

SC 85696

SUPREME COURT OF MISSOURI

MISSOURI COALITION FOR THE ENVIRONMENT, et al.

Plaintiffs-Appellants

v.

THOMAS HERRMANN,
MISSOURI CLEAN WATER COMMISSION, et al.

Defendants-Respondents

Appeal from the Circuit Court of City of St.Louis
Circuit Court No. 004-02358
The Honorable Robert Dierker, Circuit Judge

Transferred from the
Missouri Court of Appeals, Eastern District
No. ED 81790

AMICUS BRIEF of
ASSOCIATED INDUSTRIES OF MISSOURI and
REGULATORY ENVIRONMENTAL GROUP FOR MISSOURI

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JURISDICTIONAL STATEMENT

Amici adopt the jurisdictional statement in the Brief filed by the Missouri Coalition for the Environment (“Coalition”). Amici have obtained the consent of all parties to this appeal to file this Amicus Brief.

STATEMENT OF FACTS

Amicus Associated Industries of Missouri (“AIM”) represents the interests of approximately 1,500 Missouri employers. Amicus Regulatory Environmental Group for Missouri (“REGFORM”) represents the interests of 34 member companies. Many of AIM’s and REGFORM’s member companies are required by the federal Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and the Missouri Clean Water Law, Chapter 644, RSMo, to obtain and comply with Missouri State Operating Permits (water pollution permits”). Because AIM’s and REGFORM’s members are directly affected by the issue of whether third parties may lawfully appeal their permits, AIM and REGFORM and their members have a legally protectable interest in the outcome of the subject appeal.

The Department of the Army was issued water pollution permits for facilities at Fort Leonard Wood, Missouri. (L.F. 11, 12, 25 and 39). The Coalition filed a notice of appeal of those permits with the Missouri Clean Water Commission (“Commission”). The Commission dismissed the appeal for lack of subject matter jurisdiction citing *Craven et al. v. State ex rel. Premium Standard Farms*, 19 S.W.3d 160 (W.D. App. 2000) (L.F. 53, 77 and 78). The Coalition filed an action in the Circuit Court for the City of St. Louis appealing the Commission’s administrative decision (L.F. 6). The Circuit Court then dismissed the action for lack of subject matter jurisdiction in reliance on *Craven* (L.F.

A66-A-67). The Coalition then appealed. In *Missouri Coalition for the Environment, et al. v. Hermann, et al.*, 2003 WL 21488873 (E.D. Mo. June 23, 2003), the Court declined to follow *Craven* and held there was a right for a third party to appeal a water pollution permit. The Eastern District based its opinion on the 1974 Omnibus State Reorganization Act (“OSRA”)¹ and language in § 640.010.1, RSMo.

The Eastern District opinion conflicts with the Western District’s opinion in *Craven*. In *Craven*, the Court held that there was no statutory right for a third party to appeal a water pollution permit because OSRA did not vest the Director of the Missouri Department of Natural Resources (“MDNR Director”) with the statutory power to issue water pollution permits, that § 640.010.1, RSMo was inapplicable, and that § 644.051.6, RSMo expressly limited an appeal of a water pollution permit only to a permit applicant.

¹ Omnibus State Reorganization Act of 1974, C.C.S.S.B. 1, 77th General Assembly, 1st Special Session, 1973-74 MO. LAWS 530 *et seq.*

POINTS RELIED ON

I. The Missouri Clean Water Commission Properly Dismissed the Coalition’s Permit Appeal Because the Commission Lacked Subject Matter Jurisdiction Over Such Appeal in that the Missouri Clean Water Law, Chapter 644, RSMo, Does Not Confer a Third Party Right of Appeal Over a Missouri State Operating Permit.

American Healthcare Management, Inc. v. Director of Revenue, 984 S.W.2d 496
(Mo. banc 1999).

Corvera Abatement Technologies, Inc. v. Air Conservation Commission, 973
S.W.2d 851 (Mo. banc 1998).

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S. B. 984, 2002 Leg. (Mo. 2002).

II. The Missouri Clean Water Commission Properly Dismissed the Coalition’s Permit Appeal Because the Commission Lacked Subject Matter Jurisdiction Over Such Appeal in that the Permits Issued to the Army Were Issued by the Commission and Not the MDNR Director, and thus § 640.010.1, RSMo is Inapplicable.

Craven et al. v. State ex rel. Premium Standard Farms, et al., 19 S.W.3d 160
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§ 640.010.1, RSMo.

§ 644.026.1(13), RSMo.

§ 644.051.6, RSMo.

S. B. 741, 2000 Leg. (Mo. 2000).

ARGUMENT

I. The Missouri Clean Water Commission Properly Dismissed the Coalition’s Permit Appeal Because the Commission Lacked Subject Matter Jurisdiction Over Such Appeal in that the Missouri Clean Water Law, Chapter 644, RSMo, Does Not Confer a Third Party Right of Appeal Over a Missouri State Operating Permit.

- A. Because § 644.051.6, RSMo is a specific statute that concerns who may appeal a Missouri State Operating Permit, that statute controls over § 640.010.1, RSMo.

The second sentence in § 644.051.6, RSMo, states “The applicant may appeal to the commission from the denial of a permit or from any condition in a permit by filing notice of appeal with the commission within thirty days of the notice of denial or issuance of the permit.” Words used in statutes are given their plain and ordinary meaning. *American Healthcare Management, Inc. v. Director of Revenue*, 984 S.W.2d 496, 498 (Mo. banc 1999). Where statutory language is clear, unambiguous, and admits of only one meaning, there is no room for construction and the legislature is presumed to have intended what the statute says. *Corvera Abatement Technologies, Inc. v. Air Conservation Commission*, 973 S.W.2d 851, 858 (Mo. banc 1998).

Clearly, § 644.051.6 gives a permit applicant, and no one else, the right to appeal a water pollution permit to the Commission. *Craven, et al. v. State ex rel. Premium Standard Farms, et al.*, 19 S.W.3d 160, 166 (W.D. 2000) (“The unambiguous language of §

644.051.6 gives an appeal right based on the issuance of a permit to the permit applicant *only.*”).

Significantly, the Eastern District Court of Appeals failed to analyze or even discuss the appeal limitation provision in the second sentence in § 644.051.6. Rather, the Eastern District premised its opinion on OSRA and language in the fourth sentence in § 640.010.1, RSMo, that states “... decisions [made by the Director of the Missouri Department of Natural Resources] shall be subject to appeal to the board or commission on request of the board or commission or by affected parties.”

The second sentence in § 644.051.6 specifically concerns appeal procedures for the denial or issuance of water pollution permits, while the fourth sentence in § 640.010.1 generally concerns “decisions” made by the MDNR Director.² When the same subject matter is addressed in general terms in one statute and in specific terms in another, the more specific controls over the more general. *Greenbriar Hills Country Club v. Director of Revenue*, 935 S.W.2d 36, 38 (Mo. banc 1996).

Because § 640.010.1 *generally* allows for appeals from *decisions* of the MDNR Director, § 644.051.6 controls over § 640.010.1 because it *specifically* and *expressly* addresses appeals of water pollution permits. Consequently, § 640.010.1 does not confer any right to appeal a water pollution permit on a third party.

² Amici will assume in Point I, for purposes of argument only, that the MDNR Director had the power to issue the permits to the Army, thereby implicating § 640.010.1, RSMo. However, as discussed in Point II, *supra*, such power is vested in the Commission only.

- B. Because the appeal limitation in § 644.051.6, RSMo was re-enacted after OSRA and after the 1995 amendment to § 640.010.1, RSMo, the limitation in § 644.051.6, controls over § 640.010.1.

There is a direct conflict between the fourth sentence in § 640.010.1, which the Eastern District in *Coalition for the Environment* held conferred a right to appeal a water pollution permit on a third party, and the second sentence in § 644.051.6, which the Western District in *Craven* held specifically limited the right to appeal only to a permit applicant. Because the General Assembly re-enacted the appeal limitation in § 644.051.6 after the OSRA and after the 1995 amendment to § 640.010.1, the General Assembly's clear intent is to limit appeals only to permit applicants.

Repeal by implication can occur if a later-enacted statute is inconsistent and irreconcilable with an earlier-enacted statute. In that case, the later-enacted statute repeals the first statute to the extent of any conflict with the second. *Corvera Abatement Technologies, Inc. v. Air Conservation Commission*, 973 S.W.2d 851, 859 (Mo. banc 1998).

Section 640.010.1 was initially enacted in 1973 as part of OSRA. 1973-74 MO. LAWS 545. Since then, the General Assembly has amended § 640.010.1 only once, in 1995 in Senate Bill 65, without making any changes or revisions to the fourth sentence. 1995 MO. LAWS 662.

However, § 644.051.6 has been re-enacted several times since 1995. In 1999, in Senate Bill 160, the General Assembly re-enacted § 644.051.6 and amended only the first sentence: "The executive secretary shall promptly notify the applicant **or other affected**

party in writing of his **or her** action and if the permit is denied state the reasons therefor.”

1999 MO. LAWS 1112.

In 2000, in Senate Bill 741, the General Assembly re-enacted § 644.051.6 and amended only the first sentence: The [executive secretary] **director** shall promptly notify the applicant [or other affected party] in writing of his or her action and if the permit is denied state the reasons therefor.” 2000 MO. LAWS 680. Indicating its clear intent not to involve third parties in the water pollution permitting process, the General Assembly in Senate Bill 741 expressly deleted the reference to “other affected party” in the first sentence of § 644.051.6 that had been included the previous legislative session in Senate Bill 160.

Finally, in 2002, in Senate Bill 984, the General Assembly re-enacted § 644.051.6 without making any changes or revisions. 2002 MO. LAWS 987-988. The General Assembly clearly and intentionally re-enacted the appeal limitation in § 644.051.6 several times after § 640.010.1 was first enacted in 1973 and later re-enacted in 1995. Significantly, the 2000 and 2002 re-enactments of § 644.051.6 occurred after *Craven*, thus confirming the legislative intent to expressly limit such appeals only to permit applicants. Accordingly, appeals of water pollution permits are limited to permit applicants only.

II. The Missouri Clean Water Commission Properly Dismissed the Coalition’s Permit Appeal Because the Commission Lacked Subject Matter Jurisdiction Over Such Appeal in that the Permits Issued to the Army Were Issued by the Commission and Not the MDNR Director, and thus § 640.010.1, RSMo is Inapplicable.

Because OSRA transferred the Commission to MDNR via a Type II transfer, the Commission retained all its “powers, duties and functions.” 1973-74 MO. LAWS 533, 546. Under a Type II transfer, the authority of the MDNR Director “shall not extend to substantive matters relative to policies, regulative functions or appeals from decisions of the transferred . . . commission” *Id.* Because the Type II transfer did not extend to “substantive matters relative to policies, regulative functions or appeals,” the MDNR Director acquired no authority under OSRA to issue water pollution permits. Therefore, only the Commission is vested with statutory authority to issue such permits. *Craven*, 19 S.W.3d at 166.

The General Assembly has consistently intended that the statutory authority to issue water pollution permits is vested in the Commission. In this regard, § 644.026.1(13), RSMo clearly and unequivocally addresses the powers of the Commission: “The commission shall . . . [I]ssue, continue in effect, revoke, modify or deny, under such conditions as it may prescribe, to prevent, control or abate pollution or any violations of sections 644.006 to 644.141 or any federal water pollution control act, permits for the discharge of water contaminants into the waters of this state. . . .” If the General Assembly

had intended for the MDNR Director to have authority to issue water pollution permits, then § 644.026.1(13) would not vest such power and authority in the Commission.

In 2000, in Senate Bill 741, the General Assembly amended the first sentence in § 644.051.6 to provide that the MDNR Director now was administratively responsible for processing water pollution permits on behalf of the Commission. This conclusion is demonstrated by the fact that the General Assembly did not amend § 644.026.1(13) to take away from the Commission the statutory authority to issue water pollution permits.

In construing a statute, the Court must presume the legislature was aware of the state of the law at the time of its enactment. *Nicolai v. City of St. Louis*, 762 S.W.2d 423, 426 (Mo. banc 1988). When the General Assembly re-enacted § 644.051.6 in 1999 and 2000, it must be presumed that the General Assembly was aware of the *Craven* decision that water pollution permits were issued by the Commission. As a result, if the MDNR Director already had statutory authority because of the Type II transfer under OSRA to issue water pollution permits, then the 2000 amendment to § 644.051.6 was a nullity – an outcome that should not be favored by this Court.

Finally, although after the effective date of Senate Bill 741 the MDNR Director is responsible for the administrative processing of water pollution permits on behalf of the Commission, there is still no third party right to appeal such permits under § 640.010.1, as discussed in Point I, *infra*. Section 644.051.6 contains an express and specific appeal

limitation that was re-enacted after § 640.010.1. Therefore, § 644.051.6 controls over the general language in § 640.010.1.

Accordingly, it is clear that the General Assembly never intended for the MDNR Director to issue water pollution permits. The OSRA Type II transfer did not confer any of the Commission's substantive power on the MDNR Director. Moreover, § 644.026.1(13) expressly vests the power to issue water pollution permits solely with the Commission. Finally, because the MDNR Director does not issue such permits, § 640.010.1 is inapplicable to any appeal of a water pollution permit. As a result, § 644.051.6, and not § 640.010.1, is the controlling statute with respect to appeals of water pollution control permits.

CONCLUSION

Based on the foregoing, the Judgment of the Circuit Court should be affirmed because, as correctly reasoned in *Craven*, the Missouri Clean Water Commission lacked subject matter jurisdiction over the Coalition's appeal in that there is no third party right of appeal under the Missouri Clean Water Law, Chapter 644, RSMo.

Respectfully submitted,

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RULE 84.06(C) CERTIFICATION

I certify that:

1. The signature block below contains all the information required by Rule 55.03;
2. The brief complies with the limitations contained in Rule 84.06(b);
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CERTIFICATE OF SERVICE

I certify that two (2) copies and one (1) 3-1/2" floppy diskette of the foregoing were mailed via First Class U.S. Mail postage prepaid to: Shelley A. Woods, Attorney General's Office, P.O. Box 899, Jefferson City, Missouri 65102-0899 (Counsel for Respondents); Aaron Avia, U.S. Department of Justice, Environment & Natural Resource Division, P.O. Box 23795 (L'Enfant Plaza Station), Washington, D.C. 20026-3795 (Counsel for Permittee); and Kathleen G. Henry, 705 Olive Street, Suite 614, St. Louis, Missouri 63101 (Counsel for Appellants) on this _____ day of February 2004.
