appointed by the Director of MDNR, "and shall be assigned and may be reassigned as required by" the Director of MDNR. § 640.010.2.

In the "fathom" sentence quoted above the *Craven* court apparently recognizes that, until the reorganization, the statute vested in the executive secretary the duty in the first instance to issue or deny permits. Nevertheless, the court, again invoking the "plain meaning" rule, asserts categorically that the Clean Water Law "gives the Commission authority to issue permits," and that "the authority to issue permits such as the ones in issue is vested in the Clean Water Commission." 19 S.W.3d at 163, 164. On this basis the court emphatically rejects MDNR's contention that the permits were issued by the Director of MDNR. Id. at 164. The Court relies upon § 644.026.1(13), App. 4, which states that the Clean Water Commission has the authority to "[i]ssue . . . permits."

In ruling that the commission has the exclusive authority to issue permits, excluding the Director, the court, while claiming to apply the "plain meaning" rule, in fact repudiates the plain, explicit language of the statute. Section 644.026.1(13) does not state, or even suggest, that the commission has the *exclusive* authority to issue permits. The quoted section is a

section setting forth the powers of the commission. The section spelling out the procedure for issuance of permits is § 644.051, App. 5. That section requires that anyone who needs a permit must apply to the executive secretary for a permit, the executive secretary will investigate the application, and will either issue the permit or deny the permit. § 644.051.3. That section further provides for the executive secretary to conduct hearings before taking final action, make all appropriate determinations, and notify the applicant in writing of his action. § 644.051.4-6. That section further provides for an appeal to the commission from the denial of a permit or any condition in any permit. § 644.051.6. Accordingly, if one considers the entire Clean Water Law (putting aside the elimination of the executive secretary), permits are granted or denied by the executive secretary, and his action may be appealed to the commission. The commission does have authority to issue permits, when it has jurisdiction, but it has jurisdiction only on appeal from the order of the executive secretary.

> Where a statute provides for an application to and determination by one officer with provision for appeal from such determination to another officer or body or for review by such an officer or body, the reviewing body has been held to have jurisdiction to act only upon an appeal . . . .

2 Am.Jur.2d Administrative Law § 542 (1962). The Western District's conclusion that the commission has exclusive authority to issue permits ignores the plain language of the statute. Further, this conclusion that the commission has exclusive authority to issue permits, and therefore the permit has to be a commission permit (regardless of the facts), results in an appeal from the commission to the commission. That is a process which one would not expect the legislature to prescribe.

> Administrative appeal is, in the nature of things, excluded where the determining authority is either a head of a department or an independent commission, but there is room for appeal where a subordinate of a department

head, even the head of a bureau, is the determining authority . . . .

. . .

An appeal involves two tribunals, one of which has the power to decide in the first instance and the other to review on appeal a decision so made . . .

2 Am. Jur.2d Administrative Law § 541 (1962). The concept of an appeal from the commission to the commission is at least inconsistent, if not in conflict, with the 1989 amendment to Missouri's Administrative Procedure Act, § 536.083, which forbids any person who conducted an administrative hearing from conducting any subsequent appeal involving the same issue and parties.

In short, the court's ruling that the authority to issue permits could not be transferred from the executive secretary to the Director of MDNR, because the commission had the exclusive authority to issue permits, is wrong, in violation of the plain language of the statute.

As is shown by a quarter century of experience, for 25 years the executive, legislative, and judicial branches of the government unanimously believed that the legislature had, in 1974, abolished the position of executive secretary. Accordingly, that term, used in Chapter 644, was to be read as "Director of MDNR." The legislature saw no need to go through each statute individually and delete each reference to the executive secretary. It is true that the references to the executive secretary in the Air Conservation Law, as pointed out by the court, 19 S.W.3d at 165, were deleted in 1992, 18 years after the executive secretary was abolished. A cursory examination of the entire Chapter 643 will disclose that, in 1992, there was a comprehensive revision of the chapter. In that revision, somebody thought it useful to delete the words which were no longer applicable, and the legislature did so, but that event throws no light upon Chapter 644, which did not undergo a comprehensive revision.

2. The Western District also ruled that a third party, that is, somebody other than the applicant or DNR, cannot appeal from the issuance of a permit by the staff to the commission. If the permit is in fact issued by the Director, § 640.010 explicitly provides for an appeal "by affected parties." App. 2. The Court erroneously rejected this statute, on the

basis of the erroneous ruling that the Director has no authority to issue permits. 19 S.W.3d at 166.

Alternatively, the right of appeal by any person with an interest in the matter is set forth in the regulations. 10 CSR 20-6.020(6)(D) provides that appeals "may be made by the applicant, permittee or any other person with an interest which is or may be adversely affected." App. 7. This right of appeal by adversely affected parties was added to the regulations in 1984, to clarify the appeal process and comply with the latest federal regulations. See 9 Mo. Reg. 972 (June 1, 1984). The court rejected this regulation, ruling that it is invalid because it exceeds the bounds of § 644.051.6 (1999 Supp.), App. 5, which authorizes only an appeal by the applicant for the permit. Of course, the statute does not say that *only* the applicant may appeal, but that is the interpretation imposed upon it by the court.

The court made no reference to, and apparently gave no consideration to, the statute relating to rules and regulations, authorizing the commission to:

> Adopt, amend, promulgate, or repeal after due notice and hearing, rules and regulations to enforce, implement, and effectuate the powers and duties of sections 644.006 to 644.141 and any required of this state by any federal water pollution control act, and as the commission may deem necessary to prevent, control and abate existing or potential pollution.

§ 644.026.1(8), R.S.Mo. 1998 Supp., App. 4. Thus the commission has authority to adopt regulations to enforce any and all parts of Chapter 644, not merely one subsection. The commission further has authority to adopt any regulations required by the Federal Water Pollution Control Act.

The Court also overlooked § 644.026.1(15), R.S.Mo. 1998 Supp., App. 4, which provides that the commission has the power to:

> Exercise all incidental powers necessary to carry out the purposes of sections 644.006 to 644.141, assure that the state of Missouri complies with any federal water pollution control act, retains maximum control thereunder and

receives all desired federal grants, aid and benefits.

The *Craven* court concedes that allowance of an appeal by adversely affected parties is necessary for Missouri to be in compliance with federal law. 19 S.W.3d at 167. See 40 C.F.R. §§ 123.25, 124.6, and 124.74, as they existed at the time this permit was issued and amended. App. 10. If the court had read the relevant portions of Chapter 644, no doubt the court would have upheld the right of adversely affected parties to appeal the issuance of a permit.

Nor did the Court even cite *State ex rel. Lake Lotawana Development Co. v. Missouri Department of Natural Resources*, 752 S.W.2d 497 (Mo. App. 1988). In that case Lake Lotawana, an adjacent property owner, appealed to the commission from the issuance of a permit by the Director of MDNR. The court not only upheld the right of an adversely affected third party to appeal a permit, but held that the availability of this right of appeal prevents Lake Lotawana from going into court until it has exhausted this remedy. *Craven* is flatly inconsistent with *Lotawana.*

Craven not only destroys the established practice of a quarter century, it completely ignores the relevant portions of the statute, ignores the case law, and repudiates the express statutory language. This Court should look at the relevant sections of the statute, and uphold them.

E. Summary

The reorganization transferred the authority to issue or deny water permits from the executive secretary to Director of MDNR. This transfer can be upheld on any of three analyses.

1. OSRA eliminated the executive secretary and transferred his duties to the Director of MDNR. This is what everybody believed for a quarter century. The Western District rejected this analysis, ignoring most of the statute, and misreading the only sentence considered relevant.

2. Even if the legislature failed to eliminate the executive secretary, the Director

of MDNR exercised his authority, pursuant to OSRA, to abolish the position, and transfer the executive secretary's duties to himself. OSRA explicitly authorized these actions. That is clearly the effect of what he has done.

3. Nobody has seen the executive secretary for a quarter century. He is not in the budget or the appropriations. It would appear that he exists only in the imagination of the Western District. However, even if he exists as an apparition on paper, his existence is not controlling. His duties were unquestionably transferred to the Director. The transfer was clearly, explicitly authorized by OSRA.

The latter two analyses were not considered, and were not rejected, by the Western District. Either is sufficient to dispose of this case. Section 640.010 explicitly authorizes this appeal to the commission. App. 2.

The circuit court ignored these arguments, simply stating (App. 12, p. A68) that the circuit court agrees with *Craven*.

The Eastern District court of appeals, however, examined these arguments and came to a different conclusion. Regarding the argument that OSRA eliminated the position of the Executive Secretary, the Eastern District agreed with appellants. *Missouri Coalition for the Environment, et al. v. Herrmann, et al*. No. 81790, slip op. at 8 (Mo. App., E.D., June 30, 2003). App. 14, p. A79. The Eastern District took judicial notice of the

> ...Fact that the state's Official Manual for 1973 and 1974 lists an executive secretary as a member of Commission's personnel, and an executive secretary is also included as a member of the Air Conservation's staff. OFFICIAL MANUAL: STATE OF MISSOURI 1973-1974 802-06 (Thelma P. Goodwin ed., 1974). The next Official Manual was issued in 1975-76, after the implementation of OSRA, and omits any reference to the position of executive secretary for either Commission or the Air Conservation Commission. *See* OFFICIAL MANUAL: STATE OF MISSOURI 1975-1976 888-890 (Thelma P. Goodwin ed., 1976). A review of the most recent Official Manual also lacks a reference to an executive secretary of either commission,

presumably indicating the trend from 1975 forward. *See* OFFICIAL MANUAL: STATE OF MISSOURI 2001-2002 517-18, 524-25 (Rob Davis ed., 2002).

(The cited pages of these three Official Manuals are included in the Substitute Appendix as App. 17, 18 and 19.)

The Eastern District concluded that, "the executive secretary was eliminated and the duties of that position reverted to Director following the reorganization. In addition, Director was the successor to and fulfilled the executive secretary's duties related to issuing permits, which was effected through his subordinates." *Missouri Coalition for the Environment, et al. v. Herrmann, et al*. No. 81790, slip op. at 9 (Mo. App., E.D., June 30, 2003). App. 14, p. A80.

II. EVEN IF THE DIRECTOR OF MDNR LACKED THE STATUTORY AUTHORITY TO ISSUE PERMITS, HE HAD *DE FACTO* AUTHORITY, AND THE COMMISSION HAD JURISDICTION TO ENTERTAIN THIS APPEAL

Even if the Western District decision were correct, and the Director of MDNR never did acquire any de jure authority to issue permits pursuant to the Clean Water Law, nevertheless he had the *de facto* authority, and the commission has the jurisdiction to entertain an appeal from the permit issued by him.

The *de facto* doctrine applies where a person "is surrounded by the insignia of office and seems to act with authority, or . . . is exercising the duties of an officer under a color of title, right or authority . . . " 67 C.J.S. Officers § 264 (1978). If the authority to issue or deny a permit in the first instance remains with the executive secretary, even though that person does not exist, then it would follow that the Director of MDNR has been exercising the duties of the office of executive secretary "without a known appointment or election [to that office], but under such circumstances of representation or acquiescence as were calculated to induce people, without inquiry, to submit to . . . his action" 63C Am.Jur.2d Public Officers and Employees § 23 (1997).

[T]he doctrine of de facto has been ingrafted upon the law as a matter of policy

> and necessity to protect the interests of the public and of individuals involved in the official acts of persons exercising the duty of an officer without actually being one in strict point of law.

School District of Kirkwood R-7 v. Zeibig, 317 S.W.2d 295, 300 (Mo.banc 1958).

The *de facto* doctrine is most often applied where there is a defect in the title to the office which is being exercised, but the defect is not generally known, and the public understands the person in question to be the de jure officer. The doctrine is also applied where the de jure office does not even exist, but the public understands that it does. *E.g., City of Boonville ex rel. Cosgrove v. Stephens,* 141 S.W. 1111, 1117 (Mo. 1911). And the doctrine is applied where a de jure officer, under color of right, exercises the authority of another officer. "[C]ertain de jure officers who usurp the functions of other officers, . . . under certain circumstances, become officers de facto as to the functions or offices so usurped. . . . [T]herefore their status, as de facto officers, necessarily depends solely upon reputation and acquiescence." Constantineau, *The De Facto Doctrine* 168-69 (Lawyers Co-op Pub. Co. 1911).

For example, in *Case v. Wresler,* 4 Ohio 561 (1855), the de jure board of education assumed the exercise of the duties of the local directors of a subdistrict, on the claim that the local directors were neglecting to discharge their duties. The plaintiff, and apparently the public, assumed that the board of education had the authority to exercise those duties. When that authority was questioned, it was upheld under the *de facto* doctrine.

Similarly, in *Heard v. Elliott,* 92 S.W. 764 (Tenn. 1906), where the elected county surveyor assumed the duties of the elected entry taker, held himself out as entry taker, was reputed to be and was recognized as such by the public, and was accepted as entry taker by the public. Although, when questioned, his title to the office could not be established, his actions were upheld under the *de facto* doctrine.

The *de facto* doctrine would plainly be applicable here, if the Director of MDNR lacked de jure authority to issue permits. Clearly the Director appeared to have that authority.

The entire government, executive, legislative, and judicial thought that he had that authority. See *Lotawana, supra*. The attorney general explicitly ruled that he had that authority. OAG 156, August 18, 1976. See also OAG 235, June 18, 1974. The public assumed, and had every right to assume, that the Director had that authority. He exercised that authority for a quarter century without question.

The Western District ruling in *Craven* held, in substance, that all of the permits issued in the last quarter century are invalid. If that holding were to be generally recognized it would follow that all of the industries which have been discharging into waters of the state pursuant to permits issued by the Director have been discharging unlawfully. They would be subject to penalties at the hands of the government, and suit by the public. This is a fairly drastic ruling.

The Western District did not even recognize the existence of the *de facto* doctrine. The Western District did not cite any *de facto* case, or attempt to distinguish any *de facto* case. This Court, if it should somehow rule that the Director lacks the authority to issue permits under the Clean Water Law, should rule that he has had the *de facto* authority for the last quarter century, and the permits he has issued pursuant to that authority are valid.

The circuit court acknowledged that the parties argued the *de facto* rule, App. 12, p. A66, but did not address the issue. The Eastern District found it unnecessary to address this point because of its holding with respect to the first point. *Missouri Coalition for the Environment, et al. v. Herrmann, et al*. No. 81790, slip op. at 11 (Mo. App., E.D., June 30, 2003). App. 14, p. A82.

III. EVEN IF THIS COURT WERE TO FOLLOW *CRAVEN*, THIS COURT SHOULD VACATE THE OUTRIGHT DISMISSAL OF THE APPEAL, AND REMAND WITH DIRECTIONS TO THE COMMISSION TO VACATE THE SUPPOSEDLY UNLAWFUL PERMIT

If this Court should conclude that the Director of MDNR lacked de jure or *de facto* authority to issue this permit, then it would follow that the permit is invalid. If there is no valid permit, then there is nothing from which to appeal to the commission, and the commission could properly dismiss the appeal. However, in that case, the commission would have the authority and responsibility to vacate the unlawful action of the Director. When an appeal to a higher tribunal becomes moot because of an event that has occurred which makes the tribunal's decision unnecessary, or makes it impossible for the tribunal to grant effectual relief, the higher tribunal should dismiss the case and vacate the decision of the inferior tribunal. *State ex rel. County of Jackson v. Missouri Public Service Commission,* 985 S.W.2d 400, 403 (Mo. App. 1999); *State ex rel. Chastain v. City of Kansas City,* 968 S.W.2d 232, 243 (Mo. App. 1998). The superior tribunal should not leave the decision in place:

> the normal practice should be to vacate the judgment when one or more parties requests such action in a case moot on appeal.

Chastain, *supra*, 968 S.W.2d at 243. Like the *County of Jackson* and *Chastain* courts, the commission had sufficient jurisdiction of this appeal to decide its own jurisdiction, and clean up the records under its supervisory authority.

The Western District ruled that somehow the permit issued to Premium Standard Farms was issued by the commission. Whatever the record may have shown in that case which might have justified such an outlandish ruling, the record in this Court precludes any such ruling. In the Stipulation as to Record on Judicial Review, the parties stipulated that the record contains

> All minutes of the Clean Water Commission referring or relating to permit No. MO-0117251.

App. 11. The record filed in court contains only the minutes dismissing the appeal, on September 27, 2000. This permit never even came to the attention of the commission at any other time. It was never issued by the commission. The permit which is part of the administrative record here could not even be certified by the commission's Secretary. It had to be obtained from, and certified by, a DNR employee, a subordinate of the Director.

In their motion to vacate the purported permit, the Coalition called upon the commission to "review its own minutes and see that the commission has never voted to issue this permit." The only minutes of the commission which the commission has been able to find which relate to this permit in any way are the minutes of September 27, 2000, dismissing the appeal. The purported permit was never before the commission at all, was never approved by the commission, and was never a commission permit. It is not signed by any commission member, by the Chairman, or even by the commission Secretary. It is signed by the Director of the Division of Environmental Quality, a Deputy of the Director of MDNR, and by the Director of Staff, a subordinate of the Director of DNR, assigned to provide necessary staff services, which the Director of MDNR is responsible for providing. The cover letter to the permittee from the chief of the permit section of the water department of the Division of Environmental Quality of MDNR states that "we have issued" the permit, not that the commission has issued the permit.[4]

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[4] It is true, as the Western District states, that the printed form of permit mentions the

Clean Water Commission, the agency which adopted and enforces the regulations which authorize NPDES permits. That mention does not make this permit a Clean Water Commission permit. The commission did not even learn of this permit until this appeal was taken, as shown above. The Western District neglected to point out that, immediately above the reference to the Clean Water Commission, in much larger type and bold face, the permit form states: "Department of Natural Resources." LF 12, 25, 39.

On the record before this Court, it cannot be seriously argued that the permit that was issued was issued by the commission. Rightly or wrongly, it was issued by the Director. If he had no authority to issue it, the commission should vacate it. If this Court concludes that he had no authority to issue it, this Court should remand with directions to vacate the permit.

The circuit court acknowledged (App. 12, p. A65) that the Coalition had raised this issue, but then ignored the issue. The Eastern District found it unnecessary to address this point because of its holding with respect to the first point. *Missouri Coalition for the Environment, et al. v. Herrmann, et al*. No. 81790, slip op. at 11 (Mo. App., E.D., June 30, 2003). App. 14, p. A82.

CONCLUSION

The permit was issued by the Director of MDNR. A review of OSRA and the Departmental Plan conclusively demonstrate that he had authority to issue or deny the permit. Both § 640.010, R.S.Mo., and the applicable regulations place jurisdiction of this appeal in the Clean Water Commission. This Court should resolve the conflict between the Eastern District and Western District's interpretation of the law in favor of the Eastern District's interpretation. This Court should enter an order overruling *Craven* and adopting the opinion of the Eastern District, and remand the case to the commission with directions to set aside the dismissal of the appeal and to entertain the appeal.

Respectfully submitted,

_____

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RULE 84.06(C) CERTIFICATION

I certify that:

1. The signature bloc below contains all the information required by Rule 55.03;

2. The brief complies with the limitations contained in Rule 84.06(b);

3. There are 9,694 words in the brief, and

4. The disk filed and served, containing this brief, has been scanned for viruses and is virus-free.

_____
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PROOF OF SERVICE

The undersigned certifies that on the _____ day of _____, 2004, two copies of this instrument were served upon the attorneys of record for defendants by enclosing the same in an envelope and depositing said envelope, with first-class postage fully prepaid, in a United States post office mail box in St. Louis, Missouri, addressed to:

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