

**IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
NO. ED 81790**

**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,
JANICE 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**

RESPONDENT-S BRIEF

**Respectfully submitted,
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JURISDICTIONAL STATEMENT

This case originated as an appeal of a State Operating Permit filed before the Missouri Clean Water Commission. The Commission dismissed the appeal for lack of subject matter jurisdiction, and the Missouri Coalition for the Environment, Thomas J. Sager, James E. Kaufmann and Harriet Graham, appellants herein, filed a petition for review pursuant to Section 536.140, RSMo in the Circuit Court for the city of St. Louis, Missouri.

The St. Louis City Circuit Court also ordered the petition dismissed for lack of subject matter jurisdiction, and this appeal of that decision followed. This appeal does not involve any matter within the exclusive jurisdiction of the Supreme Court. Accordingly, this Court has appellate jurisdiction pursuant to Article V, ' 3, Mo. Const. and Section 477.050, RSMo.

STATEMENT OF FACTS

While most of the Missouri Coalition for the Environment, Thomas J. Sager, James F. Kaufman, and Harriet Graham (collectively the Coalition)s Statement of Facts is accurate, respondents, Thomas A. Herrmann, Cosette D. Kelly, Davis D. Minton, Kristin Perry, Arthur Hegi, James Greene, and the Missouri Clean Water Commission (hereinafter referred to collectively as the Commission) point out that, in addition to being an appointee of the Director of the Missouri Department of Natural Resources (Department), Ed Knight, as the Director of Staff for the respondent Missouri Clean Water Commission, was subject to the Commissions direction and control. Furthermore, Section 640.010, RSMo 2000¹ provides that the Director of the Missouri Department of Natural Resources is subject to the decisions of the Commission, both substantive and procedural.

ARGUMENT

- I. THE MISSOURI CLEAN WATER COMMISSION, WHICH ISSUED THE PERMIT, CORRECTLY FOLLOWED THE LAW IN ORDERING THE APPEAL DISMISSED IN THAT THE COMMISSION WAS FOLLOWING THE WESTERN DISTRICTS *CRAVEN* DECISION .

A. Standard of Review.

¹All citations are to RSMo 2000, except where specific reference is made to earlier revisions.

The standard of review in a judicial review case is governed by Section 536.140, RSMo. Appellate review of an agency decision is limited to determining whether the agency's findings are supported by competent and substantial evidence on the record as a whole; whether the decision is arbitrary, capricious, unreasonable or involves an abuse of discretion; or whether the decision is unauthorized by law. @ *Community Bancshares, Inc. v. Secretary of State*, 43 S.W. 3d 821 (Mo banc 2001.)

B. But for the *Craven* decision, the Commission would not have dismissed the appeal at issue.

The Commission find itself in an uncomfortable position. While the Commission believes it made the correct decision based on the law at the time, the Commission does not agree with the Court of Appeals, Western District's interpretation of the law as set out in *Craven v. State of Missouri, ex rel., Premium Standard Farms, Inc.*, 19 S.W.3d 160 (Mo. App. W.D. 2000).

C. The Commission issued the permit though its staff

For the most part, the Coalition's brief in the above-styled appeal expresses Commission's position as well. But the Commission does have a few additional points that need to be made. Section 644.051, RSMo requires that any person who wishes to build, erect, alter, replace, operate, use or maintain any water contaminant or point source in this state must have a permit issued from the Commission. Any person who applies for such a permit must meet not only the state requirements found in Sections 644.006 to 644.141, RSMo, and the implementing regulations found at 10 CSR 20, but also any applicable federal Clean Water Law

requirements. Section 644.051.3, RSMo. Section 644.051, RSMo then outlines the procedures for evaluating an application for a permit. Prior to 1974, the executive secretary of the Commission investigated each application for a permit, provided all public notices, and held any public hearings concerning the permit application. Sections 644.051.3 and .4, RSMo (previously Chapter 204, RSMo). Further, the executive secretary made the decision whether to grant (with such conditions as she deemed necessary) or deny the permit. Section 644.051.3, RSMo. Once the executive secretary made her decision, she was required to notify the applicant. Section 644.051.6, RSMo. The applicant could then appeal the decision of the executive secretary to the Commission. Section 644.051.6, RSMo.

The position of executive secretary to the Commission was abolished pursuant to the Omnibus State Reorganization Act of 1974 (Senate Bill No. 1, First Extraordinary Session, 77th General Assembly, portions of which are now set out at Section 640.010, RSMo) when the Legislature transferred the Commission to the Department of Natural Resources in a Type II transfer. See, Section 640.010.3, RSMo; Attorney General Opinions 1974, No. 235. App. p. A-1. Section 640.010, RSMo re-assigns the duties of the Commission's executive secretary to the Director of the Department of Natural Resources, or his designee:

1. The director shall coordinate and supervise all staff and other personnel assigned to the department. He shall faithfully cause to be executed all policies established by the boards and commissions assigned to the department.
2. All other employees of the department and of each board and commission assigned to the department shall be appointed by the director of the department.

See also, Attorney General Opinion 1976, No. 156. App. p. A-8. Therefore, 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. At present, all Missouri State Operating Permits are signed and issued by the Director of the Missouri Department of Natural Resources or his designee and the Commission's Director of staff on behalf of the Commission.

The authority to participate in an administrative proceeding, an administrative contested case, or appeal of an administrative agency final decision may be found in Missouri statutes. *Community Care Centers, Inc. v. Missouri Health Facilities Review Committee*, 733 S.W. 2d 13, 14 (Mo.App. W.D. 1987). Therefore, in order for someone to participate in an administrative review of the issuance of a Missouri State Operating Permit, a statute must grant that right. Missouri has granted the right to all affected parties, not just to permit applicants.

D. Section 640.010.1, RSMo Provides the Statutory Authority for Third Party Administrative Reviews

Section 640.010.1, RSMo specifically provides for an administrative review of any decision made by the Director or Department of Natural Resources. This statute does not limit the administrative review to Missouri State Operating Permit applicants, but instead allows the administrative appeal to be taken by an affected party.

The director shall coordinate and supervise all staff and other personnel assigned to the department. He shall faithfully cause to be executed all policies

established by the boards and commissions assigned to the department, be subject to their decisions as to all substantive and procedural rules and *his decisions shall be subject to appeal to the board or commission on request of the board or commission or by affected parties.* (Emphasis added)

The term *Aaffected party@* is not defined in either Chapters 640 or 644, RSMo. However, since the statute addresses when a person may become a litigant in an agency proceeding, the word *Aparty@* in the context of Section 640.010.1, RSMo cannot mean a person involved in a legal proceeding as a litigant. Instead, the word *Aparty@* is being used as a substitute for the word *Aperson.@* See, *American Heritage Dictionary of the English Language*, 1321 (3d ed. 1996). The word *Aaffected@* limits who may appeal the Director=s decision to the appropriate Commission. The common meaning of the word *Aaffect@* is *Ato have an influence on or affect a change in.@* *The American Heritage Dictionary of the English Language*, 29 (3d ed. 1996). Thus, any person who has a definable interest may appeal a decision of the Director of the Missouri Department of Natural Resources, particularly if that person=s interests are within the zone of the interest protected or regulated by the Missouri Clean Water Law. See, e.g., *National Welfare Rights Organization v. Finch*, 429 F.2d 725 (D.C. Cir. 1970); *Nicholas v. Board of Trustees of Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881 (D.C. Dir. 1987).

E. The Commission followed the Western District Court of Appeals=decision and dismissed the above-styled appeal.

Based on the Western District=s decision in *Craven*, the Missouri Clean Water Commission (Commission) did follow the law in effect at the time when it dismissed

Coalition=appeal. The Commission, by statute, is housed within the Missouri Department of Natural Resources (Department). Section 644.021, RSMo. The Department, as an agency of state government, is located in Jefferson City, Cole County, Missouri. Missouri Constitution, Art. IV, Sections 12, 20.

Consequently, the Commission is located within the territorial jurisdiction of the Western District Court of Appeals, State of Missouri. Section 477.070, RSMo. The Court of Appeals, Western District decided *Craven* . (Appendix, p. A-38) As a party in that case, the Commission was and is obligated to follow the *Craven* decision. In *Craven*, the Court of Appeals, Western District found that the Commission lacked subject matter jurisdiction to hear third-party appeals of Missouri State Operating Permits issued by the Commission pursuant to its authority granted under the Missouri Clean Water Law, Chapter 644, RSMo. The case before this Court is a third-party appeal of a Missouri State Operating Permit, Missouri State Operating Permit No. MO-0117251. The Commission followed *Craven* and dismissed plaintiff's appeal.

The *Craven* decision speaks for itself. While the Commission is bound by the *Craven* decision, as is evident from its arguments to the Court of Appeals, Western District, the Commission believed at that time (and continues to believe) that it had jurisdiction over third-party appeals of Missouri State Operating Permits. (Appendix, p. A-17.)

II. THE *DE FACTO* AUTHORITY DOCTRINE DOES NOT APPLY IN THE CASE BEFORE THIS COURT IN THAT NO ONE IN THE CASE REQUIRES THE PROTECTION AFFORDED BY THE DOCTRINE.

A. Standard of Review.

The standard of review on the Coalition's second Point Relied On is the same as that outlined above in the Commission's Argument to the Coalition's first Point Relied On.

B. The *De facto* doctrine does not apply in the case before this Court.

The Coalition's second's point is that even if the Director of the Department did not have the necessary statutory authority to issue Missouri State Operating Permits, because everyone believed that he/she did, the *de facto* doctrine should apply, and this Court should find that the Director did in fact issue the permit.

The Coalition cites only to some out-of-state decisions, to two very old Missouri decisions, and to an older scholarly treatise, the later of the two Missouri decisions being the most instructive. In *School District v. Charles H. Zeibig*, 317 S.W.2d 295 (Mo. banc 1958), the Village of Huntleigh was under the mistaken impression that it could organize a school district. The Village of Huntleigh did attempt to organize a school district, levied taxes on property for the support of that school district and made certain payments out of the monies collected pursuant to the taxes. The adjacent school district of Kirkwood challenged the Village of Huntleigh's attempts to organize a school district, and in an *en banc* decision in 1955, the Supreme Court held that the Village of Huntleigh could not legally organize a school district. *State on Inf. of Wallach ex rel. Reineke v. Zeibig*, 275 S.W.2d 353 (Mo. banc 1955). Following that decision, the school districts of Kirkwood and the City of Ladue sought an accounting by the Village of Huntleigh for monies that came into the Village by way of taxation and by state and county allotment. The defendants, who had acted as directors of the Village

of Huntleigh School District, argued that because everyone believed that they had been legally acting as directors of the Village of Huntleigh School District, all actions taken by them, including actions to pay attorneys' fees and reimburse tuition costs, should be validated.

The Missouri Supreme Court disagreed with the defendants in the *Zeibig* case. The Supreme Court explained the *de facto* doctrine as having been grafted upon the law as a matter of policy and necessity to protect the interests of the public and individuals involved in the official acts of persons exercising the duty of an officer without actually being one in strict point of law.[@] *Zeibig*, 317 S.W2d at 300. Pointing out that there were no third parties who needed protecting, the Supreme Court held that the fundamental justification for the invocation of the *de facto* doctrine was simply not present in the case before it.

In the case before this Court, too, no third parties need the protection afforded by the invocation of the *de facto* doctrine. The applicant has its permit, which permit was issued by the Commission. The applicant certainly does not need the Director to issue a second permit. And the Coalition, while not having the opportunity for an appeal before the Commission, does have other options available to it. *See* Section 536.150, RSMo. Pursuant to that section of the Missouri Administrative Procedure Act, the Coalition may obtain a review of the permit issued to the U.S. Army Engineering Center and Fort Leonard Wood. The Coalition therefore is not a third party needing the protection of the doctrine. As in the *Zeibig* case, the doctrine should not be applied because no one is in need of its protection.

III. AS THE *CRAVEN* COURT FOUND, THE COMMISSION ISSUED THE PERMIT, AND IT WAS THUS A LAWFUL PERMIT AND SHOULD NOT BE VACATED.

A. Standard of Review.

The standard of review on the Coalition's third Point Relied On is the same as that outlined above in the Commission's Argument to Coalition's first Point Relied On.

B. The Commission, not the Department Director, issued the Permit at Issue.

Contrary to the arguments of the Coalition, the Commission issued Missouri State Operating Permit No. MO-0117251. As noted by the *Craven* Court in Footnote 3, the actual permit in that case (and in this one, too) is captioned Department of Natural Resources, Missouri Clean Water Commission, provides that it is issued in compliance with Chapter 644, RSMo, the Missouri Clean Water Law, states that the permit may be appealed in accordance with Section 644.051.6, RSMo and is signed by the Commission's Director of Staff. *Craven*, 19 S.W.3d at 165.

Just as clearly, the permit in this case was issued by the Commission. In fact, the *Craven* Court found specifically that the Apermits herein involved were issued under the authority of the Clean Water Commission.@ *Craven*, 19 S.W.3d at 168. Since the permit at issue in this case is also a Missouri State Operating Permit, the same rationale used by the *Craven* Court applies. The Missouri Clean Water Commission, not the Department Director, issued Permit Number 0117251. (For the record, the Commission would also note that the Chief, Permit Section, Water Pollution Control Program, is also a member of the Commission's staff.)

Finally, that the Commission was not aware of the permit itself does not demonstrate that it did not issue the permit. The Commission acts through its staff, which includes both the Director of Staff and the Chief, Permit Section, Water Pollution Control Program. Rarely does an administrative agency know the details of every project, including permitting projects, undertaken by its staff.

III. CONCLUSION

While the Commission continues to believe that it had and has subject matter jurisdiction to hear third-party appeals of Missouri State Operating Permits, the Commission correctly dismissed the above-styled appeal before it as it was obligated to under the *Craven* decision.

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Certification of Service and of Compliance with Rule 84.06(b) and(c)

The undersigned hereby certifies that she caused a true and correct one true and correct copy of the foregoing brief, and one disk containing the foregoing brief to be mailed, postage prepaid, this ____ day of _____, 2003 to:

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The undersigned certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 3,391 words. The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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