



**MINUTES OF THE
MISSOURI CLEAN WATER COMMISSION MEETING
Lewis and Clark State Office Building
1101 Riverside Drive
Jefferson City, Missouri**

April 2, 2020

Present via Telephone

Ashley McCarty, Chair, Missouri Clean Water Commission
Patricia Thomas, Missouri Clean Water Commission
Stan Coday, Missouri Clean Water Commission
John Reece, Missouri Clean Water Commission
Allen Rowland, Missouri Clean Water Commission
Neal Bredehoeft, Missouri Clean Water Commission
Tim Duggan, Legal Counsel, Missouri Clean Water Commission
Chris Wieberg, Director of Staff, Missouri Clean Water Commission
Krista Welschmeyer, Secretary, Missouri Clean Water Commission

Scott Adams, Missouri Department of Natural Resources, NERO
Bill Boland, EIERA
Matt Bond, Kansas City Water
Robert Brundage, Newman, Comley, and Ruth, Jefferson City, Missouri
David Carani, Metropolitan Sewer District, St. Louis, Missouri
Carol Comer, Missouri Department of Natural Resources, Jefferson City, Missouri
Kurtis Cooper, Missouri Department of Natural Resources, Jefferson City, Missouri
Eric Crawford, Missouri Public Utility Alliance
Jason Daniels, Stinson Leonard Street LLP
Aimee Davenport, Stinson Leonard Street LLP
Sharon Davenport, Missouri Department of Natural Resources, Jefferson City, Missouri
Joan Doerhoff, Missouri Department of Natural Resources, Jefferson City, Missouri
Peter Goode, Washington University, St. Louis, MO
Justina Gonzalez, EPA Region 7
Shane Graupman, Missouri Department of Natural Resources, Jefferson City, Missouri
Lacey Hirschvogel, Missouri Public Utility Alliance, Columbia, Missouri
John Hoke, Missouri Department of Natural Resources, Jefferson City, Missouri
Jay Hoskins, Metropolitan Sewer District, St. Louis, Missouri
Hannah Humphrey, Missouri Department of Natural Resources, Jefferson City, Missouri
Steve Jeffries, Jeffery Law Group, LLC

Ross Kaplan, Missouri Attorney General's Office
Michael Keaton, Missouri Department of Natural Resources, NERO
Rob Morrison, Barr Engineering
Ewell Lawson, Missouri Public Utility Alliance
Tracy Lichtenberg, Missouri American Water
Melissa Madden, EPA Region 7
Steven Mobb, Missouri Department of Natural Resources, NERO
Matt Moderson, Stinson Leonard Street LLP
Judy Morrison, Missouri Department of Natural Resources, Jefferson City, Missouri
Maggie O'Conner, Washington University, St. Louis, Missouri
Tonya Nicks, EPA Region 7
Kevin Perry, REGFORM, Jefferson City, Missouri
Amy Shields, EPA Region 7
Joel Reschly, Missouri Department of Natural Resources, Jefferson City, Missouri
Jared Schmalate, EPA Region 7
Kara Simon, Missouri Department of Natural Resources, Jefferson City, Missouri
Darrick Steen, Missouri Corn Growers/Soybean Association, Jefferson City, Missouri
Robert Voss, Missouri Department of Natural Resources, Jefferson City, Missouri
Sunny Welsley, EPA Region 7
Clayton Weems, Missouri Attorney General's Office
Debbie White, EPA Region 7
Gordon Wray, Missouri Department of Natural Resources, Jefferson City, Missouri

CALL TO ORDER

Chair McCarty called the meeting of the Missouri Clean Water Commission (CWC) to order on April 2, 2020, at 10:22 a.m.

Approval of Minutes

Approval of the January 9, 2020 Open Session Minutes
Agenda Item B-1

Commissioner Rowland made a motion to approve the minutes as presented.
Commissioner Coday seconded the motion. The motion passed with a roll call vote:

Commissioner Bredehoeft: Yes
Commissioner Coday: Yes
Commissioner Reece: Yes
Commissioner Rowland: Yes
Vice Chair Thomas: Yes
Chair McCarty: Yes

Approval of the February 24, 2020 Open Session Minutes
Agenda Item B-2

Commissioner Reece made a motion to approve the minutes as presented. Commissioner Coday seconded the motion. The motion passed with a roll call vote:

Commissioner Coday: Yes
Commissioner Reece : Yes
Commissioner Rowland: Yes
Commissioner Bredehoeft: Yes
Vice Chair Thomas: Yes
Chair McCarty: Yes

Appeals and Variance Requests

Application for Award of Attorney’s Fees Regarding Appeal No. 18-0498
Agenda Item G1

The entire discussion of this item was recorded by a court reporter and are attached to these minutes.

Tim Duggan, Missouri Attorney General’s Office, gave an update on past activity of the appeal.

The applications for attorneys’ fees arise from two separate appeals from the Missouri state operating permit that was issued for what we call the Valley Oaks concentrated animal feeding operation for cattle.

Because the parties are different, the attorneys representing them are different in these applications, and the facts asserted in support are not entirely in common. Mr. Duggan recommended that the CWC look at them independently. He also suggested that the CWC appoint a hearing officer.

Ross Kaplan, Missouri Attorney General’s Office, presented the position of the Department and stated that it would make sense for the case go before the AHC, but cautioned that they AHC has a backlog of cases due to the backlog of medical marijuana cases.

Chair McCarty then turned the floor over to Steve Jeffrey, attorney for the petitioner.

Mr. Jeffrey stated that there is enough information in front of the CWC to make a decision on the merits of this case without the need of having to refer the matter to the AHC or outside hearing officer, which would just further delay the resolution of the case.

Vice Chair Thomas made a motion to refer Case 18-0498 to the AHC. Commissioner Rowland seconded the motion. The motion passed with a roll call vote:

Commissioner Rowland : Yes
Commissioner Coday: Yes
Commissioner Bredehoeft: Yes
Commissioner Reece: Yes
Vice Chair Thomas: Yes
Chair McCarty: Yes

Application for Award of Attorney’s Fees Regarding Appeal No. 18-0501
Agenda Item G2

The entire discussion of this item was recorded by a court reporter and are attached to these minutes.

Ross Kaplan, Missouri Attorney General’s Office, stated that as with the case 18-0498, this case, Case 18-0501, has a number of issues of fact and law that need to be hashed through. In addition to that, this particular matter may also require some amount of discovery, whether that be depositions or requests for production that could take a little time.

Aimee Davenport, attorney for the petitioners, then presented to the CWC. She clarified who her clients are, and who the parties seeking fees are. Ms. Davenport pointed out that this case is limited to the request for attorney's fees under Chapter 536 and whether or not those attorney's fees were substantially justified. Ms. Davenport asked that the CWC streamline this process, and use the records before it.

Commissioner Rowland made a motion to refer Case 18-0501 to the AHC with the amendment that it be heard separately from case 18-0498. Commissioner Coday seconded the motion. The motion passed with a roll call vote:

Commissioner Coday: Yes
Commissioner Bredehoeft: Yes
Commissioner Reece: Yes
Commissioner Rowland: Yes
Vice Chair Thomas: Yes
Chair McCarty: Yes

DNR Reports and Updates

Director's Update **Agenda Item C-1**

Chris Wieberg, Director, Water Protection Program, reported the following to the Commission:

- Over 95% of WPP staff are teleworking. Access to the network is increasing and progressing each day.
- The Lewis and Clark State Office Building is currently closed to public and any staff who are non-essential.
- Inspections and non-essential field work have paused for the time being. Emergency work such as spills and fish kills are continuing.
- Future meetings in the next several months are being held virtually or via teleconference.
- A Regulatory Relief memorandum has been posted to the Department's web page.
- The Department will continue to work with entities to ensure compliance while working through challenges.
- Staff members have their office telephones forwarded and are still receiving phone calls. Response times may be reduced, but we are trying to keep things as close to business as usual as we can.
- The April 21, 2020, Clean Water Fee meeting may be cancelled due to the pandemic.

Update on the Clean Water State Revolving Fund's Regionalization Incentive Grant **Agenda Item C-2**

Kurtis Cooper, Financial Assistance Center, reported the following to the Commission:

The Regionalization Incentive grant was developed to incentivize municipalities to connect small public or private systems that are permitted or should be permitted by the Department. The grant is intended to incentivize interconnection where it would otherwise not be likely.

The grant will covers 100% eligible of costs. Eligible costs include legal, planning, designing, construction, land acquisition or easements, and closure cost of the decommissioned system(s) if it is a public system.

Projects must be cost effective to be eligible for the grant. Projects were considered not cost effective and not eligible for funding when the total cost associated with connecting the smaller system are greater than 110% of the cost to repair, replace or upgrade the wastewater treatment facility serving that system.

The Department opened the grant to application from October 31, 2019, to December 31, 2019. We received 19 applications from the following:

East Prairie
Holt Summit

Boone Co. RSD x4
Eldon

Winfield
Van Buren

Linn	Jefferson Co. PSD	Salem
Moberly	Milan	
Potosi	Purdy	

The applications were evaluated and scored using a two-step system. First the applications were placed into one of four eligibility categories based on if the system to be connected is in enforcement or not and if the system is located outside or inside the applicant’s political boundary.

Then applications were then given priority points based on the receiving stream characteristics, need for regionalization, readiness to proceed, and financial need based the facility being connected.

Of the 16 applications received 7 were evaluated as eligible for the grant. There is enough funding to fund all 7 projects.

East Prairie	\$62,500 for development of a FP
Holt Summit	\$1,017,918 for Design and Construction
Linn	\$607,570 for Design and Construction
Moberly	\$954,208 for Design and Construction
Potosi	\$363,700 for Design and Construction
Van Buren	\$981,050 for Design and Construction
Winfield	\$62,500 for development of a FP

Total grant funds to be awarded \$4,049,446

The Department will be offering the Clean Water State Revolving Fund Regionalization Incentive Grant again this year. Applications will be accepted from October 31, 2020, to January 31, 2021.

This discussion on the Regionalization Incentive Grant was for informational purposes only.

Update on the Clean Water State Revolving Fund’s (SRF) Non profit Assistance to Small and Medium Publicly Owned Treatment Works Grant
Agenda Item C-2

Hannah Humphrey, Financial Assistance Center, reported the following to the Commission:

The program wanted to provide you with an informational update on the Clean Water SRF grant to the Missouri Public Utility Alliance (MPUA) Resource Services Corporation that was the topic of discussion at several of your 2018 commission meetings.

In August of 2018 the MPUA- Resource Services Corporation submitted a Clean Water SRF application requesting \$500,000 in grant to provide assistance and to the owners and operators of small and medium sized publicly owned treatment works.

This type of funding – to a nonprofit to assist small and medium sized publicly owned treatment works - was authorized and amendment to the Clean Water Act in 2014. This authority has not been used by any other state SRF program to provide such assistance.

The Department and the MPUA- Resource Services Corporation worked together to negotiate a scope of work that focused primarily on planning assistance to help communities get ready for SRF projects. Since this is the first grant of its kind to be awarded for the purpose in the United States we consider it a pilot, and we made the award at a reduced amount, for \$300,000 on January 18, 2019, but reserved another \$200,000 in the FFY 2019 Intended Use Plan for similar awards. Since then the Department has been in close communication as the MPUA Resource Services Corporation has brought projects forward for the Department's approval, and by the end of 2019 much of the \$300,000 was committed to be spent on planning efforts.

No other organizations applied for the reserved \$200,000 dollars, so when the MPUA Resource Services Corporation applied for a grant amendment in December 2019, we amended the grant to provide an additional \$200,000 on March 4, 2020.

Lacey Hirschvogel, MPUA Environmental & Public Policy Manager with MPUA reported the following to the Commission:

MPUA Resource Services Corporation is a nonprofit organization recognized as a 501(c)(3) for charitable purposes, the promotion of social welfare and compliance assistance by providing resources related to the operation of utilities. The Foundation of MPUA-RSC is to Serve Municipal Utilities.

With the grant, MPUA RSC is assisting the following cities with projects:

The City of Lamar is being assisted with a sludge management plan, rate analysis using the rate assist calculator, SCADA system troubleshooting and consultation for upgrades.

The City of Shelbina is being assisted with the planning and execution of community workshops to inform community priorities for integrated plan, including a community workshop and a meeting with DNR.

The City of St. James is being assisted with Voluntary Order on Consent for outfall #002 removal, a Small Community Engineering Assistance Program grant application, and WWTF peak flow bypass treatment alternatives analysis.

The City of East Prairie is being assisted with developing a Capital Improvements Plan, A Regionalization Incentive Grant application, Bond Election Education and possibly with Variance Development.

Kimberling City is being assisted with Asset Management Plan on critical infrastructure, data assessment, energy audit on infrastructure, review bond and rate covenants in place for existing debt obligations

The Village of Caledonia is being assisted on a Multiple Discharger Variance application, and a SCEAP grant application for Inflow and Infiltration.

MPUA RSC is also working on an Asset Management Toolkit that will assist small- and medium-sized communities in the development of an asset management plan that is geared toward their collection system.

Also, MPUA RSC is creating a Bond Election Education Toolkit that will provide readily available education materials for Missouri communities to use during a bond election.

Public Hearing

Recommended for Adoption and Actions to be Voted On

Proposed 2020 303(d) Impaired Water List
Agenda Item E1

Robert Voss, Monitoring and Assessment Unit within the Water Protection Program reported the following to the Commission:

The proposed 303(d) list was posted for public notice from November 15, 2019, through February 20, 2020. The Department held two public availability meetings on December 10, 2019, and January 14, 2020. The Department received 6 written comments. The Department thanks everyone who participated in the meetings and those that provided comments. All public comments along with Department responses are available on the Department's website.

A summary of specific updates to the draft 303(d) list that followed the public comment period are provided in the commission blue packet and the Department's response to comments.

Overall, the 303(d) list being presented today has a total of 481 water body pollutant pairs on the proposed list, 61 are new to the list in 2020, and the remaining 420 water body pollutant pairs are being retained from the 2018 303(d) list. A total of 44 waterbody and pollutant pairs from the 2018 List are being proposed for de-listing. Of the 44 waterbody and pollutant pairs proposed for de-listing, 29 now meet water quality standards, 3 were originally listed in error, 3 are a result of a revised assessment method, and 9 are due to a total maximum daily load being developed and approved by EPA.

Upon the Commission's approval, the proposed 2020 303(d) list will be submitted to EPA Region 7 for their review and approval. During EPA's review process, they have the authority to add or remove waters from the list. Any changes they make will require a public comment period. The Department is asking for the Commission to approve the 2020 303(d) List as Proposed.

Commissioner Rowland made a motion to adopt the order of rulemaking for 10 CSR 20-6.020 Public Participation, Hearings, and Notice to Governmental Agencies as presented. Commissioner Reece seconded the motion. The motion passed with a roll call vote:

Commissioner Reece: Yes
Commissioner Bredehoeft: Yes
Commissioner Rowland: Yes
Commissioner Coday: Yes
Vice Chair Thomas: Yes
Chair McCarty: Yes

Fiscal Year 2020 Clean Water State Revolving Fund Intended Use Plan Amendment
Agenda Item E2

Joan Doerhoff, Financial Assistance Center, reported the following to the Commission:

The city of Kansas City is listed on the Fundable List for a loan in the amount of \$80,000,000. The city had originally planned to utilize an additional \$20,000,000 from other sources for the city's project estimated at \$100 million. Since the city's application, the project estimate has increased to \$160 million. The city's bonding capacity is currently only \$100,000,000, so the city will seek approval from the voters for an additional \$60,000,000 in bonds. The city has submitted a revised application requesting \$160,000,000 in SRF funds for the entire project. The Department is increasing the amount listed on the FY 2020 Fundable List to \$100,000,000 to reflect the city's bonding capacity, and is including the remainder of \$60,000,000, on the FY 2020 Contingency List until bonds are authorized for the entire project.

The city of Springfield has recently submitted an application requesting funds in the amount of \$18,375,000. The Department is placing the City of Springfield on the FY 2020 Large Metropolitan Areas and Districts Fundable List since the Department has deemed the facility plan as acceptable for the purpose of meeting the readiness to proceed criteria.

Finally, the Department is adding the seven eligible Clean Water State Revolving Fund Regionalization Incentive Grant applicants that Mr. Cooper described in his earlier presentation, to the Regionalization Incentive Grant lists on pages 7 and 8 of the FY 2020 IUP.

Communities on the Fundable List are: city of Moberly for \$954,208; city of Winfield for \$62,500, and city of East Prairie for \$62,500. Communities on the Contingency List are: city of Van Buren for \$981,050, city of Linn for \$607,570, city of Holts Summit for \$1,017,918, and city of Potosi for \$363,700.

The total requested amount of grants for communities on the fundable list is \$1,079,208 and the total grant funds on the contingency list is \$2,970,238.

The Department recommends the Missouri Clean Water Commission approve these changes to the Fiscal Year 2020 Clean Water State Revolving Fund Intended Use Plan as proposed.

Commissioner Coday made a motion to approve the amendment to the Fiscal Year 2020 Clean Water State Revolving Fund Intended Use Plan as proposed. Commissioner Reece seconded the motion. The motion passed with a roll call vote:

Commissioner Bredehoeft: Yes
Commissioner Reece: Yes
Commissioner Rowland: Yes
Commissioner Coday: Yes
Vice Chair Thomas: Yes
Chair McCarty: Yes

City of Spickard Small Borrower Loan
Agenda Item E3

Joan Doerhoff, Financial Assistance Center, reported the following to the Commission:

The city of Spickard’s wastewater treatment system consists of a three-cell lagoon that discharges to a tributary of Weldon River. One of the city’s pump stations is located near a tributary and there is a supporting sewer main, which runs underneath the tributary. In February 2020 the city applied for a Small Borrower Loan of \$100,000 to replace and relocate the pump station and sewer main. These improvements will prevent exposure of the sewer main after flooding events and allow the collection system to work more efficiently. The proposed project also includes installation of an ultraviolet disinfection unit at the city’s wastewater treatment facility, which will enable the city to comply with the *E. coli* limits that are currently in effect. The total project cost is estimate is \$355,700. The city anticipates using other funds for the remaining balance and any cost overruns.

If the commission approves allocation of funds for this project, staff will evaluate the city’s proposed user rates to ensure the city has sufficient revenue to pay back the small borrower loan prior to closing on the loan.

The Department recommends the commission approve the allocation of funding in the amount of \$100,000 for a small borrower loan for the city of Spickard.

Commissioner Rowland made a motion to approve the allocation of funding in the amount of \$100,000 for a Small Borrower Loan for the City of Spickard. Commissioner Reece seconded the motion. The motion passed with a roll call vote:

Commissioner Reece: Yes
Commissioner Rowland: Yes
Commissioner Bredehoeft: Yes
Commissioner Coday: Yes

Vice Chair Thomas: Yes
Chair McCarty: Yes

New Business

Open Comment Session

Future Meeting Dates

Missouri Clean Water Commission Meetings
Agenda Item I

- July 8, 2020, Elm Street Conference Center
- October 7, 2020, Lewis and Clark State Office Building
- January 7, 2021, Lewis and Clark State Office Building
- April 8, 2021, Lewis and Clark State Office Building
- August 9, 2021, Lewis and Clark State Office Building
- October 12, 2021, Lewis and Clark State Office Building

Closed Session

There was no closed session during this Clean Water Commission meeting.

Meeting Adjournment

Chair McCarty adjourned the open meeting at 12:43 p.m.

For more information contact:

Krista Welschmeyer, Commission Secretary, Missouri Clean Water Commission
Water Protection Program, P.O. Box 176, Jefferson City, MO 65102
Phone: 573-751-6721
Fax: 573-526-1146
E-mail: krista.welschmeyer@dnr.mo.gov

Respectfully Submitted,

Chris Wieberg

Chris Wieberg
Director of Staff

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BEFORE THE DEPARTMENT OF NATURAL RESOURCES

MISSOURI CLEAN WATER COMMISSION
VIA TELEPHONE OF ALL PARTIES
1101 RIVERSIDE DRIVE
JEFFERSON CITY, MISSOURI 65101

APRIL 2nd, 2020

1 A P P E A R A N C E

- 2 MS. ASHLEY McCARTY, Chair
MS. PATRICIA THOMAS, Vice Chair
3 MR. ALLEN ROWLAND, Member
MR. STAN CODAY, Member
4 MR. JOHN REECE, Member
MR. JOHN BREDEHOEFT, Member
5 MR. DUGGAN, Legal Counsel

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(No exhibits marked.)

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Court Reporter:
20 Joann Renee Richardson
Alaris Litigation Services
21 711 North Eleventh Street
St. Louis, MO 63101
22 (314) 644-2191
1-800-280-3376

1 PROCEEDINGS:

2 CHAIRMAN McCARTY: First, I will turn the
3 floor over to Tim Duggan, the commission legal
4 counsel from the attorney general's office, to
5 introduce this topic to us this morning.

6 MR. DUGGAN: This is Tim Duggan.
7 Yesterday I prepared a memorandum, which I sent to
8 all the members of the commission, which is
9 essentially a summary of what this matter concerns.
10 You have under -- excuse me. You have under Item G
11 two different applications for reasonable fees and
12 expenses. These arise out of two separate appeals
13 from the Missouri state operating permit that was
14 issued for what we call the Valley Oaks
15 concentrated animal feeding operation for cattle.

16 The pieces were combined at times, for
17 example, for the hearings in front of the
18 Administrative Hearing Commission, but the
19 Administrative Hearing Commission issued separate
20 decisions.

21 The commission, the Clean Water
22 Commission, also heard argument for and against the
23 recommended decisions of the Administrative Hearing
24 Commission in one meeting, but then issued separate
25 resolutions approving the decisions that were

1 recommended by the Administrative Hearing
2 Commission.

3 The matter then went up to the Court of
4 Appeals, which is the appropriate forum for
5 judicial review of a Clean Water Commission
6 decision. The appeals were separate. The briefing
7 was separate.

8 But then the Court of Appeals decided to
9 combine them for purposes of arguments and also the
10 written decision that they issued affirming the
11 Clean Water Commission's adoption of the
12 Administrative Hearing Commission recommended
13 decisions in both cases.

14 Because the parties are different, the
15 attorneys representing them are different in these
16 applications, and the facts asserted in support are
17 not entirely in common. I do recommend that the
18 Clean Water Commission look at them independently.
19 I also suggest that the Commission appoint a
20 hearing officer.

21 My memo explains that you have different
22 options for how you would proceed, but I think
23 after you hear from the attorneys for the
24 parties -- and I think you should take them one at
25 a time -- you will find that there are disputed

1 facts that probably will require for resolution
2 some kind of a hearing that is on the record.

3 The only way around that really is for
4 the parties to stipulate as to all the essential
5 facts so that a hearing is not necessary, but they
6 all have to agree on what the facts are. And
7 otherwise there will be, I suspect, disagreements
8 among the attorneys about the legal principles that
9 apply to these particular applications.

10 So this is not the day to make any
11 decisions about the merits of these cases. This is
12 the day simply to confer with attorneys and decide
13 what process makes the most sense going forward.
14 And, again, I recommend you take them up
15 individually.

16 Did all the commissioners have an
17 opportunity to take a look at the memo that I sent
18 yesterday?

19 THE COMMISSIONERS: Yes.

20 MR. DUGGAN: Are there any questions
21 based on the process?

22 CHAIRMAN McCARTY: This is Ashley. I
23 just had a question for you, Tim. It looks like
24 this Commission has at least one decision on if we
25 appoint a Commission member as a hearing officer or

1 if we ask the AG to take up this matter. Is that
2 one of the decisions before us this morning?

3 MR. DUGGAN: Yes. Or you can hire an
4 attorney to serve as hearing officer, as opposed to
5 the Administrative Hearing Commission. That is
6 another option as well. Also, the commission can
7 hear the cases as a commission.

8 If you were to go that route, I would
9 recommend that you do it separate and apart from
10 one of your regular meetings because these things
11 can take some time and it's logistically much more
12 complicated to do it that way. I think it's easier
13 if you have a single hearing officer. The HC, as I
14 indicated in my memo, is used to doing these kinds
15 of hearings.

16 If you go with an attorney, a
17 Missouri-licensed attorney, I believe the Office of
18 Administration has a list of those attorneys who
19 have contracts with the state to serve as hearing
20 officers for various agencies.

21 And we would have to take a look at that
22 list and, I think, Chairman McCarty, you would be
23 able to appoint -- assuming the commission today
24 agrees, I think the chairman would have the
25 discretion to choose the hearing officer off that

1 list.

2 And if that occurs, there should be a
3 statewide contract in place for that hearing
4 officer. And the Department of Natural Resources
5 would set that up.

6 And the state agency would absorb the
7 cost of the hearing officer's time, the court
8 reporter services, and make arrangements for any
9 facilities where the hearing would have to be held;
10 be it at a hotel or a convention center or
11 something like that, or someplace large enough to
12 accommodate anybody who would want to observe that
13 kind of hearing. So that's how that would work.

14 The HC already has hearing space if
15 they're the hearing officer. And if a member of
16 the commission serves as hearing officer, you have
17 the same issues with deciding where it's going to
18 be.

19 So making sure there's enough capacity
20 for anyone who wants to participate or observe as
21 audience, if you will, and they would have to make
22 arrangements for the court reporter and any costs
23 associated with renting the facility, et cetera.
24 So those are your basic options.

25 COMMISSIONER ROWLAND: This is Allen

1 Rowland. Tim, if one of us decides to be the
2 hearing officer, what kind of duties would we have
3 in this?

4 MR. DUGGAN: Well, Commissioner Rowland,
5 you participated in the case when it was first in
6 front of you, correct?

7 COMMISSIONER ROWLAND: Yes.

8 MR. DUGGAN: Did you have the opportunity
9 to read the transcript of the hearing that was in
10 front of the administrative hearing commissioner?

11 COMMISSIONER ROWLAND: Yes.

12 MR. DUGGAN: The role of a clean water
13 commissioner would be just like that. You would
14 preside. You would swear in the witnesses. You
15 would allow the attorneys to examine the witnesses.
16 You would have to rule on objections that the
17 attorneys may pose to questions the other side is
18 asking. You would have to allow cross-examination
19 of the witnesses. You would have to make decisions
20 regarding admitting exhibits and so forth.

21 Now, since none of the members of the
22 commission are attorneys, I would be happy to sit
23 with that commissioner during the hearing and
24 assist with things like that, make sure the
25 commissioner is comfortable with the process.

1 Some commissioners I've worked with are
2 very, very good and never call on an attorney to
3 assist them with, well, should I overrule that
4 objection or sustain it.

5 But other commissioners might not be
6 comfortable without some kind of assistance. And I
7 would do that. And, of course, I have to provide
8 neutrality. I can't be favoring anybody in the
9 hearing.

10 VICE CHAIR THOMAS: Tim, this is Pat
11 Thomas. Do we have precedent on this type of
12 thing? What has the commission prior to us done?

13 MR. DUGGAN: You do not have precedent,
14 to my knowledge, with respect to attorney's fees
15 applications. You do have precedent -- past
16 commissions have had hearings on variances that are
17 requested, for example. Some of those have gone to
18 some kind of a hearing process. Typically if it's
19 that sort of thing, it can be done in the context
20 of a commission meeting and the entire commission
21 simply hears the testimony, witnesses that are
22 presented, and so forth.

23 Other commissions I've worked with over
24 the years have done various things. Typically if
25 they don't go with the HC, for example, they'll

1 either hire an attorney or they'll appoint one of
2 their own members to be a hearing officer.

3 And in those situations, the transcript
4 you wind up with looks just like what you saw in
5 the Administrative Hearing Commission record here.
6 That's kind of how it proceeds. And I've seen
7 commissions do it both ways.

8 COMMISSIONER REECE: Tim, John Reece.
9 Tim, I don't feel comfortable being a hearing
10 officer in a situation like this and I would prefer
11 to have a representative from the AHC lead that
12 hearing because they are lawyers, they're legal
13 counsels, and they would be more qualified to
14 conduct that hearing rather than myself as a
15 commissioner.

16 MR. DUGGAN: This is Tim Duggan.
17 Commissioner Reece, in response to that, I would
18 point out that since the applications were filed,
19 the attorney general's office has appointed Ross
20 Kaplan and Clayton Weems to represent the
21 Department as a party in these applications and
22 they have filed, in each of these cases, a motion
23 for the appointment of a hearing officer.

24 So what I would suggest, when you get to
25 the agenda items after I've answered all of your

1 questions, that is a motion you may want to take up
2 today as to whether to appoint a hearing officer or
3 not. And then, you know, that would be done by
4 motion, second, and a vote of the commissioners.

5 And then at that point, depending on how
6 it goes, a follow-up motion might be how to handle
7 the appointment of a hearing officer. But at this
8 point, I'm just answering questions and the
9 decisions you make will follow this conversation.

10 COMMISSIONER CODAY: Okay. Tim, this is
11 Stan Coday.

12 MR. DUGGAN: Yes.

13 COMMISSIONER CODAY: Am I correct in
14 assuming that as far -- if we use the AHC, we're
15 not looking for a decision from them such as was
16 given when we first started this process, but this
17 is simply to provide information that we can use in
18 the future to make our decision; is that correct?

19 MR. DUGGAN: This is Tim Duggan again.
20 This would look very similar to the hearing that
21 was on merits of the initial appeals. That is to
22 say, it would be its own contested case. So the
23 Administrative Hearing Commission would do the same
24 process that they did before.

25 They would hold the hearing, take in the

1 evidence, make a record, and then they would indeed
2 prepare a recommended decision with findings of
3 fact and conclusions of law and an order or
4 decision at the end of those findings and
5 conclusions. And all of that would be packaged up
6 and sent to the Clean Water Commission for your
7 review.

8 And I think at that point you would
9 follow the same process you did before. You would
10 put the recommended decisions on the agenda of a
11 regular meeting and give the attorneys an
12 opportunity to make presentations either for or
13 against or suggesting to modify the recommended
14 decision and then you would proceed to decide
15 whether to adopt it or do something different.

16 COMMISSIONER CODAY: Thank you.

17 CHAIRMAN McCARTY: This is Commissioner
18 McCarty. Any other questions or comments for Tim
19 at this juncture?

20 Okay. Tim, next order of business then,
21 should we invite the parties of each separate
22 appeal to make comments? Should we deal with the
23 motions procedurally? What is your recommendation?

24 MR. DUGGAN: I think you should take them
25 up one at a time. And in each case there is a

1 motion pending, so that would -- it would be
2 logical to ask Mr. Kaplan or Mr. Weems to present
3 that motion and then let the other attorneys
4 respond to the motion.

5 I think that would be the most orderly
6 way to proceed because that at least establishes
7 that the first order of business for each case is
8 how do we want to move forward, with a hearing
9 officer or without a hearing officer, et cetera,
10 and the commission can then make that decision on
11 the motion.

12 There's really not much that needs to be
13 addressed. In fact, I don't think you need to
14 address much of anything at all on the merit of the
15 applications if they go to a hearing officer
16 anyway. So that's how I would suggest proceeding.

17 CHAIRMAN McCARTY: Thank you. Okay. So
18 then with that, Agenda Item G-1, the first appeal
19 before us, is Number 18-0498 and I would invite
20 Mr. Kaplan or the representative of the attorney
21 general's office to present your motion on that
22 matter.

23 MR. KAPLAN: Thank you, Ms. McCarty. For
24 the record, this is Ross Kaplan representing the
25 Department of Natural Resources. I thank you for

1 the opportunity to present the motion.

2 At this time, with respect to Case No.
3 18-0498, the petitioners have submitted a petition
4 for an amount of money of approximately \$33,934 in
5 attorney's fees. I note for the record that the
6 motion listed it as almost \$68,000. That was a
7 mathematical error on my part. Unfortunately, I
8 did not go to math school, so please accept my
9 apologies for that.

10 With respect to the petition that's been
11 filed, there are numerous issues, both in law and
12 in fact, that need to be addressed. This starts
13 with whether or not the Department in and of
14 itself, in making the decision to issue the
15 license, was substantially justified in their
16 actions.

17 It's the Department's position and I
18 believe that it will be the position of the Clean
19 Water Commission that what we did was substantially
20 justified.

21 I would note that while we did not win
22 before the Administrative Hearing Commission or
23 before your commission, that is not the stance that
24 we would take and it is not the standard that you
25 look to to determine whether or not what the agency

1 did was substantially justified.

2 And so that would require going back
3 through and making arguments, again, both
4 dissecting the facts and looking to the law on the
5 matter. And so this is one of the reasons we filed
6 the motion in the first place. We thought that it
7 might be easier, rather trying to make the argument
8 to five different people, to make it to one person
9 who could then confer back with the other people.

10 Separate and apart from substantial
11 justification, there are matters ranging from how
12 much money in attorney's fees per hour Mr. Jeffery
13 may or may not be entitled to, how much of the
14 amount that he's claiming, whether it's before the
15 Administrative Hearing Commission, before the Clean
16 Water Commission, or before the Court of Appeals,
17 if he's entitled to all of that.

18 He brought eight counts to attack the
19 application and only won on three of them. So the
20 question also is raised, and needs to be further
21 disseminated and discussed and dissected, how much
22 should he be entitled to if he spent a great deal
23 of time on counts that he lost on and a relatively
24 small amount of time on counts that he won. All of
25 those things will take a certain amount of time.

1 Now, separate and apart from that, while
2 I certainly wouldn't want to suggest what sort of a
3 hearing officer you all might want to choose, it
4 would be our position that the appointment of any
5 of you as a single hearing officer would be more
6 than acceptable to us, or hiring a separate hearing
7 officer.

8 I think that it makes lot of sense to go
9 before the Administrative Hearing Commission. I
10 would caution, however, with respect to that, that
11 they are currently inundated with medical marijuana
12 cases and so I don't know what sort of priority
13 this sort of a case might take or how long it might
14 take. So for expediency purposes, I'd ask that you
15 would consider that. Thank you.

16 CHAIRMAN McCARTY: Thank you, Mr. Kaplan.
17 Can I ask a clarifying question?

18 MR. KAPLAN: Yes, ma'am.

19 CHAIRMAN McCARTY: You would encourage us
20 to consider the potential backlog at the AHC. Was
21 that your concluding remarks?

22 MR. KAPLAN: Yes, ma'am. They have -- I
23 believe they have approximately tripled, if not
24 quadrupled, the number of cases at this moment that
25 they normally have and it all relates to medical

1 marijuana.

2 So while I do believe that they would be
3 perfectly acceptable hearing officers and they
4 would certainly have a background in this sort of
5 thing, I'm not sure if they have the capacity at
6 this time. At the very least, it should be a
7 consideration.

8 CHAIRMAN McCARTY: Thank you.

9 VICE CHAIR THOMAS: This is Pat Thomas.
10 I have a question.

11 MR. KAPLAN: Yes, ma'am.

12 VICE CHAIR THOMAS: So, Mr. Kaplan, is
13 there some reason you feel this needs to be handled
14 expediently?

15 MR. KAPLAN: I don't personally feel that
16 way. I'm a civil defense attorney. I don't think
17 anything needs to be handled expediently. But I
18 think that a resolution to this matter -- it's been
19 going on since 2018 -- I think it's incumbent upon
20 us to try to be as expedient as possible.

21 CHAIRMAN McCARTY: Thank you. Any
22 questions for Mr. Kaplan, commissioners?

23 COMMISSIONER ROWLAND: Mr. Kaplan, this
24 is Allen Rowland.

25 MR. KAPLAN: Yes, sir.

1 COMMISSIONER ROWLAND: Would you say
2 again the amount, the actual amount instead of the
3 \$68,000?

4 MR. KAPLAN: Yes. It's approximately
5 \$33,934. There might have been some change also,
6 but I believe that was the number I called off at
7 the prayer.

8 COMMISSIONER ROWLAND: Okay. Thank you.

9 MR. KAPLAN: Yes, sir.

10 CHAIRMAN McCARTY: Any other questions?

11 Thank you, Mr. Kaplan.

12 Mr. Jeffery, would you like to address us
13 as well.

14 MR. JEFFERY: Sure. Thank you, Madam
15 Chairman. This is Steve Jeffery, for the record.
16 First of all, in these trying times I'm sure that
17 all of us are being safe and practicing social
18 distancing and understanding that sometimes that
19 creates these technical glitches, like the password
20 for the call. But I know that we all -- working
21 together, we can all get through all this. That
22 was my introductory remark.

23 Anyway, I think -- I don't know how many
24 of the commissioners have had the opportunity to
25 review the second amended application that was

1 filed in Case -- I'll call it 498. Referring back
2 to some of the comments that the attorney general's
3 office just made concerning the issue, whether or
4 not the DNR permitting decision was justified or
5 not in the first place, a copy of the opinion of
6 the Missouri Court of Appeals, Western District, is
7 attached to a copy of the second amended
8 application.

9 And towards the back -- the end of that
10 opinion, they specifically discuss that issue and
11 it was decided adversely to the department. So
12 notwithstanding the suggestion from the attorney
13 general's office, that legal issue has already been
14 addressed.

15 The other two issues that the attorney
16 general's office said needed to be addressed are
17 the hourly rate that was charged for this work as
18 well as whether or not the number of hours charged
19 were reasonable or not. Again, referring back to
20 the second amended application, it contains three
21 affidavits from three well-seasoned,
22 well-experienced attorneys.

23 One of the attorneys is Rachel Foley.
24 She lives in the Lone Jack area. She's familiar
25 with the Lone Jack Neighbors group. In her

1 affidavit she discusses how they searched and
2 searched the Kansas City area, could not find an
3 attorney who was willing to take this case for a
4 reasonable rate.

5 A second affidavit is provided by Gene
6 Schmittgens. A lot of people -- a lot of the
7 attorneys on the call may know Gene. He's well
8 experienced. He's currently practicing law with a
9 firm in Kansas City.

10 And, significantly, the third affidavit,
11 which confirms that, you know, the rates charged on
12 this case are reasonable and the hours are
13 reasonable, is Roger Walker. Roger Walker is well
14 known by members of the commission. He's addressed
15 the commission on many issues before.

16 And he's the president of REGFORM.
17 REGFORM is a well-known industrial organization in
18 Missouri and I would strongly suggest that his
19 opinions should carry a lot of weight with the
20 commissioners.

21 So for any members of the commission who
22 have not had the chance to review the affidavits,
23 which are attached to the second amended
24 application, I would strongly encourage them to do
25 so before voting to further continue and further

1 delay the resolution of this matter, which in our
2 view is ultimately just going to end up costing
3 Missouri taxpayers even more money as we continue
4 to devote more time and resources to this endeavor.

5 In conclusion, I would say that there are
6 no factual issues. The only legal questions
7 concerning hourly rates and whether the number of
8 hours are reasonable are addressed in the
9 affidavits which have been submitted.

10 Significantly, the attorney general's
11 office hasn't submitted anything contradicting or
12 opposing any of the points which are addressed by
13 either Ms. Foley, Mr. Schmittgens, or Mr. Walker.

14 So in that context, again, it's just our
15 view that there's enough information in front of
16 the commission to make a decision on the merits of
17 this without the need of having to refer the matter
18 to the AHC or outside hearing officer, which again
19 is just going to further delay the resolution of
20 this.

21 And I'd be glad to answer any questions
22 that the commissioners might have.

23 CHAIRMAN McCARTY: Thank you,
24 Mr. Jeffery.

25 Commissioners, any questions?

1 Okay. Hearing none, thank you,
2 Mr. Jeffery.

3 MR. JEFFERY: Thank you.

4 CHAIRMAN McCARTY: Okay. Commissioners,
5 it seems we need to take some action on this appeal
6 before moving into consideration of the next. I
7 open the floor for discussion.

8 CHAIRMAN REECE: Ashley, John Reece. The
9 hourly rate that was given in the supporting
10 documentation for this 18-0498 indicates \$175 per
11 hour was a fair rate; however, I have seen some
12 correspondence from the AHC which stated that \$75
13 per hour was a fair rate.

14 Tim, could you comment on that?

15 MR. DUGGAN: That is the legal question.
16 The \$75-an-hour rate is set by the statute and it
17 is a sort of cap on the attorney's fee hourly rate,
18 unless a special factor is found by the commission
19 to justify paying a higher rate than that.

20 And Steve Jeffery has indicated that he
21 feels those affidavits establish the special
22 factor, but my sense is that Ross Kaplan may want
23 to contest that at a hearing.

24 It's true, as far as I recall looking at
25 the documents filed thus far, that Ross didn't

1 expressly address those affidavits. But that is
2 not to say that he would not have testimony if this
3 thing goes to some kind of a hearing to discuss the
4 merits of those affidavits. That concludes my
5 observations.

6 MR. KAPLAN: This is Ross Kaplan. Could
7 I have the opportunity to address the affidavits
8 for one moment?

9 CHAIRMAN McCARTY: Yes.

10 MR. KAPLAN: I would point out that, in
11 fact, in our answer to his petition, we objected as
12 self-serving hearsay to each of those affidavits
13 and they have not yet been subject to
14 cross-examination, which would be one of the
15 purposes of having an evidentiary hearing.

16 At the moment those statements are just
17 spatial. They have not been subject to
18 cross-examination, which is the vast majority of
19 the point of adversary proceedings in the first
20 place, to get to the actual truth of the matter.

21 Separately, while I don't want to
22 conflate the two cases, I would note that there
23 were other attorneys that were available at \$75 an
24 hour, because that would be the rate of the
25 attorney in Case No. 18-0501. Thank you.

1 CHAIRMAN McCARTY: Thank you, Mr. Kaplan.
2 Okay. So in my opinion commissioners --
3 this is Commissioner McCarty -- rather than
4 standing hourly rate and number of hours, in my
5 opinion there's a threshold question before us of
6 substantial justification of DNR's decision.

7 And I do believe, given the precedent of
8 this commission's decision being further challenged
9 through the legal process, that it is wise of us to
10 do due diligence and build a strong record that
11 will support the decision that the commission
12 settles upon after deliberation.

13 And so while we have a large record
14 before us of the previous case, of the underlying,
15 you know, Valley Oaks case, we really seem to be
16 lacking precedent in award of attorney's fees, and
17 there's a lot of findings of fact and conclusions
18 of law that have not been drawn out from our
19 perspective on this decision.

20 So I would certainly lean toward building
21 a record so that we can support whatever decision
22 we conclude so that if the decision is challenged
23 further, there is a strong body of evidence moving
24 forward.

25 COMMISSIONER REECE: This is John Reece.

1 I agree, Ashley.

2 CHAIRMAN McCARTY: Thank you,
3 Commissioner Reece.

4 Any thoughts from anyone else? Or I
5 would certainly open the floor to any motions or
6 any questions from any of the parties before us at
7 this time.

8 VICE CHAIR THOMAS: This is Commissioner
9 Thomas.

10 CHAIRMAN McCARTY: Yes, ma'am.

11 VICE CHAIR THOMAS: I make the motion
12 that we -- I want to make sure I have my wording
13 correctly, but I make a motion that we move this --
14 suggest that this go to the AHC at this time.

15 CHAIRMAN McCARTY: Thank you,
16 Commissioner Thomas.

17 Is there a second to that motion?

18 COMMISSIONER ROWLAND: This is
19 Commissioner Rowland. I second.

20 CHAIRMAN McCARTY: Okay. Commissioner
21 Rowland has seconded.

22 Any discussion on the matter that we ask
23 that this be taken up by the AHC?

24 COMMISSIONER REECE: John Reece. I have
25 a question, Pat. Are we at the point where it

1 needs to be forwarded to the AHC, or do we need to
2 discuss this further at another commission meeting?

3 MR. DUGGAN: This is Tim Duggan. If the
4 commission votes that it go to the AHC, then it's
5 incumbent upon the program staff to arrange that
6 with the AHC. And I have spoken with some
7 attorneys -- the attorney for the Administrative
8 Hearing Commission indicated to me that what would
9 be required is a memorandum of understanding and
10 that's worked out generally with the chairman of
11 the Administrative Hearing Commission.

12 But they have their standard rates and
13 their processes for coming up with a memorandum of
14 understanding, which is essentially a contract.
15 They would be a contract hearing officer. They are
16 open to doing that. There is no problem with them
17 doing that, but that would have to be resolved. It
18 would not require any additional meetings of the
19 Clean Water Commission, unless Chairman McCarty
20 says no.

21 COMMISSIONER REECE: All right. John
22 Reece. At that point, then it would come back to
23 the commission for further consideration?

24 MR. DUGGAN: If the AHC and the
25 Department work out a contract or memorandum of

1 understanding, then the AHC would take it from
2 there and they would work with the attorneys to set
3 up a hearing schedule and prepare the record and so
4 forth and return it with the recommended decisions.

5 COMMISSIONER REECE: Return it to the
6 commission?

7 MR. DUGGAN: Yes. The Clean Water
8 Commission has the final say --

9 COMMISSIONER REECE: Right.

10 MR. DUGGAN: -- with respect. So, yeah,
11 you will get the recommended decision and a
12 transcript of all the proceedings at the
13 Administrative Hearing Commission.

14 COMMISSIONER REECE: Thank you.

15 CHAIRMAN McCARTY: Thank you, Mr. Duggan.
16 Commissioners, any further discussion, or
17 are we ready to proceed to a vote?

18 Have we addressed your question,
19 Mr. Reece?

20 COMMISSIONER REECE: Yes, thank you.

21 CHAIRMAN McCARTY: Hearing no further
22 discussion, Krista, can you call the roll on this
23 motion, please?

24 MS. WELSCHMEYER: Yes.

25 Commissioner Rowland?

1 COMMISSIONER ROWLAND: Aye.

2 MS. WELSCHMEYER: Commissioner Coday?

3 COMMISSIONER CODAY: Aye.

4 MS. WELSCHMEYER: Commissioner

5 Bredehoeft?

6 COMMISSIONER BREDEHOEFT: Aye.

7 MS. WELSCHMEYER: Commissioner Reece?

8 COMMISSIONER REECE: Aye.

9 MS. WELSCHMEYER: Vice Chair Thomas?

10 VICE CHAIR THOMAS: Aye.

11 MS. WELSCHMEYER: Chair McCarty?

12 CHAIRMAN McCARTY: Aye.

13 The motion has passed. Thank you all.

14 Thank you to the parties here today. We look
15 forward to resolving this in the most thorough way
16 possible.

17 Next we're going to repeat this process
18 to some degree for Appeal 18-0501. We'll start
19 with Mr. Kaplan and then call on Ms. Davenport as
20 well.

21 And, Mr. Kaplan, I will now turn it over
22 to you for a comment on the motion and the item
23 before us.

24 Is Mr. Kaplan still on the phone with us?

25 MR. KAPLAN: I'm sorry, ma'am. I had my

1 phone on mute.

2 CHAIR McCARTY: No worries. Thank you.

3 MR. KAPLAN: Thank you, Commissioner
4 McCarty. As with the case 18-0498, this case, Case
5 18-0501, there are a number of issues of fact and
6 law that need to be hashed through. In addition to
7 that, this particular matter may also require some
8 amount of discovery, whether that be depositions or
9 requests for production, that could take a little
10 time.

11 As of now it's unclear, based off of the
12 petition, exactly who is asking for what. In this
13 instance, the plaintiffs in this case -- excuse me,
14 not the plaintiffs -- the parties that intervened,
15 the neighborhood association, was comprised of
16 three separate parties.

17 Of those three separate parties, only one
18 is asking for attorney's fees. And it appears that
19 the one party that is asking for attorney's fees is
20 asking for the entire amount of fees that have been
21 raised. And in this case I believe that amount
22 was -- give me one second. I believe it was around
23 \$70,000. It was in my motion. Yeah, \$72,000.

24 It is the Department of Natural
25 Resources' position that one of three parties is

1 not entitled to all of the fees and, in fact, may
2 be entitled to none of the fees because we are not
3 entirely certain if they qualify as a party under
4 the Administrative Procedures Act. So we need to
5 be able to get into the details of that particular
6 issue.

7 Separate and apart from the party issue,
8 we also have issues with respect to whether, again,
9 the Department was substantially justified in its
10 actions and whether or not all of the fees that are
11 being requested are appropriate; namely, whether or
12 not the expert witness fees that have been
13 requested, they should be entitled to them, and
14 also whether or not the fees that were incurred at
15 the Court of Appeals should be -- they should be
16 entitled to them. And it's the Department's
17 position that they are not entitled to any of those
18 fees.

19 CHAIRMAN McCARTY: Thank you.

20 Any questions for Mr. Kaplan,
21 commissioners?

22 Hearing none at this time, Ms. Davenport,
23 are you on the phone?

24 MS. DAVENPORT: Yes. Good morning, Chair
25 McCarty and members of the commission. I'm Aimee

1 Davenport with the law firm of Stinson and I'm here
2 on behalf of Ryan and Elizabeth Deich and Powell
3 Gardens.

4 And to start with, I'll clarify that my
5 clients are Ryan and Elizabeth Deich and Powell
6 Gardens. The homeowners association and the
7 neighborhood association were the plaintiffs in the
8 prior appeal. So two plaintiffs in this case.

9 The Deichs are a family of four that own
10 a centennial farm right adjacent to Valley Oaks, on
11 Valley Oaks' side. And Powell Gardens is a
12 nonprofit community botanical garden, one of Kansas
13 City's botanical gardens right on the border of
14 Jackson County.

15 And I know most of you -- I want to thank
16 you very much from hearing from us again because
17 most of you have been through these issues more
18 than once, so I appreciate your time this morning.

19 But just for the new commissioners, I
20 will reemphasize that the record on these issues as
21 well as other issues are -- the records are vast
22 and extensive and they date back going on a few
23 years now.

24 We have been talking about these issues
25 in some form or fashion in now six venues,

1 including the Missouri Supreme Court, Missouri
2 Courts of Appeals, Clean Water Commission, AHC, and
3 two Circuit Courts.

4 So there are records available for the
5 commission and its designated hearing officer to
6 look at when parsing through these issues. And our
7 purpose here today is limited, not to rehash the
8 underlying issues that we litigated for a few days
9 two years ago.

10 If you were there at the hearing, it was
11 a very intense and extensive hearing for all
12 parties, including the State of Missouri, to go
13 through nutrient-management issues, manure-storage
14 issues, water-runoff issues and so on, groundwater
15 issues, and it is not our purpose today in this
16 application to do that again.

17 And I do not believe that the
18 commission -- I'm asking you not to view your role
19 of this attorney's fees application to undo a prior
20 due process and hearing and undo that decision, but
21 that your purpose here and what our request is is
22 limited to our request for attorney's fees under
23 Chapter 536 and whether or not those attorney's
24 fees were substantially justified.

25 And we submit to you that those issues

1 are very narrow and whomever hears those, whether
2 it's the Clean Water Commission with the assistance
3 of Tim Duggan -- which we would ask that that be
4 the most efficient way to do that -- whether it's
5 the Clean Water Commission that hears it directly
6 or the AHC, those issues are narrow. And they are
7 Chapter 536 issues. They are not clean-water,
8 Chapter 644 issues.

9 All you have to decide is whether we are
10 parties under the statute, whether we prevailed,
11 whether our fees are reasonable under the statute;
12 and, lastly, if the Department was substantially
13 justified in making its decision to issue the
14 permit. And we ask you to do -- in this case to
15 look at the record to determine whether the
16 Department was substantially justified.

17 All parties briefed this case extensively
18 and you will be able to find all the information
19 you need in the briefs on all sides in the record.
20 And while the DNR's counsel says that there are
21 facts in dispute, I think that we could get to a
22 point where we could stipulate that the record is
23 the record and the record speaks for itself.

24 And we ask you to use the record in
25 determining whether or not the Department was

1 substantially justified in making its decision in
2 this case.

3 So that is a direct response to
4 Mr. Kaplan's position that we need a full
5 evidentiary hearing on the merits of this case. We
6 do not. It's in the record. And we ask you and --
7 well, we'll submit to you that you have -- the
8 commission has the authority to decide this case
9 without a full-blown evidentiary hearing.

10 And there are multiple courts of appeals,
11 which we would be happy to brief and submit
12 citations for, but multiple courts of appeals that
13 have recognized the commission's authority to
14 decide attorney's fees cases on affidavits and on
15 pleadings without going through a full-blown
16 hearing.

17 Finally, I would like to ask you more of
18 a fairness and just an argument out of the state of
19 affairs today, but also in Ryan and Elizabeth
20 Deich's case as well as the nonprofit's case, I've
21 never been involved in another case that should be
22 decided as expeditiously as this one.

23 Given all the litigation that has
24 occurred thus far and all the records that are out
25 there, all the attorneys' fees that have been

1 submitted, this case deserves an expeditious and an
2 efficient ruling.

3 The purpose of the attorney's fees
4 statute is to award plaintiffs and relieve their
5 financial burden in cases where there has been a
6 wrong decision and they have prevailed. And by
7 forcing the parties to go through what they have
8 already gone through again totally defeats the
9 purpose of our attorney's fees statute.

10 So I ask you here today to please
11 streamline this process, use the records before
12 you. I believe we could stipulate that the record
13 is the record and that you would have that at your
14 disposal to make your decision.

15 And at this point I won't go on any
16 further. Thank you for listening. Any questions,
17 I'd be happy to take them.

18 CHAIRMAN McCARTY: Thank you,
19 Ms. Davenport.

20 Any questions from the commission or
21 comments from the commission for any of the parties
22 who have spoken on 18-0501?

23 I have one quick one. Mr. Duggan, you
24 said that there's a memorandum of understanding
25 that is drafted with the AHC chairman as a contract

1 hearing officer. Are there stipulations put on --
2 as Ms. Davenport just raised -- on the scope of the
3 findings of fact and conclusions of law through
4 that MOU initially, or is that a captive "they are
5 going to serve as our hearing officer," fairly
6 straightforward?

7 MR. DUGGAN: This is Tim Duggan. It's
8 simply a contract for the services. It would not
9 define the scope of the issues or how the hearing
10 would proceed. That is just handled under the
11 Administrative Hearing Commission's rules.

12 As Aimee Davenport has indicated, it
13 could well be that stipulations would suffice and
14 that would certainly expedite the process at the
15 AHC. And the AHC, of course, encourages that sort
16 of thing because of its own workload.

17 So, no, we can't dictate to the hearing
18 officer exactly what the hearing scope should be.
19 That's between the hearing officer and the
20 attorneys.

21 CHAIRMAN McCARTY: Thank you.

22 VICE CHAIR THOMAS: Mr. Duggan, this is
23 Pat Thomas. I have a question.

24 MR. DUGGAN: Yes.

25 VICE CHAIR THOMAS: Mrs. Davenport made

1 reference to the fact that they had to go to great
2 expense to hire experts and do all of those things.
3 If I remember correctly, when both sides came
4 before the commission, both sides had gone to great
5 expense to hire experts and such. Is that not the
6 case and is that not the norm in the industry, that
7 if someone wants to fight a case or a permit such
8 as these, they do go to those expenses?

9 MS. DAVENPORT: Commissioner Thomas, this
10 is Aimee.

11 Tim, did you want me to take that or --

12 MR. DUGGAN: I'm sorry, I was on mute.

13 In this particular situation -- and this
14 is typical with these kinds of challenges to
15 operating permits issued for these kinds of
16 operations -- it depends on what the issues are
17 that form the basis of the challenge.

18 And in cases where there are technical
19 challenges, you didn't do the math right, you
20 didn't do the engineering right, you didn't
21 calculate this or that or there's other concerns
22 about the impacts from the -- or potential impacts
23 from the operation, sure. It's not atypical for
24 parties to hire expert witnesses.

25 VICE CHAIR THOMAS: Thank you.

1 CHAIRMAN McCARTY: Thank you.

2 Any other questions, commissioners? If
3 not, we'll open the floor to discussion.

4 When this case -- these two cases were
5 heard in a parallel fashion previously before the
6 AHC, they were, you know, handled somewhat together
7 with separate decisions issued, separated
8 recommended decisions issued in each. I would
9 suggest perhaps that is again the most defensible
10 and clearcut route for this commission to take.

11 MR. KAPLAN: Commissioner McCarty, this
12 is Ross Kaplan. Could I just respond to that for
13 one moment?

14 CHAIRMAN McCARTY: Yes.

15 MR. KAPLAN: So I would agree with you
16 that in the underlying case it made a lot of sense
17 because you were dealing with one party and one set
18 of operative facts, but we're kind of getting into
19 something that is a bit more meta at this point;
20 and that is what the individual has.

21 And when we're looking not to what
22 happened, but to individual parties, there's a
23 great deal of difference between Lone Jack as a
24 group and what their attorneys did and the Powell
25 Gardens parties and what their attorneys did.

1 There's a number of different matters that are
2 involved. There's potential for one of these
3 matters to need discovery while the other one may
4 not need any.

5 I know that Ms. Davenport keeps going on
6 and on about creating an entirely new evidentiary
7 record. We're not trying to dispute the underlying
8 record. The question is not whether or not the
9 Department won its case.

10 The question is whether or not the
11 Department was justified in the actions it took and
12 do the parties who are seeking these fees qualify
13 for them and in what amounts. And there's a wide
14 disparity in what each of those parties is looking
15 for. To that extent, I would ask that they be kept
16 separate before the AHC. Thank you.

17 CHAIRMAN McCARTY: Thank you.

18 Okay. Commissioners, I will open the
19 floor for discussion or motion.

20 COMMISSIONER ROWLAND: This is
21 Commissioner Rowland. I would move that we place
22 Case No. 18-0501 to the AHC.

23 CHAIRMAN McCARTY: Thank you, sir.

24 A motion has been made. Is there a
25 second to that motion?

1 COMMISSIONER CODAY: Second.

2 CHAIRMAN McCARTY: Thank you,
3 commissioner.

4 Any discussion before a roll-call vote is
5 taken?

6 VICE CHAIR THOMAS: This is Commissioner
7 Thomas. I'm wondering if Commissioner Rowland
8 would accept a friendly amendment that the MOU be
9 designed that Case 0501 be kept separate from Case
10 0498.

11 COMMISSIONER ROWLAND: Yes, I would
12 accept that.

13 VICE CHAIR THOMAS: Thank you.

14 COMMISSIONER REECE: This is John Reece.
15 Wouldn't that be a decision of the AHC rather than
16 a recommendation by the Clean Water Commission?

17 VICE CHAIR THOMAS: John, this is Pat.
18 As I just understood what Tim said and what Ross
19 Kaplan said, was that the Department, under our
20 guidance, will write an MOU. And so we're
21 basically asking the Department, when they write
22 the MOU with the AHC, to keep those two cases
23 separate. Is that not correct?

24 CHAIRMAN McCARTY: Tim Duggan, can you
25 address that?

1 MR. DUGGAN: Yes. This is Tim Duggan. I
2 think that could be done, but I also see a
3 possibility where there's a separate MOU for each
4 case.

5 COMMISSIONER REECE: This is John Reece.
6 And who determines that, Tim?

7 MR. DUGGAN: I think that can be
8 negotiated with the chairman of the Administrative
9 Hearing Commission.

10 Keep in mind that when these cases were
11 heard together by the AHC for hearing purposes, the
12 party that owns the CAFO was part of the case. And
13 so the AHC deemed it convenient to combine the
14 hearings because the underlying merits involved
15 some of the same issues with respect to the
16 operation of that particular facility.

17 These cases are not about that. The CAFO
18 is not part of either of these cases. They are
19 very different in that parties are coming after the
20 Department of Natural Resources and asking this
21 commission to award those parties attorneys' fees
22 and it's just not necessary to combine them. But
23 we can certainly make that clear to the
24 Administrative Hearing Commission.

25 And to Ms. Davenport's point, her case

1 may be handled more expeditiously if she and Ross
2 Kaplan get together with the administrative hearing
3 commissioner and would come up with a process that
4 moves faster based on stipulations and so on. They
5 can work that out.

6 But we can certainly indicate, as the
7 Department makes this arrangement, that these are
8 two separate cases.

9 COMMISSIONER REECE: Thank you.

10 CHAIRMAN McCARTY: Okay. Commission,
11 before us on the floor we have a motion that we
12 recommend this be taken up by the AHC with separate
13 MOUs created for each of these prospective cases.
14 And that motion has been moved and seconded.

15 Barring any further discussion, Krista,
16 can you call the roll?

17 MS. WELSCHMEYER: Yes.

18 Commissioner Coday?

19 COMMISSIONER CODAY: Aye.

20 MS. WELSCHMEYER: Commissioner

21 Bredehoeft?

22 COMMISSIONER BREDEHOEFT: Aye.

23 MS. WELSCHMEYER: Commissioner Reece?

24 COMMISSIONER REECE: Aye.

25 MS. WELSCHMEYER: Commissioner Rowland?

1 COMMISSIONER ROWLAND: Aye.
2 MS. WELSCHMEYER: Vice Chair Thomas?
3 VICE CHAIR THOMAS: Aye.
4 MS. WELSCHMEYER: Chair McCarty?
5 CHAIRMAN McCARTY: Aye.
6 Motion has passed. This item will be
7 before us again, so we will have a record upon
8 which to affirm or modify the findings of fact and
9 conclusions of law as recommended by the AHC on
10 attorney's fees. Thank you to the two parties for
11 being before us today.

12 [Hearing concluded at 11:30 a.m.]
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C E R T I F I C A T E

I, Joann Renee Richardson, Certified Court Reporter, do hereby certify that pursuant to Notice there came before me on April 2nd, 2020, Department of Natural Resources Missouri Clean Water Commission Hearing, via telephone of all parties, and this hearing was written in machine shorthand by me and afterwards transcribed and is fully and correctly set forth in the foregoing 40 pages.

I further certify that I am neither attorney or counsel for, nor related to, nor employed by any of the parties to this action in which this hearing is taken; and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in this action.

Given at my office in the City of St. James, County of Phelps, State of Missouri this 6th day of April 2020.

Joann Renee Richardson, CCR

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