

**MISSOURI DEPARTMENT OF NATURAL RESOURCES  
LAND RECLAMATION COMMISSION**

In the Matter of:	)	
	)	
AA QUARRY LLC	)	
AA Quarry Site # 2462	)	
Johnson County, Missouri,	)	
New Site Permit Application	)	
	)	
DAVID EARLS, et al,	)	Proceeding Under
	)	The Land Reclamation Act
Petitioners Pro Se,	)	§§ 444.760 - 444.789, RSMo
	)	
v.	)	Permit #1094
	)	
DEPT. OF NATURAL RESOURCES,	)	
KEVIN MOHAMMADI, Staff Director,	)	
Land Reclamation Program,	)	
Division of Environmental Quality,	)	
	)	
Respondent,	)	
	)	
AA QUARRY LLC,	)	
	)	
Applicant.	)	

**APPLICANT'S MOTION TO EXCLUDE EVIDENCE OF ISSUES OUTSIDE OF THE  
LAND RECLAMATION COMMISSION'S JURISDICTION AND  
TO DISMISS ANY CLAIMS RELEVANT THERETO AND  
MEMORANDUM IN SUPPORT**

COMES NOW AA Quarry LLC ("Applicant") and for its Motion to Exclude Evidence of Issues Outside of the Land Reclamation Commission's Jurisdiction and to Dismiss Any Claims Relative Thereto and Memorandum in Support, states as follows:

**I. BACKGROUND**

The issuance of a land reclamation permit is governed by R.S.Mo. § 444.762, *et seq.* Section 444.773 sets forth the procedure for the application for and issuance of land reclamation permits. The application for the permit is filed with a staff director of the land reclamation

commission, who investigates whether the applicant fully complied with § 444.772 and applicable rules. If the director recommends the issuance of the permit, the permit can be issued without hearing unless a petition is submitted by a person whose “health, safety or livelihood is affected by noncompliance with applicable laws or regulations,” in which case a hearing may be held. R.S.Mo. § 444.773(3).

On November 16, 2012, Applicant applied for a land reclamation permit (Permit Application for Industrial Mineral Mines under 10 CSR 40-10.020(1)) to conduct quarry operations at a 520-acre site located on AA Highway in Johnson County, Missouri. In accordance with 10 CSR 40-10.020(2)(H), Applicant published its notice of intent to operate a surface mine in a local newspaper authorized for legal publications and submitted an affidavit of publication. On January 22, 2013, DNR Land Reclamation Program Director Kevin Mohammadi advised Applicant that after the public notices had been given regarding the permit application, DNR had received letters from the public regarding requests for a public meeting, and Applicant agreed to the public meeting. A public meeting was held on March 7, 2013.

On April 2, 2013, Mr. Mohammadi submitted a memorandum to the Land Reclamation Commission recommending that Applicant receive Land Reclamation Commission permit for 214 acres of the 520-acre site. Mr. Mohammadi suggested that due to public concerns, the director’s recommendation be docketed for the May 23, 2013 Land Reclamation Commission meeting. On that same date, Tucker Frederickson of the DNR Land Reclamation Program advised Petitioners of their rights to request a public hearing from the Land Reclamation Commission. Several Petitioners thereafter requested a formal public hearing and on April 30, 2013, Mr. Mohammadi advised that the Land Reclamation Commission would decide whether or not to grant a formal public hearing at the meeting on May 23, 2013. A number of prospective

Petitioners appeared at the May 23, 2013 Land Reclamation Commission meeting, made statements, and after due consideration, the Commission voted to grant Petitioners a formal public hearing.

In arguing that they were entitled to a formal public hearing, Petitioners claimed standing based on numerous issues including concerns with roads, blasting, noise, vibration, property values and general aesthetics. As these concerns are not within the authority of the DNR—air, water, and land reclamation—they could not contribute to the determination that the Petitioners had standing and the Petitioners must be excluded from presenting this evidence at the formal public hearing.

## II. ANALYSIS

### A. **The Land Reclamation Commission has jurisdiction to determine whether Petitioners’ complaints are within the scope of the Department of Natural Resources’ authority.**

The Land Reclamation Commission has original jurisdiction to determine whether it has subject matter jurisdiction to hear the Petitioners’ concerns regarding noise, vibrations, and traffic under the primary jurisdiction doctrine. The primary jurisdiction doctrine provides that “courts will not decide a controversy involving a question within the jurisdiction of an administrative tribunal until after that tribunal has rendered its decision.” *Cooper v. Chrysler Grp., LLC*, 361 S.W.3d 60, 63 (Mo. App. 2011), reh’g and/or transfer denied (Jan. 23, 2012), transfer denied (Apr. 3, 2012) (citing *Killian v. J & J Installers, Inc.*, 802 S.W.2d 158, 160 (Mo. banc 1991)). The primary jurisdiction doctrine applies “(1) where administrative knowledge and expertise are demanded; (2) to determine technical, intricate fact questions; (3) where uniformity is important to the regulatory scheme.” *Cooper*, 361 S.W.3d 60, 63 (citing *Killian*, 802 S.W.2d at 160; *Deckard*, 31 S.W.3d at 14; *Jones v. Jay Truck Driver Training Center*, 709 S.W.2d 114,

115 (Mo. banc 1986), *overruled on other grounds by McCracken v. Wal-Mart Stores East, LP*, 298 S.W.3d 473, 479, 479 n. 3 (Mo. banc 2009).

In *Cooper*, the plaintiff filed a lawsuit in Missouri circuit court claiming damages for injuries arising from a slip and fall at his employer's place of business during the course and scope of his employment. He simultaneously filed a workers' compensation claim with the Labor and Industrial Relations Commission ("LIRC"). In the circuit court action, the court granted summary judgment in favor of the employer, noting that Workers' Compensation Law provided the exclusive remedy to the employee. On appeal, the Missouri Court of Appeals for the Eastern District reversed and remanded, noting that the exclusivity of the Workers' Compensation Law applied only to injuries within the definition of "accident" under the Workers' Compensation Act. *Cooper*, 361 S.W. 3d 60, 63. The Court held that under the primary jurisdiction doctrine, the LIRC had original jurisdiction to determine factual issues that establish whether or not a claim is subject to its jurisdiction—that is, whether the plaintiff's injury was an "accident" within the meaning of the act. Accordingly, only after the LIRC had determined whether there was an accident under the act could the circuit court consider the exclusivity defense. *Id.* at 65.

Missouri courts have reached the same conclusion in cases involving the Missouri Public Service Commission ("MPSC"). *Inter-City Beverage Co., Inc. v. Kansas City Power & Light Co.*, 889 S.W. 2d 875 (Mo. App. W. D. 1994). In *Inter-City Beverage*, the issue before the court on declaratory judgment was which of two rates filed and published by the MSPC was applicable. Noting that the MSPC was statutorily charged with the regulation and fixing of rates for public utilities, as well as the classification of the users to whom the rates are chargeable, the

Missouri Court of Appeals concluded that the MSPC had exclusive jurisdiction to determine the applicable rate.

Likewise, in this case, the Land Reclamation Commission has primary original jurisdiction to determine factual issues that establish whether or not the Petitioners' claims that their health, safety, or livelihood are within the authority of any environmental law or regulation administered by the DNR, and thus whether the Land Reclamation Commission can consider evidence of those claims in evaluating Applicant's permit request. *See Cooper*, 361 S.W.3d 60, 63 (citing *Hannah v. Mallinckrodt, Inc.*, 633 S.W.2d 723, 726 (Mo. banc 1982); *see also Sheen v. DiBella*, 395 S.W.2d 296, 303 (Mo. App. 1965); *State ex rel. Ford Motor Co. v. Nixon*, 219 S.W.3d 846, 849 (Mo. App. 2007); *Deckard v. O'Reilly Automotive, Inc.*, 31 S.W.3d 6, 14 (Mo. App. 2000), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003); *State ex rel. FAG Bearings Corp. v. Perigo*, 8 S.W.3d 118, 121 (Mo. App. 1999). Land reclamation and the environmental laws and regulations administered by the DNR is uniquely within the Land Reclamation Commission's knowledge and expertise, the issues involve technical and intricate questions of fact, and uniformity in determining standing and hearing evidence at formal public hearings for land reclamation permits is important to the Land Reclamation Act.

Therefore, under the primary jurisdiction doctrine, the Land Reclamation Commission has authority to make the decision whether Petitioners' noise, blasting, and traffic concerns constitute undue impairments to their health, safety, or livelihood within the jurisdiction of the DNR and Land Reclamation Commission.

- B. **The Land Reclamation Commission lacks jurisdiction and authority to consider any issues outside of environmental laws or regulations administered by the Department of Natural Resources.**

As an administrative agency, the Land Reclamation Commission has only those powers which the Missouri Legislature has expressly or impliedly conferred. *Curdt v. Missouri Clean Water Comm'n*, 586 S.W.2d 58 (Mo. App. 1979) (attached hereto). Thus, the Land Reclamation Commission lacks jurisdiction to consider evidence or make a determination on Applicant's permit based on claims of potential concerns related to road safety, blasting, noise, property devaluation, or the natural beauty of the area because such concerns are not within the authority of any environmental law or regulation administered by the Department of Natural Resources ("DNR").

Specifically, the Land Reclamation Commission is a department of the DNR. The DNR draws its authority from R.S.Mo. § 640.010, and the director of the DNR is to administer programs relating to environmental control and the conservation and management of natural resources. The DNR administers the air conservation commission, the clean water commission, the state environmental improvement authority, the state park board, the state soil and water districts commission, the state geologist, the state land survey authority, the state oil and gas council, the land reclamation commission, and the division of health in the maintenance of water dispensed to the public and licensing and regulating solid waste. A list of the laws and regulations that give the DNR authority on the areas within its control is provided on the DNR's website. (<http://www.dnr.mo.gov/assistance/laws-regulations.htm>).

As an agency created by R.S.Mo. § 444.520, and taking the powers set forth in § 444.530, the Land Reclamation Commission's "powers are limited to those conferred by the [Missouri] statutes, either expressly, or by clear implication as necessary to carry out the power specifically granted." *GS Technology Operating Co., Inc. v. Kansas City Power & Light*, 2004 WL 2752782, 11 (Mo. P.S.C.) (citing *State ex rel. Utility Consumers Council of Missouri, Inc. v.*

*Public Service Commission*, 585 S.W.2d 41, 47 (Mo. banc 1979); *State ex rel. City of West Plains v. Public Service Commission*, 310 S.W.2d 925, 928 (Mo. banc 1958)). It has only such jurisdiction as is conferred upon it by statute. *Mikel v. Pott Indus./St. Louis Ship*, 896 S.W.2d 624, 626 (Mo. 1995) (citing *Soars v. Soars-Lovelace, Inc.*, 346 Mo. 710, 142 S.W.2d 866, 871 (1940)).

With respect to mining permits, the Land Reclamation Commission's authority is governed by the Land Reclamation Act. R.S.Mo. § 444.760-790. The stated goal of the Land Reclamation Act is, among others, to:

". . . strike a balance between surface mining of minerals and reclamation of land subjected to surface disturbances . . . and . . . to protect and promote health safety and the general welfare of the people of the State."

See Land Reclamation Act Declaration of Policy at §444.762, R.S.Mo. The Act is to balance state needs for the mining of minerals through surface mining operations while as far as practicable minimizing the adverse effects on the public and the environment. To carry out that practical purpose the General Assembly adopted an elaborate permitting system found in §§444.770 through 444.773 as reflected also in the state regulations found in 10 C.S.R. 40-10.020 - 10.040.

Pursuant to its authority in § 444.530.1, the Land Reclamation Commission has adopted and promulgated rules and regulations regarding the administration of § 444.773, which are found at 10 CSR 40-10.010 to 10.100. Section 10 CSR 40-10.080 sets forth the requirements a petitioner must establish in order to have standing for a formal public meeting after a petition is filed under § 444.773(3). Specifically, the petitioner must provide "good faith evidence of how their health, safety, or livelihood will be unduly impaired by the issuance of the permit. *The impact to the petitioner's health, safety, and livelihood must be within the authority of any*

*environmental law or regulation administered by the Missouri Department of Natural Resources.*” 10 CSR 40-10.080(2)(B) (Emphasis added). Necessarily, impact on a petitioner’s health, safety, or livelihood that is *not* within the authority of laws administered by the DNR does not provide standing, cannot be the basis for a formal public hearing, and cannot be the basis for the denial of a land reclamation permit. Road traffic, blasting, noise, vibrations and real estate valuations are not within the authority of laws administered by the DNR and thus cannot be considered when considering the Land Reclamation Commission’s recommendation that a land reclamation permit be issued.

The Land Reclamation Commission and DNR have also interpreted their regulations such that their jurisdiction does not encompass issues regarding blasting, public safety on roads and mines effect on property values, and that such issues are “. . . outside the regulatory authority provided by the program through the Land Reclamation Act,” and advises visitors to the DNR website that truck traffic and noise are not activities regulated by the DNR. *See* 7/1/13 DNR publication issued under names of Jay M. Nixon, Governor, and Sara Parker Pauley, Director; DNR web site FAQ's; Publication 2191, page 6. Specific to this case, in his initial memorandum recommending the issuance of the permit to Applicant, Kevin Mohammadi, acknowledged that the DNR “does not have jurisdiction to address concerns related to road safety, blasting, noise, property devaluation or the natural beauty of the area.” Kevin Mohammadi Memo, page 2. Thus, the Land Reclamation Commission is acting in accordance with its understanding of the limitations of its jurisdiction. Finally, when reviewing an agency’s interpretation of its own regulations, significant deference to the agency action is in order. *State ex rel. Webster v. Missouri Res. Recovery, Inc.*, 825 S.W.2d 916, 931 (Mo. App. 1992). Therefore, where the Land Reclamation Commission and DNR have interpreted their regulations to exclude jurisdiction

over road safety, blasting, noise, property devaluation or the natural beauty of the area, deference should be given.

The principle that an agency cannot exceed its statutory authority was recognized by the Court of Appeals for the Eastern District in *Curdt v. Missouri Clean Water Comm'n*, 586 S.W.2d 58 (Mo. App. 1979), which is particularly instructive because it involves the Clean Water Commission, another agency under the DNR. In *Curdt*, landowners opposed the Clean Water Commission's order granting a utility a permit to operate a water purification lagoon on adjoining property. The landowners claimed that the Clean Water Commission acted arbitrarily because it did not consider whether the landowners' riparian rights were violated by the flow of the discharged water onto their property. The Court of Appeals held that as the Missouri Clean Water Law did not give the Clean Water Commission the power to determine riparian rights, and the applicant was in full compliance with the Missouri Clean Water Law, therefore the Clean Water Commission properly granted the permit without consideration of riparian rights. *Curdt*, 586 S.W. 2d at 61. The Court of Appeals noted that the applicant was still obligated to comply with all other laws, ordinances, codes, and regulations, and if the applicant was, in fact, violating the landowners' alleged riparian rights, the proper course for seeking relief was in the courts and not in challenging the issuance of a clean water permit. *Id.* at 60.

Likewise in this case, the Land Reclamation Commission cannot consider the personal interests that Petitioners seek to safeguard and ameliorate (the alleged effects of roads, blasting, etc.) because those concerns are not interests of those directly affected by the consequences of surface mining within the authority of the Land Reclamation Act. The Petitioners' remedy for any claims regarding alleged rights outside of DNR's jurisdiction lies in equity and not in the administrative procedure for the issuance of a permit. As such, the Petitioners' concerns

regarding road safety, blasting, noise, property devaluation or the natural beauty of the area cannot be considered in evaluating the Applicant's permit, should be excluded from evidence at the formal public hearing, and those claims should be dismissed with prejudice.

**C. The Land Reclamation Commission cannot base its decision whether to issue a land reclamation permit on considerations of roads, blasting, or similar issues because those issues are regulated by other entities.**

An agency such as the Land Reclamation Commission cannot enlarge its authority by its own volition, or by its own holdings of waiver, estoppel or contract, because allowing it to do so would permit the Land Reclamation Commission to give itself powers, rights, and duties beyond what the Missouri Legislature provided or intended. *Soars v. Soars-Lovelace, Inc.*, 346 Mo. 710, 719, 142 S.W.2d 866, 871 (1940)(citations omitted). Blasting, highway use, property valuation and other similar concerns are outside the powers given to the Land Reclamation Commission by statute, and thus cannot be considered in the permitting process. Allowing the Land Reclamation Commission to expand its consideration of issues into other areas, such as blasting or roads would cause the Land Reclamation Commission to encroach on the authority of other agencies. Blasting is governed by the Missouri Blasting Safety Act, R.S.Mo. § 319.300 *et seq.*, which regulates the use of explosives in mining and charges the State Blasting Safety Board with “establishing and enforcing consistent statewide industry standards” regarding blasting, which specifically includes considerations of vibrations. R.S.Mo. § 319.300, 319.324, 319.306-321. The Land Reclamation Commission does not oversee or have any authority over blasting. R.S.Mo. § 319.327.

Similarly, the Missouri Department of Transportation (“MoDOT”) and the state highways and transportation commission are responsible for all state highways, including regulating motor vehicle carriers and vehicle weight. R.S.Mo. § 226.005; Chapters 226-238, and

Chapters 300-307. The Land Reclamation Commission does not have authority to make decisions with respect to traffic on state highways, and cannot make permit issuance decisions based on trucks and traffic on AA Highway.

The Petitioners' demands that the Land Reclamation Commission consider blasting and transportation issues and deny Applicant a permit based on these issues is an improper backdoor effort to regulate blasting and traffic through the Land Reclamation Commission. If the Land Reclamation Commission were to hear evidence on Petitioners' complaints of vibrations or noise from blasting, or commercial vehicle use of AA Highway, and were to make a determination on Applicant's land reclamation permit on those grounds, this action would have the effect of regulating blasting, the effect of vehicles on roads, and the adequacy of roads for a particular purpose. The Petitioners' property valuation arguments are essentially a request for the Land Reclamation Commission to engage in *de facto* zoning. If the Land Reclamation Commission bases its decision regarding the permit on these issues, it will have performed functions that are specifically delegated to different state agencies, even though the Land Reclamation Commission is not qualified or authorized to make such determinations.

If the Land Reclamation Commission makes the determinations that the Petitioners are requesting—that proposed blasting activity will result in harmful vibrations or noise, that AA Highway is not equipped to handle increased traffic, that AA Highway is too narrow to accommodate commercial trucks, and the overall safety of AA Highway—there is a risk that the determinations will be cited to the State Blasting Safety Board or MoDOT as authority for that agency taking action in another case. Considering such evidence also creates a precedent within the Land Reclamation Commission, inviting future petitioners to ask the Land Reclamation

Commission to make determinations based on considerations outside of the authority of environmental laws or regulations administered by the DNR involving air, water, and land.

- D. Evidence of impact on health, safety, or livelihood outside of the scope of the environmental laws or regulations administered by the Department of Natural Resources should be excluded from the formal public hearing and must be dismissed with prejudice.**

The concerns cited by the Petitioners that do not fall under the authority of the DNR should be excluded from the formal public hearing. The Land Reclamation Commission cannot consider blasting vibrations, noise, property valuations, traffic, or roads in their decision whether to issue Applicant a land reclamation permit, and these concerns do not affect the Petitioners' standing for a formal public hearing. Because this evidence does not affect standing or the permit, the evidence is irrelevant and the Petitioners should not be allowed to present evidence of these issues at the formal public hearing. When presented with claims over which an agency lacks subject matter jurisdiction, the only action the agency can take no other action than to dismiss the claims. *St. Charles Ambulance District Inc. v. Missouri Department of Health and Senior Services*, 248 S.W.3d 52 (Mo. App. 2008).

In the event the Petitioners are permitted to present evidence of vibrations, noise, property valuations, traffic, or roads at the formal public hearing, these issues must not be considered by the Land Reclamation Commission in making its decision on whether to affirm Mr. Mohammadi's recommendation that Applicant be issued a land reclamation permit.

### **CONCLUSION**

The Land Reclamation Commission only has the authority given to it by the Missouri Legislature. It cannot expand its given authority to include blasting or roads. As considerations of blasting and roads are not within the environmental laws or regulations administered by the Missouri Department of Natural Resources, these issues cannot be considered at a formal public

hearing pursuant to 10 C.S.R. 40-080(2)(B), or when determining whether Applicant is in compliance with Missouri's Land Reclamation Act and entitled to a land reclamation permit, this evidence should be excluded from the formal public hearing and claims relative thereto be dismissed with prejudice. *St. Charles Ambulance District, Inc.*, 248 S.W. 3d 52.

Respectfully submitted,

**BROWN & RUPRECHT, P.C.**

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Certification of Service

I hereby certify a copy of foregoing has been sent via email this 30th day of September, 2013, to:

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586 S.W.2d 58  
Missouri Court of Appeals, Eastern District, Division  
Four.

Melvyn CURDT and Norma Curdt, His Wife,  
Appellants,  
v.  
MISSOURI CLEAN WATER COMMISSION and  
Terre Du Lac Utilities, Inc., Respondents.

No. 40263. | Aug. 14, 1979.

Landowners filed petition for review of Clean Water Commission's order granting utility a permit to operate a water purification lagoon. The Circuit Court, St. Francois County, Gary R. Black, J., entered judgment against plaintiffs and they appealed. The Court of Appeals, Satz, J., held that Clean Water Law, including provision that Commission shall require proper disposal of residual wastes from treatment facilities and sewer systems, did not explicitly or impliedly grant Commission power to determine riparian rights; thus Commission had no authority to determine whether riparian rights were violated by flow of waste water from utility's water purification lagoon into pond on plaintiffs' adjoining property.

Affirmed.

West Headnotes (3)

[1] **Administrative Law and Procedure**

🔑 Statutory basis and limitation

Administrative agency has only those powers which Legislature has expressly or impliedly conferred.

3 Cases that cite this headnote

[2] **Water Law**

🔑 Sewage and refuse matter

Clean Water Law, including provision that Clean Water Commission shall require proper

disposal of residual wastes from treatment facilities and sewer systems, did not explicitly or impliedly grant Commission power to determine riparian rights; thus Commission had no authority to determine whether riparian rights were violated by flow of waste water from utility's water purification lagoon into pond on adjoining landowner's property. V.A.M.S. §§ 204.011, 204.021, 204.026.

2 Cases that cite this headnote

[3] **Environmental Law**

🔑 Extensions, Exceptions, and Variances for Particular Parties

Clean water permit issued under Clean Water Law does not exempt permittee from complying with all other decisional and statutory law, ordinances, codes, regulations and the like. V.A.M.S. §§ 204.051, subd. 3, 204.131.

1 Cases that cite this headnote

**Attorneys and Law Firms**

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Jerry B. Schnapp, Schnapp, Graham & Reid, Fredericktown, for Terre Du Lac Utilities, Inc.

Frank J. Murphy, Asst. Atty. Gen., John D. Ashcroft, Atty. Gen., Jefferson, for Missouri Clean Water Commission.

**Opinion**

SATZ, Judge.

This cause was tried before the trial court without a jury. There is no dispute as to the facts.

Pursuant to the Missouri Clean Water Law, Ch. 204, RSMo (1973), respondent, Terre Du Lac Utilities, Inc., (Terre Du Lac), applied to co-respondent, Missouri Clean Water Commission (Commission), for a permit to operate

a water purification lagoon. As an interested party, appellants, Melvyn Curdt and Norma Curdt (Curdts), were permitted to appear at the hearing before the Commission, and, over the Curdts' objections, the Commission granted Terre Du Lac its permit.

The Curdts duly filed a Petition for Review of the Commission's Order, and all parties stipulated to the record which would be before the trial court for its review.<sup>1</sup> The pertinent facts are that the "waste-water" being discharged from Terre Du Lac's lagoon is clean and not polluted. The water is discharged into a surface watercourse on real estate belonging to Terre Du Lac, continues across that property into a surface watercourse on real estate belonging to the Curdts and then flows into a pond on the Curdts' property. The water discharged from the lagoon into the watercourses does not exceed the natural capacity and stays within the confines of the watercourses. Terre Du Lac does not have a written easement across the Curdts' real estate.

The Curdts contend the Commission acted arbitrarily by refusing to consider whether their riparian rights were violated by the flow of the discharged water onto their property. We do not agree.

<sup>[1]</sup> The primary purpose of the Missouri Clean Water Law is to insure high water quality and a minimum degradation of the waters of this state, s 204.011 RSMo (1973). \*60 The Missouri Clean Water Commission is the administrative agency charged with administering, enforcing and promoting the goals of this Law, s 204.021 and s 204.026, RSMo (1973). Like other administrative agencies, the Commission has only those powers which the legislature has expressly or impliedly conferred. *Soars v. Soars-Lovelace, Inc.*, 346 Mo. 710, 142 S.W.2d 866, 871 (1940); *Wright v. Board of Education*, 295 Mo. 466, 246 S.W. 43, 45 (1922); *State Board of Reg. for Healing Arts v. Masters*, 512 S.W.2d 150, 161 (Mo.App.1974).

<sup>[2]</sup> The statutory provisions of the Missouri Clean Water Law do not explicitly grant the Commission the power to determine riparian rights. Moreover, these provisions do not impliedly grant this power. For example, a clarification of the respective rights and duties of a lagoon owner and an adjacent property owner would not affect, and, thus could not facilitate the Commission's required determination of whether the discharged water meets the statutorily defined effluent limitations and water quality standards. Furthermore, determination of the riparian rights of individual landowners would not reveal what impact the discharge would have on water quality and, thus, could not serve to insure minimum water quality degradation in this state.

The Curdts, however, find implied authority for the Commission to determine private riparian rights in s 204.026 RSMo (1973), which provides that:

"The commission shall:

14. Require proper maintenance and operation of treatment facilities and sewer systems and proper disposal of residual waste from all such facilities and systems;"

The Curdts interpret "proper" as requiring the Commission to determine not only whether Terre Du Lac "properly" complied with the statutorily defined clean water standards but as also requiring the Commission to determine whether Terre Du Lac "properly" complied with the riparian rights of the Curdts, because, the Curdts argue, failure to impose the latter requirement on the Commission would, in effect, allow condemnation of the Curdts' property under the color of a clean water permit.

<sup>[3]</sup> The Curdts misconceive the legal effect of the clean water permit. This permit merely reflects full compliance with the clean water law standards imposed by the Missouri Clean Water Law, s 204.051.3 RSMo (1973). It does not follow that the owner of the permit is thereby exempted from complying with all other decisional and statutory law, ordinances, codes, regulations and the like. To the contrary, specific recognition that the Curdts' existing rights are not abridged by the issuance of a permit is found in s 204.131, RSMo (1973), which provides:

"Nothing in sections 204.006 to 204.141 alters or abridges any right of action now or hereafter existing in law or equity civil or criminal, nor is any provision of sections 204.006 to 204.141 construed as prohibiting any person, as a riparian owner or otherwise, from exercising his rights to suppress nuisances."

Thus, if Terre Du Lac is indeed violating the Curdts' alleged riparian rights, then, Terre Du Lac is not absolved from liability by its clean water permit.

The Curdts' relief, if any, is in the courts, and the Commission had no authority and properly refused to consider this private dispute raised by the Curdts, a third party to the permit proceedings. See *State v. Waddill*, 318 S.W.2d 281, 287 (Mo.1958) and *State v. Welsch*, 124 S.W.2d 636, 639-641 (Mo.App.1939); cf. *State v.*

Eckhardt, 322 S.W.2d 903, 908-910 (Mo.1959).

The Curdts also contend that the discharge of Terre Du Lac's effluent onto their property is a tort, and, citing *State v. Longfellow*, 169 Mo. 109, 69 S.W. 374 (1902), the Curdts argue that the Commission cannot permit Terre Du Lac to commit an unlawful act. In the Longfellow case a utility applied for a permit to construct a building and the face of the application disclosed the obvious fact that the building would partially lie on public land. In refusing \*61 to issue a mandamus to compel the issuance of the building permit, the Supreme Court stated: L.C. 69 S.W. 379

“The fact that relator asks a permit to erect a private building partly upon the public domain is, in itself, enough to require public officers to refuse the permit, and the courts will not compel any public officer to grant any one a permit to do an unlawful act.”

The facts of the Longfellow case distinguish it from the instant case. From that case as reported, it is not clear that the utility fully complied with the code the commissioner was authorized to enforce. Moreover, even if the utility had fulfilled the technical requirements of that code, we have held, in a fact situation similar to the instant case,

that the distinctive facts of Longfellow place it in a unique and different class, because the utility in Longfellow proposed to commit an act that was clearly unlawful. *State v. Welsch*, supra, at 640. Comparable to Welsch and differing from Longfellow, Terre Du Lac's application, in the instant case, is not on its face unlawful but, rather, viewed from the Curdts' perspective, the application would involve complex questions concerning alleged riparian rights and duties of adjacent landowners. Furthermore, in order for the Curdts to make Longfellow relevant here, they must interpret Longfellow as standing for the principle that an administrative agency is required to consider and determine the propriety of matters outside the scope of its statutory authority. If Longfellow were to stand for that peculiar principle, then, we would question its validity.

After the Commission satisfied itself that Terre Du Lac had complied with all provisions of the Missouri Clean Water Law, the Commission properly issued Terre Du Lac its operating permit. Therefore, the judgment of the Circuit Court is affirmed.

DOWD, P. J. and SMITH, J., concur.

#### Footnotes

- 1 There is no question that the parties stipulated to the record before the trial court, apparently, pursuant to s 536.130.1(1) RSMo, “Administrative Procedure and Review”. These stipulated facts are sufficient to define the relevant issues now before this Court. However, in their briefs, the parties refer to additional facts which are not within their stipulation. Since these latter facts neither change nor affect the resolution of the issues, we consider only the stipulated facts.