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 REPLY BRIEF

Kathleen G. Henry (Mo. Bar #39504)
Bruce A. Morrison (Mo. Bar #38359)
Great Rivers Environmental Law Center
705 Olive Street, Suite 614
St. Louis, Missouri 63101
(314) 231-4181, Facsimile 231-4184
Attorneys for Plaintiffs-Appellants

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ARGUMENT

The commission generally agrees with the points made in the Coalition's brief. With two minor exceptions which will be noted below, the commission supports the Coalition.

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.

The commission agrees that, prior to 1974, the executive secretary of the commission investigated each application for a permit, made the decision whether to grant or deny the permit, and then granted or denied the permit. Respondent's Brief (hereinafter "Resp. Br.") 4. The commission further agrees that the position of executive secretary was abolished pursuant to the Omnibus State Reorganization Act of 1974, and his duties were assigned to the Director of the Department of Natural Resources, or his designee. Idem. Moreover, the commission agrees that every time the Missouri Clean Water Law refers to the "executive secretary," it is actually referring to the Director of the Missouri Department of Natural Resources. Resp. Br. 5. Finally, the commission agrees that § 640.010, R.S. Mo., grants the right of administrative review by the commission to all affected parties, not just to permit applicants. Idem.

This legislation is fundamentally sound. As is shown by the commission's regulations, the commission agrees that orderly administration of the Clean Water Act requires an administrative hearing and decision subject to judicial review on the objections of an aggrieved third party, such as the neighboring property owner in *State ex rel. Lake Lotawana*

Development Co. v. Missouri Department of Natural Resources, 752 S.W.2d 497 (Mo. App. 1988). Resort to trial de novo in the circuit court under § 536.150, R.S. Mo., not only burdens the court but abrogates the goal of administrative agency enforcement of the Clean Water Act.

On two points the commission apparently takes a view somewhat different from that of the Coalition. At page 3 the commission asserts that "the Commission issued the permit through its staff." This assertion is not explained in the text of the brief. Perhaps the commission is relying upon the misleading interpretation at page 3 of its brief of § 644.051.2. The commission reports that this statute requires that any person who seeks to operate a water contaminant source "must have a permit issued from the Commission." However, the statutory language is that a person may not operate a water contaminant source unless he holds a permit from the commission, "subject to such exceptions as the commission may prescribe by rule or regulation." See Appendix 5 attached to Coalition's opening brief. The commission has prescribed such exceptions in detail. As pointed out at pages 17-19 of the Coalition's brief, the commission has adopted regulations which provide in detail that the department issues the permits, not the commission, and appeals go to the commission. All the relevant provisions of the statute, as well as the regulations, emphasize that the permit is issued by the Director, not by the commission. See Coalition's Brief at 23, 17-19.

The commission argues that the commission properly followed the *Craven* decision in dismissing this appeal, even though the commission disagrees with *Craven*. Resp. Br. 6-7. The commission asserts that it is bound by the *Craven* ruling. But this Court is not bound by that ruling. The responsibility of this Court is to decide the case in accordance with the law.

Summary

The commission clearly had jurisdiction of this third-party appeal from the Director's granting of the permit. This Court should set aside the order dismissing the appeal, and order the appeal remanded for further proceedings.

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.

This point was fully explained at pages 28-30 of the Coalition's opening brief. The commission concedes the validity of the *de facto* argument generally, taking exception to only one point: the commission argues that the *de facto* doctrine is designed to protect the interests of the public, and in this case there are no third parties who need the protection afforded by the *de facto* doctrine. Resp. Br. 9. But there are many people who need that protection. The Coalition and its members need that protection in order to assert their right of appeal to the commission in this case, and obtain a ruling setting aside the permit. Further, if the Western District ruling were to prevail, one would have to recognize that the Director has been unlawfully issuing permits ever since 1974. All of those permits were illegal, on this theory. While the passage of time may have eliminated or mitigated the problem for some of the older permits, the holders of the more recent permits are highly vulnerable to suit for operating without a valid permit. Even if they could somehow win such suits, they would be exposed to expensive litigation and considerable uncertainty. They are clearly third parties who need, and are entitled to, the protection afforded by the *de facto* doctrine.

The commission's only complaint being invalid, if this Court should somehow rule that the Director lacks the authority to issue permits under the Clean Water Law, this Court 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.

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.

This point was made at pages 31-33 of the Coalition's opening brief. The commission does not express any disagreement whatever.

IV. THIS COURT MAY NOT CONSIDER ADDITIONAL ISSUES RAISED BY AMICI

CURIAE, SINCE MISSOURI LAW HOLDS THAT AMICI CURIAE MUST TAKE THE CASE AS THEY FIND IT.

Two amici curiae briefs were filed in this Court, but were not filed in either of the two lower courts. Amicus curiae Premium Standard Farms, Inc. and Contigroup Companies, Inc. were represented in one brief and are hereinafter referred to as "PSF." Amicus curiae Associated Industries of Missouri and Regulatory Environmental Groups for Missouri are represented in one brief and are hereinafter referred to as "AIM." Both amici make two new claims that can be summarized as follows: 1) § 644.015.6 controls over § 640.010.1 because § 644.015.6 is a more specific statute, and Missouri case law holds that a more specific statute controls over a more general one (PSF Br. 11-13; AIM Br. 10); and 2) § 644.015.6 controls over § 640.010.1 because § 644.015.6 is a later enacted statute in that it was amended later than § 640.010 was amended, and a later enacted statute repeals the first to the extent of a conflict (PSF Br. 15-16; AIM Br. 11, 12).

At the trial and appellate levels, neither appellants nor respondents raised these issues. Missouri case law firmly states that an amicus curiae cannot inject new issues into a case, but must take the case as he finds it. *State ex rel. Jackson County Library Dist. v. Taylor*, 396 S.W.2d 623, 626 (Mo. banc 1965). "An amicus curiae cannot inject new issues into the case and the court will not pass on grounds of invalidity urged by an amicus curiae but not presented by the parties." *Gem Stores, Inc., v. O'Brien*, 374 S.W.2d 109, 118 (Mo. 1963). Therefore, amici may not inject these issues into this case.

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. The judgment of the circuit court should be reversed, and the case

remanded with directions to set aside the dismissal of the appeal by the commission, and to entertain the appeal.

Respectfully submitted,

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Kathleen G. Henry (Mo. Bar #39504)
Bruce A. Morrison (Mo. Bar # 38359)
Great Rivers Environmental Law Center
705 Olive Street, Suite 614
St. Louis, Missouri 63101
(314) 231-4181, Facsimile 231-4184

Attorneys for Plaintiffs-Appellants

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 1877 words in the brief, and

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

_____
Kathleen Green Henry (Mo. Bar # 39504)
Great Rivers Environmental Law Center
705 Olive Street, Suite 614
St. Louis, Missouri 63101
(314) 231-4181, Facsimile 231-4184

Attorneys for Plaintiffs-Appellants