No. SC 84336

IN THE MISSOURI SUPREME COURT

MISSOURI SOYBEAN ASSOCIATION, et al.
Appellants

vs.

MISSOURI CLEAN WATER COMMISSION, et al.
Respondents

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
CASE NO. CV198-1432, DIVISION NO. 1
HONORABLE THOMAS J. BROWN III,
TRANSFERRED FROM THE COURT OF APPEALS,
WESTERN DISTRICT, CASE NO. WD 59650

SUBSTITUTE BRIEF OF RESPONDENTS

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[1]References are to the current version of cited federal and state statutes because amendments since this case arose in 1998 are not material.

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STATEMENT OF FACTS

The appellants' statement of facts is one-sided and argumentative. The court of appeals has written a statement that is thorough, accurate and balanced; it need not be repeated here in full.[2] The following is a brief summary of this matter for the purpose of bringing the issue into focus.

Several trade associations, including the Missouri Soybean Association, appeal the circuit court's dismissal of their petition for declaratory judgment and injunctive relief challenging the Missouri Clean Water Commission's 1998 list of "impaired" state waters. The Commission developed that list for the United States Environmental Protection Agency (EPA) pursuant to ' 303(d) of the federal Clean Water Act, 33 U.S.C. ' 1313(d).[3] The associations claim that the list is a rule and asked the circuit

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[2]*See* pages 1-11 of the slip opinion, found at the beginning of the Appendix portion of Appellants' brief.

[3]A water body is considered "impaired" if existing controls limiting the effluent that may be discharged into it are not stringent enough to achieve an applicable water quality standard. As discussed later, the list is prepared every other year.

court to declare it invalid because the Commission had not followed statutory procedures for promulgating it as such.

The petition (Legal File [LF] 3-19) was filed pursuant to ' 536.050.1, RSMo, which provides that the declaratory judgment power of state courts extends to "declaratory judgments respecting the validity of rules, or of threatened applications thereof." The circuit court determined that it did not have subject matter jurisdiction because the final determination of the list's contents was made by the EPA, not the Commission, and that the EPA's actions were beyond the purview of the court.[4]

The court of appeals agreed that the circuit court did not have jurisdiction, but on different grounds, holding that "the development of the list submitted to EPA did not constitute rulemaking activity."[5] The court of appeals reached this conclusion upon an analysis of the definition of the term "rule" in ' 536.010(4), RSMo, with particular attention to an exception within that definition:

> (4) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of an existing rule, but does not include:
>
> * * *

[4]LF, vol.3, 462-463.

[5]Page 23 of the Court's slip opinion.

(c) An intergovernmental, interagency, or intraagency memorandum, directive, manual or other communication which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof.

Background

Each even-numbered year the state submits a ' 303(d) list to the EPA for review and approval.[6] For years the Department of Natural Resources sent the list to the EPA directly, but recently the Department changed its procedure by presenting its recommendations to the Clean Water Commission, thereby assuring a forum for public comment.[7] Waters on this list are subjected to further study to determine the "total maximum daily load" (TMDL) of pollutants that may be discharged into them without causing violations of applicable water quality standards.[8]

[6]LF at 73, deposition of John Madras, Department employee, pp. 50-51.

[7]LF at 70, John Madras deposition, p. 38.

[8]LF at 69-70, John Madras deposition, pp. 36-39.

In developing the 1998 list, the Department, through four public notices issued between January 23 and August 14 of that year, requested public comments.[9] EPA representatives also provided comments and had discussions with Department employees during this process, but the EPA did not reach any conclusions, deferring its decisions until after formal submission of the list.[10] In September, the Commission, during an open meeting, modified the list by adding the Missouri and Mississippi Rivers, in their entire lengths, on the basis of "habitat loss" due to "channelization."[11] Before voting, the Commission heard comments from the Missouri Soybean Association and the Sierra Club concerning the addition of these waters. The Department did not make a recommendation concerning this question. The list approved by the Commission, including the Missouri and Mississippi Rivers, was submitted to the EPA in October, together with copies of the four public notices, comments received, a management strategy document, and a summary of the issues.[12]

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[9]LF, 177-198.

[10]LF at 78, Madras deposition, pp. 70-72.

[11]LF, vol. II, 204.

[12]LF, vol. III, 296.

The EPA made determinations partially approving and disapproving the list and sought public comments in January of 1999.[13] In April of 1999, the EPA responded to public comments and made its final determination regarding Missouri's 1998 list, making certain changes to it, but retaining the Missouri and Mississippi Rivers.[14]

[13]LF, vol. III, 443-448.

[14]LF, vol. 2, 389-398.

An affidavit by John Madras, the planning section chief for the Department's Water Pollution Control Program, succinctly describes the actions of the Department, the Commission and the EPA.[15] The Department's proposed 1998 list of impaired waters, as submitted to the Commission, consisted of three categories. The first included rivers which the Department considered impaired and for which the Department intended to develop TMDLs of identified pollutants in order to assure that the water bodies achieve applicable water quality standards. The second category included waters for which the Department, because of concerns about the quality of the data, recommended further monitoring before deciding whether to develop TMDLs.[16] To this second category the Commission added the Missouri and Mississippi Rivers, thereby proposing to postpone, until after further study, decisions regarding whether TMDL development for them is necessary.[17] The third category included waters for which the Department considered TMDL development impracticable because removing contaminants may be impossible, too costly or damaging.[18]

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[15]Madras affidavit, LF, vol.2, 292-295.

[16]*See* the Department's report at LF 311-12.

[17]Madras affidavit, 293, **&** 4.

[18]*Id*.

The EPA did not accept the three categories, but combined them into a single list of waters requiring TMDL development.[19] Assuming that further monitoring of the Missouri and Mississippi Rivers identifies pollutants for which TMDLs should be developed, any TMDLs are not expected before 2009.[20]

[19] *Id.*, 292-93, **&&** 3-6.

[20] *Id.*, 292, **&** 3 and 294, **&** 7.

The Commission's 1998 list as submitted to the EPA did not establish any particular pollution control measure for any water body.[21] And, again, as to rivers in the second and third categories (including the Missouri and Mississippi), the list did not even propose requiring TMDL development. The list did not impose a final requirement upon any person or entity.[22] There is no dispute that the Commission did not promulgate the list as a rule.

STANDARD OF REVIEW

Respondents adopt the standard of review set forth by court of appeals at pages 11 and 12 of its opinion. In reviewing the circuit court=s dismissal of the petition for declaratory judgment, the court of appeals considered whether the pleaded facts invoked principles of substantive law that would entitle the associations to a declaration of rights or status, irrespective of whether they were entitled to the relief requested. *Willamette Industries, Inc. v. Clean Water Comm'n*, 34 S.W.3d 197, 200 (Mo. App. W.D. 2000). Finding that the facts were uncontested, the court of appeals determined that the circuit court correctly applied the law to those facts under the principles of *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

ARGUMENT

I. The circuit court properly dismissed the petition seeking a declaratory judgment concerning the Avalidity@ or Athreatened application@ of the Commission=s

[21] *Id.*, 293, && 5 & 6.

[22] *Id.*, 293, & 6 and 294, & 7.

Aimpaired waters@ list, as delivered to the EPA in 1998 for federal review, because the list was not a Arule@ subject to challenge under ' 536.050.1, RSMo. It was also not a Adetermination@ subject to judicial review under either ' 536.050.1 or an authority not raised by the petition. (Response to Appellants= First Point Relied On.)

A. The Commission=s recommendation to another agency with authority to decide the issue is not a rule as defined in ' 536.010(4), RSMo. (Response to Appellants= I.B.2.)

For the circuit court to assert jurisdiction under ' 536.050.1, which was the only authority cited in the petition, the impaired waters list must be a Arule@ whose Avalidity@ or Athreatened application@ can be adjudicated by declaratory judgment. The petition was properly dismissed because ' 536.050.1 does not empower a court to review a state agency=s recommendation to a federal agency that has final authority over the issue. The recommendation does not become a Arule@ merely because the Commission may be required to promulgate rules in the future B rules that will be subject to ' 536.050.1 B to implement the federal agency=s action on the issue addressed by the recommendation.

1. The Commission=s recommended identification of Aimpaired waters@ is not a Arule@ because it has no effect on anyone=s legal rights or status. Moreover, the list fits an exception to the definition that allows the Commission to share with other agencies communications that do not have a legal impact.

A Arule@ is Aeach agency statement of general applicability that implements, interprets or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any

agency.@ *See* ' 536.010(4). The Commission=s recommended list for 1998 does not meet this definition. While it may be a Astatement of general applicability,@ it is not one Athat implements, interprets or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency.@ Moreover, as the court of appeals determined, even if the Commission=s list **B** before it had undergone EPA=s own public comment process, review and determination **B** did fit the definition, the list still fell within the exception of Aan intergovernmental . . . communication which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof@ under ' 536.010(4)(c).[23]

The power to formulate rules is legislative. *Missourians for the Separation of Church and State v. Robertson*, 592 S.W.2d 825, 841 (Mo. App. W.D. 1979). A generally applicable statement is a rule only if it is legislative, i.e., if it is not just a statement of policy or interpretation of law, but a statement or interpretation "of future effect" that acts on unnamed and unspecified persons or facts. *Id*. If the generally applicable statement does not have a Afuture effect,@ then it is not a rule. *Baugus v. Director of Revenue*, 878 S.W.2d 39, 42 (Mo. banc 1994).

The Afuture effect@ of a rule is its potential impact upon the substantive or procedural rights of some member of the public describable in the abstract, even if that person is not presently known. *Id*. Although the identity of that person may not be known, the person can still be described Ain the abstract@ because there is a discernible legal effect on the person=s rights or duties under certain circumstances. For example, licensing requirements for a profession must be promulgated as rules

[23]Suit was filed to challenge the list before EPA made a final determination.

because it can be discerned that the requirements would apply to a person who intends to engage in that profession, even though an individual specifically affected may not be identified until he either submits a license application or is caught practicing without a license.

Another example is the ARight of Way Manual@ used by the Missouri State Highway and Transportation Commission to determine compensation for persons whose property was condemned for highway purposes. In *Tonnar v. Missouri State Highway & Transp. Comm'n*, 640 S.W.2d 527 (Mo. App. W.D. 1982), which is cited by the associations, the court of appeals found that the manual was a rule and could not be given the force of law because it had not been validly enacted. But *Tonnar* is distinguishable because of the Afuture effect@ the manual had upon the rights of the public. Since 1971 the Commission had considered the manual controlling with respect to the computation of relocation assistance payments. The Commission regarded it as binding upon every condemnee, irrespective of the evidence offered in a contested case hearing about a specific property. Because the effect of the manual was to "declare the policy of the Commission in respect to certain compensation and relocation payments and to set practices and procedures governing the rights of the public in these areas," the manual fit the definition of a rule. *Id*.

In contrast, the Clean Water Commission's list of proposed impaired waters did not establish practices and procedures governing the rights of the public. It was a preliminary assessment for determining Missouri's impaired waters and developing measures to improve them. The Commission recommended that some waters may benefit from the development of TMDLs, but that others may not, and that still others (such as the Missouri and Mississippi) should be further studied to determine whether TMDLs would be appropriate at all. It was advice and information offered to the EPA

concerning what is known and what needs to be studied about the health of Missouri's public waters, as a prelude to future consideration about whether and how the quality of those waters can be improved.

The associations distort the Afuture effect@ of the list with exaggerated claims about how the list, even before EPA reviewed it, could have an impact. They argue, for example, that the list affects "the overwhelming majority of citizens in the State of Missouri [who] live within the watersheds adjoining these 165 bodies of water.@[24] But this is meaningless speculation. By merely expressing concern about the health of the listed waters, the Commission established neither a legal duty, nor a limitation upon an existing right.[25] Therefore, the harms they predict, such as Alimitations on crop rotations [and] increased costs and decreased use of agricultural products and services,@ amount to hyperbole, as there is no basis in the record for such fears.[26] And their argument that persons subjected to unlawful regulations in

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[24]Appellants' brief at 38.

[25]In a separate action brought by the Missouri Soybean Association in federal court to challenge the EPA=s approval of the list, the U.S. Court of Appeals for the 8th Circuit held that until the EPA develops final TMDLs, and their impact can be determined, any challenge is based upon speculation and not yet ripe. *See American Canoe Ass=n, et al. v. United States EPA, et al.*, Case No. 01-2905 (8th Cir. Slip opinion filed May 6, 2002; mandate issued June 27, 2002). A copy of the slip opinion appears in the Appendix to this brief.

[26]Appellants= brief at 41.

the future could be forever deprived of judicial recourse unless this Court declares the Commission=s suggested list invalid, borders on hysteria.[27]

The Commission=s list was a communication to the EPA in response to ' 303(d) of the Federal Water Pollution Control Act, 33 U.S.C. ' 1313(d). Through the list, the Commission attempted to identify those waters within Missouri's boundaries for which, in the Commission's opinion, existing effluent limitations may not be stringent enough to implement applicable water quality standards for purposes of protecting the public health and welfare, taking into consideration the value and uses of the waters for such purposes as public water supplies, propagation of fish and wildlife, recreation, agriculture, industry and navigation. 33 U.S.C. ' 1313(c).

The federal act requires that for each water body ultimately designated by the EPA as Aimpaired,@ the state must provide, according to a priority ranking, the Atotal maximum daily load@ (TMDL) of pollutants that may be discharged into the water body. Each TMDL shall be established at a level necessary to implement the applicable standard, considering seasonal variations and a margin of safety that takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. 33 U.S.C. ' 1313(d)(1)(C).

The EPA ultimately determines which waters are impaired and the applicable TMDLs. If the EPA disapproves the state=s identifications, EPA must produce its own determination of impaired waters and TMDLs. These determinations must then be incorporated in the state's plan for protecting and improving water quality. *See* 33 U.S.C. ' 1313(d)(1)(D)(2).

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[27]*Id.*, at 47.

EPA's duties under ' 303(d) are nondiscretionary and subject to enforcement and review by the federal courts. *See Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984). EPA has been required to either approve or disapprove a state's failure to submit any list, under the theory that the state's inaction is a "constructive submission" of no TMDLs, or a constructive state determination by the state that TMDLs are not necessary. *Id*. at 997-998.

The court of appeals correctly found that the challenged list is Alittle more than discussions between Missouri and EPA [about] what waterbodies the State has determined to potentially require TMDLs@ and that these discussions did not substantially affect the public's rights or the procedures available to the public.[28] The court of appeals found that the list was not intended to be an exercise of legislative power because the mere identification of waters that may be impaired by pollutants does not possess Athe power and force of law so as to bind indicated but unnamed or unspecified persons or situations.@[29]

The rationale of the court of appeals complements the conclusion reached by the circuit court that the Commission's proffer of the list to the EPA was not sufficient, in itself, to implement law or policy because, just as it did not have a known future effect on anybody else, it did not bind the EPA. The final list and TMDLs must be determined by the EPA. Only then will the Commission be able to develop measures that rely upon the TMDLs to improve the quality of impaired waters.

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[28]Slip Opinion at 23.

[29]*Id*. at 24.

2. The dismissal of the petition by both the circuit court and court of appeals is the only result that allows ' 536.050.1 to make sense.

That the Commission=s recommended impaired waters list is not a rule subject to challenge under ' 536.050.1 is apparent from the impracticality of granting the relief the statute contemplates. The statute implicitly limits the available relief to a declaration that the Arule@ is invalid, or that the Arule@ cannot be applied as threatened. Here, neither form of relief makes any sense. Because EPA is not bound by the state=s recommendations, a judicial declaration that the recommendation is Ainvalid@ would not have prevented, and will not prevent in the future, the EPA from placing waters, including the entire Missouri and Mississippi Rivers, on the list. And any Athreatened application@ of the list, namely, the final determination of which pollutants must be limited by TMDLs, must come from the EPA, not the state.

B. The Commission was not required to promulgate the list as a rule under ' 644.026.1(8), RSMo. This statute neither requires a recommendation made to another decision-making agency to be a rule, nor conflicts with the definition of Arule@ in ' 536.010(4). (Response to Appellants= I.B.1.)

The associations argue that even if the Commission=s recommendation was not a rule as defined in ' 536.010(4), the Clean Water Law independently requires that the Commission promulgate it as a rule. They find this obligation in ' 644.026.1(8), which requires the Commission to adopt rules Ato enforce, implement and effectuate any powers and duties required . . . of the state by the federal water

pollution control act.@[30] But this statute does not enlarge the definition of Arule@ in ' 536.010(4) to include a preliminary assessment of what state waters should be studied to determine whether they are impaired by pollutants and would meet water quality standards from the imposition of TMDLs for those pollutants. It merely requires that rulemaking procedures are required for the Commission to enforce, implement or effectuate a legal duty created by federal law. But it is an unreasonable stretch to read the statute as treating the Commission=s proposal to study the effectiveness of current water quality standards for named streams as the an implementation of a federal legal requirement that can be enforced against the public or any members thereof.

C. An agency action is not a rule merely because it may result in the expenditure of public funds. (Response to Appellants= I.D.2 and II.A.2.)

The associations argue that the expenditure of public funds to develop TMDLs and the costs that would result from the their speculative list of harms are Afuture effects@ of the Commission's list.[31] The argument seems to be that the Commission may not spend public monies without first formally promulgating a rule authorizing the activity for which the costs will be incurred.

The legislature has granted broad powers to the Commission. For example, the Commission may encourage, participate in, or conduct studies, investigations and research demonstrations relating to water pollution abatement. *See* ' 644.026.1(5). The Commission may advise, consult and cooperate

[30]Appellants= substitute brief at 35.

[31]Appellants= substitute brief, pp. 63-67.

with other agencies of the state, the federal government, other states, interstate agencies, political subdivisions, affected groups, and industries for such purposes. *See* ' 644.026.1(3). The Commission may collect and disseminate information relating to water pollution and its prevention, control and abatement. *See* ' 644.026.1(6). Engaging in any of these activities may result in the expenditure of public funds. Appellants cite no authority for the proposition that incurring costs for such authorized purposes so substantially affects the rights of the public, or any segment thereof, that the activities must be promulgated as rules to be Avalid.@ They offer no authority for the proposition that the expenditure of public funds to conduct these statutory activities is a Arule,@ the Athreatened application@ of which may be subject to declaratory judgment under ' 536.050.1.

The Commission could not function in a reasonable manner if it must promulgate a rule every time it proposes to expend funds to engage in these authorized activities. It is impossible to imagine the havoc that would result, were this court to so broadly apply the definition of "rule" in ' 536.010(4) to all public agencies.

D. Because the state and federal procedures allowed the public an opportunity to comment on the 1998 Aimpaired waters@ list, no public procedural rights were impaired when the Commission did not promulgate its recommendation to EPA as a rule. (Further Response to Appellants= I.B.2. and II.A.1.)

The associations also argue that the list is subject to declaratory judgment because the list substantially affects the procedural rights of the public. But this argument is circular. It presumes that the list is a rule and then asserts the Commission=s failure to follow the rulemaking procedures to show that the public=s procedural rights were violated. The argument ignores the opportunities for public

comment provided by the federal process for developing TMDLs. For example, the associations ignore, although the court of appeals did not, the fact that the Commission provided four notices soliciting comments about the list and delivered the comments to EPA.[32] Under the total circumstances, the court of appeals fairly concluded that the communication between the Commission and the EPA did not substantially impair the rights of the public, or of any segment thereof, to express their concerns about the list. And noting the Missouri Soybean Associations direct participation in the public comment process and open meetings provided by both the Commission and the EPA, the court of appeals had a firm basis in the record for rejecting the associations complaint that they had an inadequate opportunity to comment.[33]

E. Just as the list is not a Arule,@ it is also not a "determination" that is subject to judicial review. (Response to Point Relied On I-C.)

1. A "determination" that is not a rule is not subject to review under Section 536.050.01.

Whether the Commission's list is subject to judicial review as a Adetermination@ that is something other than a rule, and what cause of actions to challenge it, if any, may be authorized by statutes other than ' 536.050.1, are academic questions, because they were not raised by the petition in this case. The associations first invoked ' 644.071 in the brief filed in the court of appeals. Such a tardy claim is

[32]Slip Opinion at p. 14; LF, vol. III, 296.

[33]*Id.*, at 6-10 and 25.

not permitted. *Artman v. State Board of Registration for the Healing Arts*, 918 S.W.2d 247, 252 (Mo. banc 1996). But if the point is considered, reliance upon ' 644.071, which authorizes judicial review of the Commission's final Adeterminations,@ is misplaced.

Just as the associations have not shown that the list has the force of legislation, neither have they shown that it constitutes the Commission's Adetermination@ of any specific person's legal rights or obligations. In the brief filed with the court of appeals, and again in their substitute brief (page 53), they contradict their own argument by conceding that the Commission's recommendation was not subject to judicial review as an Aadjudication,@ either as a Acontested case@ under '' 536.100-536.140, RSMo, or as a Anoncontested case@ under ' 536.150, RSMo.[34] This concession is correct because the Commission's recommendation was too early in the TMDL development process to determine the legal rights, duties, or privileges of specific parties or persons.[35]

[34]*See* Appellants' Brief filed in the court of appeals, at 34 and 41.

[35] *See* ' 536.010(2), definition of "contested case" and ' 536.150.

If the list were a Adetermination@ in any sense other than a rulemaking, to be judicially reviewable it must be Afinal.@ As already discussed, any Afinal@ list must be determined by EPA. The Commission=s proposed 1998 list was not Afinal.@ But more accurately, the Commission=s proffered list was not subject to judicial review because it was not even a Adetermination.@ It was merely a point of discussion, in 1998, between the Commission and the EPA regarding further studies, and the development of future controls, for impaired Missouri water bodies. Because the associations have not shown that the list has the force of state law on the rights of any known person, they have not shown that it is a Adetermination@ subject to judicial challenge under any state statute.[36]

Moreover, if the Commission=s list were a Adetermination@ in the sense of an administrative action affecting a specific person=s rights, privileges, or duties, the circuit court=s dismissal would still be required for lack of subject matter jurisdiction under ' 536.050.1. To invoke the court's jurisdiction to review a final Adetermination,@ the aggrieved person would have to follow other prescribed procedures that cannot be avoided by challenging the Commission's final Adetermination@ as an invalid Arule.@ *Willamette Industries, Inc. v. Clean Water Comm'n*, 34 S.W.3d 197 (Mo. App. W.D. 2000)

[36]Again, the 8th Circuit has held that the Missouri Soybean Association has not shown that Missouri=s 1998 list, even after EPA=s action, affected its members in any concrete way, citing the speculative nature of any future regulation based upon the list. *See* Appendix.

(affirming dismissal of declaratory judgment action that challenged permit conditions as invalid rules and requiring plaintiff to exhaust administrative Acontested case@ hearing requirement before seeking judicial review).

2. The rationale used by the court of appeals would not nullify any provision authorizing judicial review of Commission determinations by finding that the list is not subject to attack as an invalid "rule" under Section 536.050.1.

In view of the concession that the list is not subject to judicial review as an adjudication, the claim that the court of appeals used a rationale that would nullify ' 644.071 is confusing, if not disingenuous.[37] Nothing in the opinion suggests that the court of appeals would find ' 644.071 meaningless or in conflict with any judicial review mechanism provided in Chapter 536. The court merely held that it would be up to the legislature to provide an avenue for judicial review of a ' 303(d) list, given that it is not reviewable as a rule under ' 536.050.1.[38] Indeed, the legislature would have to provide a special avenue for judicial review of the ' 303(d) list because it is also not a Adetermination.@ There is no provision for judicial review for an agency=s action, as a Adetermination,@ where the action is neither a rule nor an adjudication affecting anyone=s legal rights or status. Under these circumstances,

[37]*See* section "C" under Appellants= first point, beginning at p. 45.

[38]Slip Opinion at 25.

the court of appeals correctly suggested that the legislature would have to create an avenue for judicial review of the ' 303(d) list because it has not already done so.

II. The merits of the list were not considered by the circuit court for lack of subject matter jurisdiction. A judicial review of whether the list is Aarbitrary and capricious@ would not lead to meaningful relief in any event. (Response to Appellants= II.B.)

Reasonable persons may disagree about the whether including the Missouri and Mississippi Rivers on the ' 303(d) list was appropriate, and the associations contend that it was Aarbitrary and capricious.@ The circuit court did not reach the issue, citing the lack of subject matter jurisdiction. But even assuming that the circuit court may evaluate the Commission=s inclusion of the major rivers on the list sent to EPA in 1998, it does not follow that the court can provide meaningful relief to the associations and their members.

A determination by this Court that the circuit court has jurisdiction to review the merits would put this case in a strange posture. The circuit court, on remand, would presumably review the Commission=s expression of concern about the Ahabitat loss@ in the major rivers and its recommendation of further study to determine the causes of that problem. Again, the Commission merely intended to recommend further study to determine whether pollutants were a factor and whether TMDL development was appropriate at all. The circuit court has already found that the Commission did not intend to make a Afinal@ determination about that question and that the EPA ignored the Commission=s intentions by requiring pollutant TMDLs for the Missouri and Mississippi Rivers. Thus, the circuit court has already concluded that Awhile EPA may have rendered a final decision for purposes of judicial

review, it is clear that the Commission did not.@[39] Even if the circuit court, on remand, were to find that it was Aarbitrary and capricious@ for the Commission to express its concern on the proposed ' 303(d) list, EPA=s action will not be affected. The circuit court cannot undo what the EPA has done.

In view of these circumstances, it is difficult to imagine why the Commission should be forced to defend its 1998 list. Again, that list is no longer important after EPA made its own determination. The EPA=s list includes changes the Commission did not want and over which the Commission has no control. A judicial determination of whether the Commission=s advice to the EPA in 1998 was Aarbitrary and capricious@ will not result in any practical relief from EPA=s list. Therefore, the exercise makes no sense.

CONCLUSION

Because the Clean Water Commission's recommendation to EPA was not a rule, it was not subject to review under ' 536.050.1, RSMo, and the petition for review was outside the circuit court's subject matter jurisdiction. Therefore, the circuit court properly dismissed the petition and the court of appeals properly affirmed that action. This Court should agree that the petition did not invoke jurisdiction under '536.050.1.

Respectfully submitted,

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[39]L.F. at 462-463.

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Certification of Service and of Compliance with Rule 84.068 and (g)

The undersigned hereby certifies that on this 10 th day of July, 2002, two true and correct copies of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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_____
Timothy P. Duggan

APPENDIX

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