

Missouri Clean Water Commission
Truman Hotel and Conference Center
1510 Jefferson Street
Jefferson City, Missouri 65109

September 5, 2012

**Administrative Hearing Commission's Recommended Decision Regarding
Charles J. Malone, M and M Plumbing and Land Application Permit Appeal
Number 12-0959**

Issue: Max Foster filed a third party appeal of the Department's decision to grant Charles Malone coverage under the permit for land application of treated septage. This was a renewal of coverage, permit number MO-G821196. The Administrative Hearing Commission (AHC) found in favor of the Department, and against Mr. Foster.

Background: Mr. Foster claimed that Mr. Malone's land application of septage on adjoining property would harm his cattle, was against local zoning, and that land application of septage was not appropriate. In addition to arguing these issues are not within the scope of the Missouri Clean Water Law, the State presented reasons why the permit was protective of the environment, land application of treated septage on adjoining property posed no threat to cattle that could be documented, and that the permit did not override local zoning.

The AHC agreed with the Department and found Mr. Foster's allegations to be irrelevant as they are not within the scope of the Missouri Clean Water Law. They found the Department lawfully issued the permit, and recommended the Clean Water Commission affirm the Department's decision to issue the permit.

Recommended Action: Staff recommends the Commission adopt the Administrative Hearing Commission's recommended decision denying the appeal, and affirming the permit was lawfully issued. The Commission may 1) adopt the Administrative Hearing Commission's recommendation, 2) change findings of fact or conclusions of law or 3) vacate or modify the recommended decision. If the Commission either changes findings of fact or conclusions of law or vacates or modifies the recommended decision, it must state the specific reason(s) in writing for the change(s).

Suggested Motion Language: "I move that the Commission adopt the Administrative Hearing Commission's Recommended Decision."

List of Attachments:

- Administrative Hear Commission's Recommended Decision, Case No. 12-0959
CWC

Before the
Administrative Hearing Commission
State of Missouri



In re: CHARLES J. MALONE, M and M)
M PLUMBING AND LAND APPLICATION,)
PERMIT NO. MOG821196)

No. 12-0959 CWC

RECOMMENDED DECISION

We recommend that the Clean Water Commission (“CWC”) deny the appeal filed by Max W. Foster and affirm the decision of the Missouri Department of Natural Resources (“DNR”) granting a general operating permit to Charles J. Malone.

Procedure

On May 31, 2012, Foster filed this appeal. On July 16, 2012, we held a hearing. Foster and Malone appeared *pro se*. We consider Malone’s appearance and participation to be an intervention. Assistant Attorney General Jeremy Knee appeared for DNR. The matter became ready for our recommended decision on August 3, 2012, the last day for briefs to be filed.

Findings of Fact

1. At all relevant times, Foster was a resident of Ray County, Missouri, residing at 34507 W. 124th Street, Excelsior Springs, Missouri, on a 10-acre tract of land.
2. At all relevant times, Malone owned a 10-acre tract of land adjoining the north property line of Foster’s land.
3. At all relevant times, Foster raised cattle on his land.

4. At various times prior to May 3, 2012, Malone spread septage on his land and, at various times in the past, obtained permits from DNR to do so.

5. On May 3, 2012, DNR granted General Operating Permit number MOG821196 (“the Permit”) to Malone.

6. The Permit was a renewal of a prior permit DNR issued to Malone.

7. On May 14 and May 22, 2012, a DNR employee inspected Malone’s property to determine whether Malone was complying with the terms of the Permit. The employee concluded that Malone was complying with the Permit.

Conclusions of Law

We have jurisdiction to hear this appeal and to render a recommended decision.¹ The authority to render final decisions after hearing on appeals heard by us shall remain with DNR.² DNR has the burden of proof to show that the permit was lawfully issued.³ The standard of proof is a preponderance of the evidence.⁴

Evidentiary Issues

Foster sought to admit a notarized letter dated July 9, 2012 from Janet Aldrich addressed “to whom it may concern.”⁵ DNR objected to the letter on hearsay grounds. We admitted the exhibit subject to the hearsay objection. Aldrich’s letter states that she and her husband own the property directly north of Malone’s property and notes that Malone had dumped sewage on his (Malone’s) property in the past, had stopped for a time, but then had started again earlier in the year. The letter then goes on to express her concerns about Malone’s practice of dumping

¹Sections 621.250.1 and 640.013. Statutory citations are to RSMo Supp. 2011 unless otherwise noted.

²Section 621.250.1

³Section 640.012.

⁴See *Fujita v. Jeffries*, 714 S.W.2d 202, 206 (Mo. App., E.D. 1986) (standard of proof in Personnel Advisory Board case); *Missouri Real Estate Comm’n v. Berger*, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989) (standard of proof in professional licensure case).

⁵Petitioner’s Exhibit D.

sewage onto his property and the contamination the practice might cause, the odor emanating from Malone's property, the effect on the value of her property, and the fact that the property is not zoned for commercial use. She also expressed her belief that it was not right for Malone to dump sewage on his property and stated her belief that it was unhealthy for humans, livestock, and the environment. We overrule the objection, admit the letter, and discuss its contents below.

Was the Permit Lawfully Issued?

DNR's authority to issue permits such as the one it issued to Malone derives from § 644.051.3, which provides as follows:

Every proposed water contaminant or point source which, when constructed or installed or established, will be subject to any federal water pollution control act or sections 644.006 to 644.141 or regulations promulgated pursuant to the provisions of such act shall make application to the director for a permit at least thirty days prior to the initiation of construction or installation or establishment. Every water contaminant or point source in existence when regulations or sections 644.006 to 644.141 become effective shall make application to the director for a permit within sixty days after the regulations or sections 644.006 to 644.141 become effective, whichever shall be earlier. The director shall promptly investigate each application, which investigation shall include such hearings and notice, and consideration of such comments and recommendations as required by sections 644.006 to 644.141 and any federal water pollution control act. *If the director determines that the source meets or will meet the requirements of sections 644.006 to 644.141 and the regulations promulgated pursuant thereto, **the director shall issue a permit with such conditions as he or she deems necessary to ensure that the source will meet the requirements of sections 644.006 to 644.141 and any federal water pollution control act as it applies to sources in this state.*** If the director determines that the source does not meet or will not meet the requirements of either act and the regulations pursuant thereto, the director shall deny the permit pursuant to the applicable act and issue any notices required by sections 644.006 to 644.141 and any federal water pollution control act.

(Emphasis added.) Except when the context requires a contrary interpretation, the word “shall” connotes a mandatory duty.⁶ In other words, DNR must issue a permit when the requirements of §§ 644.006⁷ to 644.141⁸ are met. Then on appeal of that decision, our duty under § 640.012 is to determine whether the permit was lawfully issued.

DNR’s evidence on this issue was scant, consisting of the following exchange between DNR’s counsel and its only witness, Curtis Gateley:

Q. Now, does the land application of domestic septage as it's defined in the permit violate the Clean Water Law –

A. Does not.

Q. -- or its regulations?

A. It does not.⁹

Still, Gateley was the person who reviewed the documentation and made the decision to grant the renewed permit, and his was the only relevant testimony as to the permit received on the matter.

Other Issues Besides the Issuance of the Permit

Instead of trying the case on the basis set out by statute, the parties spent most of their time and effort setting forth other matters. As we set out above, DNR dedicated its case to a general overview of its permitting process and how it fit in with state and federal requirements, while Foster raised issues that had nothing to do with the permitting process. We discuss those issues here.

⁶*State ex rel. City of Blue Springs v. Rice*, 853 S.W.2d 918, 920 (Mo. banc 1993).

⁷RSMo 2000.

⁸*Id.*

⁹Tr. 26.

Zoning Ordinances

Foster's testimony and Aldrich's letter complain that Malone is violating county zoning ordinances by dumping septage on his property. That may be, but even had Foster established what those laws said (and he did not), we could not enforce them. Our jurisdiction comes from the statutes alone,¹⁰ and we have no jurisdiction to enforce county zoning laws. Other entities, however, have such enforcement powers, and any such claims should be pursued in those proper venues.

Foster's Claims that Malone's Actions Harmed his Cattle

Foster alleged in both his complaint and at the hearing that the materials Malone dumped on his land were making their way onto Foster's property and were damaging the hooves of his cattle. As with the zoning ordinance, this fact, even if true, is irrelevant to the issue of whether the Permit was lawfully issued.

DNR Inspections of Malone's Property after Issuance of the Permit

On May 14 and May 22, 2012, a DNR employee inspected Malone's property to determine Malone's compliance with the Permit. On both occasions, the employee concluded that Malone was complying with the terms of the Permit. We consider this information, however, to be irrelevant to the issue of whether DNR lawfully issued the Permit.

General Issues of Equity

Aldrich's letter makes explicit what Foster's complaint says obliquely – that it is not right that Malone be allowed to dump septage directly onto the surface of his land. But questions like that, which go outside the narrow confines of the law, are called questions of equity, and as an administrative agency, we have no authority to apply the doctrines of equity.¹¹ Just as with

¹⁰*State Bd. of Regis'n for the Healing Arts v. Masters*, 512 S.W.2d 150, 161 (Mo. App., K.C.D. 1974).

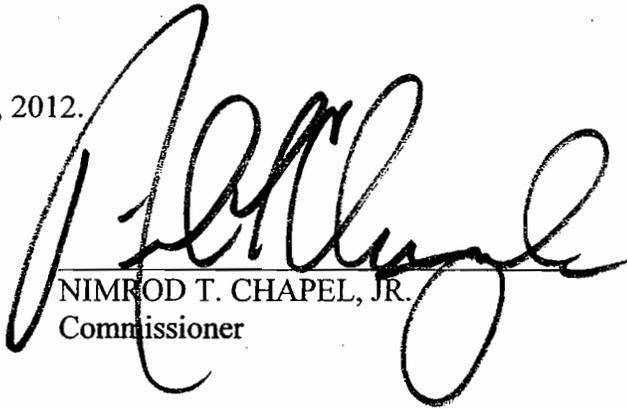
¹¹*Soars v. Soars-Lovelace, Inc.*, 142 S.W.2d 866, 871 (Mo. 1940).

the county zoning ordinances, there are courts that have that authority. In this proceeding, we only have the power to find whether DNR lawfully issued the Permit.

Summary

Based on the foregoing, we conclude that DNR proved that the Permit was lawfully issued. We recommend that the CWC affirm DNR's decision to grant a general operating permit to Malone.

SO RECOMMENDED on August 7, 2012.



NIMROD T. CHAPEL, JR.
Commissioner