

Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 1
Issue 1 *Summer 1993*

Article 3

1993

Interview with David Shorr, Director, Missouri Department of Natural Resources, An

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Recommended Citation

Tony Farrell, *Interview with David Shorr, Director, Missouri Department of Natural Resources, An*, 1 Mo. Envtl. L. & Pol'y Rev. 17 (1993)
Available at: <https://scholarship.law.missouri.edu/jesl/vol1/iss1/3>

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AN INTERVIEW WITH DAVID SHORR, DIRECTOR, MISSOURI DEPARTMENT OF NATURAL RESOURCES

by TONY FARRELL

What directions or goals do you bring to your new role as the Director of the Department of Natural Resources (DNR)?

One of the reasons I believe I was brought in was to change the overall attitude of the agency, so that it would become more people oriented. We have had a bad rap that we don't worry about who we enforce upon. The DNR doesn't need an overhaul on the environmental side, we just need to do what we are now doing and do it better. We have had a lot of mandates placed on us over the last two years, and now are playing "catch up ball," my job is to make that transition smooth.

Are current funding levels in the DNR adequate for the department's responsibilities? The DNR is not actually overworked, just understaffed. We are suffering most in those areas that are traditionally general revenue based. The new areas we regulate are well funded and well staffed. For example in the new Clean Air Act implementation, we will probably have 75 FTE (full time employees), which will be adequate to cover the job we have to do. For the old Clean Air Act programs we just don't have adequate resources. We don't cross our resource lines because we are a fee-based agency; we can't jump back and forth easily. We can absorb a lot more activities; we just need the staff to do it.

The state legislature has not underfunded the DNR in the last 3 three years, as there has been a dramatic change in philosophy in Missouri. We went from: "Let's keep DNR

small and they won't hurt you," to: "By keeping DNR small it has hurt all of us." The General Assembly and industry have been very helpful in getting our programs restaffed, refunded, and have realized that it is an economic advantage to have a strong, thorough, knowledgeable DNR. We now have a pretty good cooperative relationship with our advocacy and interest groups, even ones that are generally viewed as the ones we regulate; they realize now that they need our help.

"We believe the environment can be taught at every grade level and every area of education."

Would you like to emphasize the educational enforcement or compliance aspects of environmental law? When an agency in any state or federal government gets a cutback in funding, the first things to go are the things that aren't their bread and butter. That's what happened in the case of the DNR, especially the Division of Environmental Quality (DEQ); you cut back general revenue, but you still have the federal level programs which concentrate on permitting and enforcement. The things you cut in that situation are all the frills, and the frills are the things that really get the community in touch with the goals and missions of the department.

Our technical assistance and related education activities were nonexistent three years

ago. They're still pretty weak. It is a function of money. If the money is there, anyone in my organization would love to give at least a helping hand before we slap the hand. I don't think there is anybody, even my true enforcement people, who would not want to help out. But if you don't have the money to do it, why lie? I think that's where we are at right now.

We did request an improvement in the technical assistance program in this year's budget, and it was approved. Management areas were approved, and we are now evaluating a move to improve technical assistance with more staff. The public and industry wants compliance assistance or "enforcement avoidance," depending on your side of the ledger.

Before we went to the General Assembly, we thoroughly evaluated our strategy and consequently we received the management before the staff. This is better than being given the staff first, which is what has happened in our history.

There are funds available in technical assistance for the Air program. We are moving the technical assistance in DEQ to one unit, where it will get the advocacy it needs. We are adding a compliance assistance unit, starting with small business technical assistance for the Clean Air Act. This will be a model for other programs.

We now have two educational assistants in the DNR. The Department of Conservation has 12 educational assistants, while the Education Department has zero for environmental education. This number of people is not adequate and is not in step with what is happening at the federal level. We would like to change social attitudes at the elementary level. Teachers have been demanding a change in the educational assistance program and more environmental education overall.

The Education Department has rigid guidelines which impact our success in this area. We believe the environment can be taught at every grade level and every area of education. We need to and want to nurture this attitude. The solid waste reduction requirements in Senate Bill 530, which requires a 40% reduction in solid waste volume in five

years, put our staff in a responsible position on environmental education. Even hazardous waste incinerators can be used for educational purposes in the disciplines of science, chemistry, math, government, and even spelling. Teachers are demanding it and we must deliver.

Could you explain the DNR's minority recruitment program? We are heavily involved in minority recruitment, as our organization now is not culturally diverse and not representative of Missouri. We want to stimulate discussion on this topic in the department, ensure our compliance with federal and state laws, and educate our staff on the advantages of diversity. We need to have input on our decisions from different culture groups in Missouri.

Seventy percent of our enforcement and permit actions are in urban areas. We have committed resources in Kansas City and St. Louis, and need to dedicate more resources in those areas. They have not been neglected, but we can and have to improve the communication. Being in Jefferson City it is easy to forget that those communities are part of your assignment, not part of the problem.

Are there any new state or federal programs being implemented? As far as new state programs, along with the technical assistance change, other things have also been neglected. We need to push pollution prevention like the other environmental departments have. Non-point source pollution is a major, controversial, and problematic area which the DNR needs to address. The people in Washington behind the "Greenbelt" are isolated from the implementation aspects of environmental law.

I feel that our reliance on agriculture and our two large cities' heavy reliance on industry make Missouri uniquely situated for implementing federal programs. For example, stormwater runoff is a problem, and Missouri could be a testing ground for any new changes.

While most people focus on the DEQ, the DNR does a lot more things. We need to change the goals and objectives in the Divi-

sion of Energy; it was an agency that gave out grants and nothing more. The Energy Division has had very little controversy or stimulus on the Missouri public, yet the principle area where we need to improve the environment is energy consumption. The Energy Division has poor finances and has a general need for someone who is going to step in and push the issues. This is especially true as it applies to transportation, which will be the largest area of change.

The DNR is running close to the schedule on Clean Air Act implementation. Usually we have to wait a year to get the staff for the implementation, which means we already

"In solid waste we need a new permitting law; the state must address this issue and the problems of siting."

are two years behind the schedule when we can begin. This has put a tremendous burden on our staff, and they have done a good job keeping pace despite the pressures of the public and the government.

The new Air rules are the biggest change and will impact dry cleaners and others who are not usually regulated. It will be just like the 70's again. We now have the luxury of working with people who have been regulated for 20 years. This will change drastically.

What is your view on Missouri's restrictions in air regulations to the federal regulation? The recent Cole County Circuit Court case which held that Missouri law may be no stricter than federal laws is not acceptable. The restriction violates the constitutional integrity of federalism, and the DNR and Attorney General Jay Nixon will actively oppose it. It is bad public policy and not in the citizen's interest.

The legislative intent is unclear in the law. The real problem with the provision and the case is that the EPA can be 5-10 years

behind in regulations. Why should Missouri wait when it is already established that the pollution is a problem? I can accept the premise of consistency once the EPA acts. That the law is needed to protect Missouri citizens prior to EPA action is simply hog-wash.

What legislative changes do you feel are needed? In solid waste we need a new permitting law; the state must address this issue and the problems of siting. It is now a "patchwork quilt" of issues, and the system doesn't flow well. I don't like the idea of a state-wide landfill siting commission. I have never seen one that has worked. People are afraid of them, but there have to be landfills somewhere.

Among our responsibilities is Senate Bill 530 (requires a 40% reduction in solid waste volume in five years, see §§ 260.200 et seq. RSMo 1992), but we are just now getting the plans from many communities for their compliance. We need to work with them to help them along, and we may need an enforcement philosophy added to reach these goals. Senate Bill 530 is okay, but it needs to be comprehensive. There are too many weak links. I believe we need a public debate on the issues of: preemption of zoning laws by the DNR solid waste law, and zoning which interferes with landfill permits. Zoning which interferes with a permit that has already issued amounts to a taking; the case holding otherwise is simply bad judicial law.

I am opposed to all the current solid waste bills (ex. HB 669 & 919); they amount to NIMBYism. The DNR already ensures compliance with the laws, but we need to strengthen the laws. I have no use for "Don't site a landfill within x feet of x." (see HB 69, SB 30) Under Subtitle D, the landfills will increase in quality. I do approve of the bill allowing the DNR to increase the bond requirement to 30 years under Subtitle D.

The Safe Drinking Water Act (SDWA) means a lot of money and activity for our staff. Also we will be busy with hazardous waste, which is always dynamic. We are now obtaining Subtitle D authority under RCRA

for regulating solid waste.

With all these new assignments, we also need control on the DNR's growth for efficiency purposes. We opened a new lab two years ago, and it is now full spacewise.

Our voluntary cleanup program will increase our cleanup capability across the board. I believe most actors are good ones. About one-third see that it is in their advantage to be in compliance; another one-third need to be motivated, and one-third aren't going to do it without inspection and enforcement.

Of new legislation, I am very much in favor of Senate Bill 80, 100, 170, 17. These allow the DNR to charge fees for hazardous waste inspections on commercial facilities. This builds confidence in the public, as the standards are stringent but inspection is lacking. The new voluntary cleanup program and the revisions to the administrative penalties improve the law and makes them more tolerable now.

Senate Bill 171, a remediation fund for storage tanks, may die in committee, but I approve of it. It covers above and underground tanks, and it now has come to "Pay me now or pay me later." For one penny a gallon, this fund will remediate every tank in Missouri through fixing the insurance fund and adding a remediation fund. We need to do it here or through general taxes after petroleum is gone. We now have 32,000 abandoned tanks in Missouri, and actually the fund is an "excise operation," not a tax. It was sponsored by petroleum marketers and would be beneficial to all, maybe it will come back in '94.

Could you give us an update on the petroleum waste spill in Columbia? The petroleum waste spill in Columbia has entered the investigation stage, and there may be some violations eventually. The entrance of the EPA was premature, as we have agreements that this would be a DNR responsibility. I have a responsibility to protect our state. On the emergency services provided by DNR, we are not "first responders." We are in an emergency consultant capacity,

or we carry out the job when no other support is available.

We are not a HAZMAT response team, and our response is based on the authority in the laws. Our concern is public safety, our actions have been adequate, and our people have done a done great job overall. We need five more teams statewide to help fire departments. Even with our flying capability, we may be needed two hours away from Jefferson City.

Are you pleased with the new Environmental Enforcement Division at the Attorney General's Office? I have great confidence in Assistant Attorney General

"The Department of Natural Resources will continue allowing environmentally beneficial projects as alternative settlements when allowed under Missouri law."

Joe Bindbeutel and the new Environmental Enforcement Division at the Attorney General's office. This will clear up the logjam and change the philosophy of the AG's office. There now are some backlogs; for example in Water, we have been 300 cases behind. They had eight attorneys for the protection of the environment, and we are pretty prolific according to industry.

The DNR needs them to try these cases in order to define the scope of our authority and enforcement, instead of working on assumptions. Jay Nixon concurs in this, and will try a loser to find the law; he just needs more staff. Most of them are strong advocates of the environment; we just need to "let the bridles loose," as they now have 100 cases each.

How does the DNR handle in-house settlements? We reach many settlements within the DNR office, then the AG reviews and approves them. We now will have 12 attorneys in the Environmental Enforcement

Division, and the AG's office will provide the in-house counsel for the DNR. I am not completely comfortable with that yet, but we will see. I have great confidence in Jay and Joe.

The DNR settlements are public records after the negotiation is complete. The sunshine laws only apply to that negotiation stage. We will be more open, but we have no centralized filing. It is difficult to find information which does not serve the public well. We should be cutting down on our use of paper, not increasing it. Maybe we will obtain optical disk scanning capability, but whether the General Assembly feels that this is appropriate will depend on our recommendation to them. This should be in the interest of their constituents.

Will the DNR continue seeking alternative settlements? The DNR will continue allowing environmentally beneficial projects as alternative settlements when allowed under Missouri law. (see David Taylor, *Anatomy of an Environmental Settlement*, 1 MO. ENV'T. L. & POL'Y REV. 21 (1993)) These usually relate to education, as we have very few actually on the ground. For example, Hudson Foods distributed turkey and chicken for two years to school children. There is a water quality and an economic benefit to that solution. After all, correcting an improper economic benefit is the goal of penalties. We may also consider deferred settlements, where instead of settling for one-half of the penalty, we will penalize only for the first offense, then they must pay the penalty authorized by law in full the second time.

We also will be pursuing more natural resources damages on top of penalties. They tend to be harder to calculate, but violators comprehend damages more clearly than just penalties. We need remuneration to Missouri, but alternative settlements also have benefits to Missouri.

What areas would you like to see more research in? To do our job better, we need more research in the stuff we deal with every day. More data is needed to gauge the

efficiency, accuracy, and adequacy of our standards. We are now using a "shotgun" approach, without knowing what we are hitting. The federal government is similar, where there is no real knowledge of the effects. We have had some accomplishments. In 1970 there were 800 miles of quantified streams that were deteriorated; now there are 26 out of 21,000 miles regulated and 51,000 total. These are major improvements, but we need good data and a "blend."

Missouri needs research on the lead tailings problem in Southern Missouri. We can't get away from this, as with only one earthquake it could liquify and move. At that point it is not solvable; meanwhile, we need directions for the future.

How would you deal with the pesticide and wetland problems? For farms, pesticides are regulated under federal law (FIFRA), so the DNR does not have many responsibilities there. We do need to reduce their use, make them biodegradable, and control soil erosion. We need referrals under RCRA for pesticides to act, and better overall communication with the Department of Agriculture.

Pesticides are also a good area for research, as farmers are willing to accept their regulation with data to back it up. They have a "Show me" attitude, and will accept it once shown that any restrictions will not compromise the overall operation.

We have lost 90% of our wetlands, and need to enhance this situation. The proof is in the pudding, as the farmer asks why he must take 20 acres out of cultivation. We all know empirically it must happen, but how?

It is their investment, not ours; they want to know the long term effects and tradeoffs of any wetland restoration program.

What new responsibilities or duties will the DNR have? The DNR will accept some new responsibilities, but not from the Corps of Engineers. We will continue the Section 401 part of 404, as it is not in our interest to "punt." There will be new authority on solid waste under Subtitle D of RCRA, as well as for hazardous oil and industrial wastes which impact our cement kilns. We also will seek RCRA "corrective action" authority, which are the only two areas that Missouri does not have delegation. We probably are the most complete state in delegation authority.

On drinking water, we will have 2-3 communities that will be in violation, but the states may return the safe drinking water law (SDWA) to the federal government in two years. We now have a mandated fee on utility bills for drinking water cleanups until 1997 and the delegation may be returned to EPA if the fee is not renewed.

Illinois has returned its underground injection delegation, while Iowa returned authority on RCRA and had also returned its authority on drinking water. The EPA gives responsibility to the states, but not the cash or flexibility to implement them properly or effectively. The old "bean count" does not work.

We need to improve our working relation with the Conservation Department. We have different mission statements, but the same goal: improve habitat, both human and wild life. Their fish data does help the DNR in evaluating water quality, as does a lot of their

wild life research.

Could you give us an overall view of federal regulation changes? For federal programs Missouri is the best test case, as we are 50% industry and agriculture. They can use Missouri to see the impact nationally. The "Greenbelt" mentality seems to forget the practicality of these laws. For instance, the Clean Air Act, while some strategies are good, is stringent in the implementation aspects. Meanwhile the Clean Water Law has been the most successful in history.

CERCLA needs an overhaul. It has had a good history in Missouri, but has been even better for lawyers. As with all the other federal laws, it needs more flexibility in its administration.

I believe President Clinton will give more state support than previous administrations. Carol Browner (EPA Administrator) is a former Florida state regulator, and I hope she remembers her roots and is not tainted by the Greenbelt mentality.

Overall, we need less compartmentalization and more flexibility in the federal statutes. We need more help from the federal level with research, and also more freedom in the administration of the federal programs. I have no comment on the dioxin incinerator case in Arkansas and the selection of Yucca Mountain Nevada as the site for radioactive waste disposal.

As for the MISSOURI ENVIRONMENTAL LAW & POLICY REVIEW, we need more localized publications on the environment. Currently there are some publications from St. Louis and the DNR produces the ENVIRONMENT ACTION REPORT on a limited budget, so "GO FOR IT!"

ANATOMY OF AN ENVIRONMENTAL SETTLEMENT, OR I'D RATHER EAT WORMS THAN NEGOTIATE WITH A SHOTGUN TO MY HEAD

by DAVID TAYLOR

Those of us who practice environmental law know well why so few cases reach trial. The laws are drafted so strictly and punitively, and the interpretative cases have been so consistently supportive in enforcing the laws that attorneys must tell clients things like; "Don't worry, the worst that could happen to you is you may lose your business, go to jail and have to give up your first born child, but I haven't seen any children lost yet." Needless to say, this type of warning tends to loosen the pocket books of environmental defendants.

In this setting lawyers bravely march into settlement negotiations with their "game faces" on, telling government attorneys: "We'll see you in court buddy, just go ahead and sue our socks off." At the same time they, however, secretly pop another antacid tablet and think about how many points their blood pressure just went up.

A little over a year ago I found myself in this familiar circumstance. My client was the City of Moberly and the attorney representing the state was Joe Bindbeutel, a long time Assistant Attorney General whom I have known for many years and worked with on a number of occasions. This familiarity and mutual respect meant we were spared the "dance of

the toreadors" lawyers often perform in the early posturing part of their relationship. Here's how the case developed.

In November 1991 the City received a proposed Consent Decree from the Attorney General's Office setting forth a schedule for renovating the City's poorly functioning waste water treatment facility. The proposed Consent Decree followed a number of Notices of Violation received by the City for failing to meet NPDES effluent limitations such as those for biochemical oxygen de-

"Don't worry, the worst that could happen to you is you may lose your business, go to jail and have to give up your first born child..."

mand and suspended solids. The proposed Consent Decree also provided for the payment of a \$122,000 penalty. This presumably got the City's attention and convinced them they needed an environmental lawyer.

I entered the fray in December 1991 and responded to the proposed Consent Decree with a question, not a counter proposal.

Practitioner's Corner

"Where do you State guys get off asking for a \$122,000 penalty? I mean, get real!" I, of course, articulated the question more diplomatically! "We'd really appreciate it if you could provide us with your justification for this penalty. That would put us in a much better position to provide you with a meaningful response." Having worked on the other side as an Assistant Attorney General myself, I harbored a modest suspicion that the Department of Natural Resources ("DNR") Water Pollution Control Program had pulled the penalty figure out of their hats.

I was surprised, if not shocked, to receive from Joe in January 1992 a copy of a work sheet used by DNR in calculating the \$122,000 penalty. It should be noted that these discussions were taking place before the DNR's Administrative Penalty Assessment Protocol was adopted. The penalty assessment protocol became effective in July 1992.¹

In February and March 1992 the City and State held several meetings dealing primarily with the schedule for completing improvements at the treatment facility. While the Consent Decree was discussed, the parties stayed away from the big money question. On March 30th, I provided the State with the City's counter proposal concerning the proposed monetary penalty. Armed with the State's penalty assessment calculations, I whittled away at the numbers until I got to the lowest possible figure I could present with a straight face and some semblance of dignity. The figure was \$18,000. It was now time for Joe to tell me to "get real." As I said earlier, it helps when the attorneys know each other, and are, at the very least, familiar with each other's negotiating style. This helps to avoid slammed phones and irate letters.

Joe laughed at the City's counter proposal

1 10 C.S.R. §§ 20-3.010 et seq. (1992).

but went back to work realizing that the ball was in his court. After enough of a delay to make me very nervous Joe responded to the City's counter proposal in mid-July. The State said it would agree to a \$68,000 penalty. I started to get a terrible sinking feeling since my authorization from the City was only a few thousand dollars above the \$18,000 we had originally offered.

Working on the premise that fear breeds creativity, I began scouring through applicable, quasi-applicable and totally inapplicable laws, rules and regulations hoping to stumble across an idea or concept that would help us break the fifty thousand dollar logjam between the State and City.

I discovered a seemingly innocuous passage in the recently adopted administrative penalties rule:

Environmental Projects. The department may consider decreasing a penalty in return for an agreement by the violator to undertake an environmentally beneficial project. The project must involve activities which are in addition to all efforts to achieve compliance with the pending enforcement action. The department may propose a project or review and approve or disapprove of projects proposed by the violator.²

So what if we were not dealing with an administrative penalty, but rather with a court action initiated by the Attorney General's Office? At least I had a hook.

I immediately called the Moberly City Administrator and Director of Public Works and asked them if they could come up with any environmentally beneficial projects they had been thinking about undertaking. After giving the matter some thought they advised me about a City pond contaminated with

alum sludge from the City's drinking water plant. Although DNR was aware of the pond problem it was a very low priority for the State and would be years, if at all, before the State thought about pressuring the City to take remedial action. Cleanup costs for the pond were estimated at approximately \$150,000. The City had given some thought to cleaning up the pond, but was a long way from being committed to the project. City representatives agreed that if they could get some credit from the State against the proposed penalty for cleaning up the pond, they would be willing to undertake the project.

Next came the real tricky part. How much

"Working on the premise that fear breeds captivity, I began hoping for an idea that would help us break the logjam."

credit should the City get for cleaning up the pond and how should the proposal be presented to the State? I answered the first question by placing a call to the Region VII Environmental Protection Agency ("EPA") office. A few months earlier I had heard about a defendant attempting to negotiate with Region VII on the basis of an environmentally beneficial project. I knew that the State was not about to give us a 100% credit for a separate project and I also knew that the State would probably look to EPA for guidance. I decided to beat the State to the punch and ask the EPA first, realizing that they probably would not be as candid with me as they would with the State. I was advised by the EPA Counsel's office that there were no

formal guidelines in effect, but EPA would consider giving between a 25 and 30% credit for an appropriate project. Now, I knew where I was going.

We set up a meeting with DNR and Attorney General representatives in early August 1992. The City reiterated its \$18,000 penalty offer. At this point the faces on the other side of the table got very serious. Then, however, the City proposed the environmentally beneficial project, with an offer to clean up the pond and spend a minimum of \$150,000 in the process, and the atmosphere in the room brightened instantly. To make the City's proposal work mathematically, given the City's desire to limit the penalty to \$18,000, the City wanted a 33% credit for the project. The next few months were spent with some minor haggling over the credit percentage and a few other minor items. We finally settled on a credit of approximately 27%. The Consent Decree was signed and filed with the court in early 1993.

In retrospect this has been one of the more satisfying projects I have been associated with in eighteen years of practice. The City agreed to a reasonable schedule for renovating its wastewater treatment facility and the State showed flexibility in allowing an environmentally beneficial project to offset a substantial portion of a proposed penalty assessment. I guess there occasionally are win/win situations.

— Mr. Taylor is a Jefferson City attorney whose practice is concentrated in environmental law. He is a former Assistant Attorney General who represented the Missouri Department of Natural Resources in environmental litigation. He is also a past Chairman of The Missouri Bar Environmental and Energy Law Committee.

2 10 C.S.R. 20-3.010(9)(C) (1992).

APPEALING ALLEGED VIOLATIONS OF MISSOURI'S SOLID WASTE LAW

by PAUL A. BOUDREAU

In order to represent effectively those who have been cited for violations of Missouri's Solid Waste Disposal Law, §§ 260.200-.345, RSMo 1986, as amended ("the Act"), one must have an understanding of both the types of actions taken by the Department of Natural Resources ("DNR") for alleged violations and the administrative and judicial review procedures applicable to each action. This article will describe the avenues available to persons who have received from the DNR a Notice of Violation ("NOV") and a Cease and Desist Order ("CDO").

It is not uncommon for the DNR to issue both a NOV and a CDO in the event of an alleged violation of the Act. The NOV is typically a one page form notice sent by the Division of Environmental Quality. It describes the location where the violation is alleged to have occurred and specifies the law or regulation claimed to have been broken. The issuance of the NOV does not impose any penalty or, by its terms, require any remedial action. In contrast, the CDO may direct the recipient to take particular corrective steps upon threat of a subsequent penalty action. For the practitioner, the key

question is what in each case should be done to protect the client's right to a hearing and/or appeal.

NOV Procedure

In the case of a NOV, there is no provision in the Act setting out rights to a hearing or for judicial review. Thus, a petition for review must be filed with the circuit court in accor-

"For the practitioner, the key question is what in each case should be done to protect the client's right to a hearing and/or appeal."

dance with the Administrative Procedure and Review Act ("APA").¹ In a review action of this sort, the circuit court will hear evidence on the incident and determine whether the issuance of the NOV was unlawful, unreasonable, arbitrary, involved an abuse of the DNR's discretion or was unconstitutional. An adverse judgment may be appealed to the court of appeals.²

CDO Procedure

Appeals of CDOs, on the other hand, are taken in the manner provided in § 260.235, RSMo 1986 which authorizes an aggrieved person to request a hearing on the order within thirty days of issuance.³ The hearing is conducted before the Director of the DNR, or his designee. The provisions of the APA relating to discovery, evidence, briefs, and decisions govern.

The DNR's decision becomes final after thirty days unless appealed to the Administrative Hearing Commission ("AHC") within that time. The proceeding is a de novo hearing before the AHC and not an action in the nature of a judicial review of the Department's decision. All of the same provisions of the APA governing contested cases, including notice provisions and judicial review, govern the AHC's review of CDOs.⁴

The AHC has only limited experience in hearing cases appealed to it pursuant to the provisions of the Act. Recently, it has taken evidence on two DNR denials of applications for solid waste disposal permits.⁵ In *Missouri Mining v. Department of Natural Resources*, the AHC allowed the parties "to submit the record of and exhibits admitted in the hearing held before the DNR's hearing officer as if it had been held before this Commission" in lieu of holding another evidentiary hearing.⁶ These are the only AHC decisions concerning appeals of DNR decisions to date.

Practitioner's
Corner

1 §§ 536.010-536.150, RSMo 1986, as amended.

2 Mo. Const. art. V, § 3.

3 § 260.210.5, RSMo Supp. 1992.

4 § 260.235, RSMo 1986.

5 *Bi-State Disposal, Inc., v. Department of Natural Resources*, Case No. 91-001530NR (July 31, 1992); *Missouri Mining, Inc. v. Department of Natural Resources*, Case No. 92-001043NR (January 25, 1993).

6 *Missouri Mining, Inc. v. Department of Natural Resources*, Slip op. at p. 16.

Final decisions of the AHC are subject to judicial review by the circuit court pursuant to review of the APA's provisions for contested cases.⁷ The judgment of the circuit court may be appealed to the court of appeals.⁸

In summary, the issuance of both NOV's and CDO's relating to the same alleged solid waste violation can result in three separate evidentiary hearings before the DNR, the AHC, and the circuit court ultimately resulting in two independent judicial review actions. To make matters more interesting, various of the hearings and appeals could occur contemporaneously.

This is not necessarily bad news for the attorney. A client has no shortage of rem-

edies and, in either case, an impartial forum is available to hear the evidence at some point in the process. On the other hand, the potential exists for inconsistent decisions

"A client has no shortage of remedies and, in either case, an impartial forum is available to hear the evidence at some point in the process."

relating to the same occurrence and there is no clear statutory mechanism to reconcile

such an outcome. It may also be prohibitively expensive to challenge the DNR's actions on all fronts. Accordingly, the attorney will need to consider how best to approach this situation based on the special facts and circumstances of each case.

— Mr. Boudreau is a partner in the Jefferson City, Missouri firm of Brydon, Swearengen & England P. C. He is a graduate of the University of Missouri-Columbia School of Law. He has an administrative law practice representing regulated industries in proceedings before state agencies.

⁷ § 621.145, RSMo 1986.

⁸ AHC review of a Personnel Advisory Board decision has been found to be unconstitutional as being in violation of Article V, § 18 of the Missouri Constitution which provides for direct review by the courts of final agency decisions. *Asbury v. Lombardi*, 846 S.W.2d 196 (Mo. banc 1993) The procedure set out in § 260.235, RSMo 1986 may be distinguishable from that addressed by the *Asbury* court in that the DNR's decision does not appear to become final if appealed to the AHC within the time allotted.