IN THE SUPREME COURT OF MISSOURI

Case No. SC97695

HICKORY NEIGHBORS UNITED, INC., Appellant

v.

MISSOURI DEPARTMENT OF NATURAL RESOURCES, Respondent

MISSOURI CLEAN WATER COMMISSION, Respondent

TRENTON FARMS RE, LLC, Respondent

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant Hickory Neighbors United, Inc. ("Appellant") seeks judicial review of the Final Decision issued by Respondent-Missouri Clean Water Commission ("hereinafter Commission" or "CWC") dated December 12, 2017 approving the issuance of Permit MOGS10520 by Respondent-Missouri Department of Natural Resources (hereinafter "DNR") to Respondent-Trenton Farms RE, LLC (hereinafter "Trenton Farms").

In this regard, § 644.056.5, RSMo states, *inter alia*:

> . . . The [clean water] commission's decision shall be subject to judicial review pursuant to chapter 536 [the Missouri Administrative Procedure Act], except that the court of appeals district with territorial jurisdiction coextensive with the county where the point source[1] is to be located, shall have original jurisdiction.

The concentrated animal feeding operation ("CAFO") proposed by Trenton Farms is located in Grundy County, Missouri. *Record on Appeal ("ROA") at 043, 051, 058, 073*. The court of appeals district with territorial jurisdiction coextensive with Grundy County is the Missouri Court of Appeals, Western District. Because the issue does not fall within the exclusive jurisdiction of the Missouri Supreme Court pursuant to Article V, § 3 of the Missouri Constitution, the Court of Appeals has original jurisdiction over this appeal under §§ 477.070, and 644.056.5, RSMo. Appellate jurisdiction is with the Supreme Court under Article V, § 3 of the Missouri Constitution.

STANDARD OF REVIEW

Concerning the standard of review,

> Article V, section 18 of the Missouri Constitution articulates the standard of judicial review of administrative actions. On appeal, this Court is charged with determining whether the agency actions "are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record."

Albanna v. State Bd. Regis. Healing Arts, 293 S.W.3d 423, 428 (Mo. banc 2009).

STATEMENT OF FACTS

On August 12, 2015, DNR previously issued Permit MOGS-10500 to Trenton Farms to operate a swine concentrated animal feeding operation ("CAFO") in Grundy County, Missouri.[1] *Trenton Farms RE, LLC, v. Mo. Dep't of Natural Res.*, 504 S.W.3d 157, 159 (Mo. App. W.D. 2016). On August 28, 2015, Petitioner timely appealed the issuance of Permit MOGS-10500. *Id.*, 504 S.W.3d at 159-160. On February 24, 2016, the Clean Water Commission reversed and vacated the issuance of Permit MOGS-10500. *Id.*, 504 S.W.3d at 160.

Shortly thereafter, on May 5, 2016, the Missouri Senate adopted Senate Amendment 1 to Senate Committee Substitute for House Committee Substitute for House Bill 1713 ("HB 1713"). *Appendix to Appellant's Substitute Brief at 063-064*. On May 11, 2016, SCS HCS HB 1713 was truly agreed to and finally passed. *Appendix to Appellant's Substitute Brief at 065-070*.

On June 28, 2016, HB 1713 was vetoed by Governor Nixon, but such veto was subsequently overridden. *Appendix to Appellant's Substitute Brief at 071*. The Governor's veto message stated, *inter alia*,

> Senate Committee Substitute for House Committee Substitute for House Bill No. 1713 (House Bill No. 1713) would shift the balance of power on the Missouri Clean Water Commission away from the public interest and in favor of regulated interests. Specifically, a provision inserted late in the legislative process, and without public hearing, would change the

[1] DNR has issued two CAFO permits to Trenton Farms. The first - Permit MOGS-10500 - was disapproved by the Clean Water Commission on February 24, 2016, whose denial was affirmed by this Court. The current appeal concerns the second permit - MOGS-10520 - which DNR issued the day after the Court of Appeals decision affirming the denial of the earlier permit.

> commission membership requirements by eliminating the minimum number of public representatives that are currently mandated, and would allow the commission to operate with no public members. Decreasing the public's voice on this commission that has been involved in overseeing our state's water quality for over 40 years is wrong and cannot receive my support.

Appendix to Appellant's Substitute Brief at 071.

On November 22, 2016, the Commission's Final Decision denying Permit MOGS-10500 was affirmed by the Court of Appeals. *Trenton Farms, supra*, 504 S.W.3d at 167. In its opinion, the Court noted that while DNR's determination that Trenton Farms' CAFO facility was protected from inundation from a 100 year flood was based solely on the review conducted by Greg Caldwell, "[u]ltimately, although the AHC found that Caldwell was credible, it found that his conclusions merely went to the issue of flooding of the soil and were not actually dispositive of the issue of whether the CAFO project was located in a FEMA Zone A floodplain." *Id*., 504 S.W.3d at 161.

On November 23, 2016, the day after the Court issued its opinion, DNR issued a second permit, Permit No. MOGS-10520, to Trenton Farms to operate a swine CAFO in Grundy County, Missouri. *ROA at 057-072; 135*.

On December 22, 2016, Petitioner timely filed an appeal of Permit MOGS10520 with the Administrative Hearing Commission ("AHC"). *ROA at 019*. The AHC conducted the hearing on the Petitioner's permit appeal on May 4-5, 2017 and June 21, 2017. *ROA at 015-017*.

At the AHC hearing, Gordon Wray, the DNR permit writer, testified that DNR relied solely on Hickory Exhibit L, the Allstates Consultant's Floodplain Modeling

Report, to conclude that the manure storage structures at the Trenton Farms CAFO was protected from inundation from the 100-year flood. *ROA at 196-200*.

The Federal Emergency Management Agency ("FEMA") has issued a Flood Hazard Boundary Map for Grundy County, Missouri, which delineates the 100-year floodplain. *ROA at 259-260; 1095*.

In its response to a Request for Admissions, Trenton Farms admits that the green line shown in Hickory Exhibit 14 shows the location of the FEMA 100-year floodplain line. *ROA 1096; Appendix to Appellant's Substitute Brief at 072-073*.

At the AHC hearing, John Holmes, with Allstates Consultants, testified the FEMA 100-year floodplain, Zone A, shown as the green line on Hickory Exhibit 14, runs through the site of the Trenton Farms CAFO. *ROA at 264*.

Further, Mr. Holmes testified that Hickory Exhibit 26 was an e-mail he sent to Stockwell Engineers, in which he stated, *inter alia*, "The calculated 100 year floodplain is included for information only. The 100-year floodplain limits shown on the FEMA Map and included in the drawing on the 'FLOODPLAIN-REGULATORY' layer are still what must be referenced for determining whether the project is in the floodplain." *ROA 264-265; 1099*; *Appendix to Appellant's Substitute Brief at 074*.

On August 31, 2017, the AHC issued its Recommended Decision to the Clean Water Commission. *ROA at 017*.

Between October 2017 and December 5, 2017, the Governor replaced the four Commissioners who voted to reverse and vacate the previous Trenton Farms permit with four new Commissioners.

On December 12, 2017, the Commission considered the AHC Recommended Decision voted to approve Permit MOGS-10520 to Trenton Farms. *ROA at 1720-1726; 1760-1762*.

On January 10, 2018, Appellant timely filed its Petition for Judicial Review with the Western District Court of Appeals.

POINTS RELIED ON

Point I

THE CLEAN WATER COMMISSION ERRED IN APPROVING PERMIT MOGS-10520 BECAUSE THE COMMISSION WAS UNLAWFULLY CONSTITUTED IN THAT THE COMMISSIONERS APPOINTED PURSUANT TO § 644.021.1, RSMO, AS AMENDED BY HB 1713 (2016), WERE UNLAWFULLY APPOINTED BECAUSE HB 1713 IS UNCONSTITUTIONAL IN THAT HB 1713 WAS ENACTED IN VIOLATION OF ARTICLE III, §§ 21 AND 23 OF THE MISSOURI CONSTITUTION.

American Eagle Waste Indus., LLC v. St. Louis County, 379 S.W.3d 813 (Mo. banc 2012).

Jackson Cty. Sports Complex Auth. v. State, 226 S.W.3d 156 (Mo. banc 2007).

National Solid Waste Management Ass'n v. Director of Dept. of Natural Resources, 964 S.W.2d 818 (Mo. banc 1998).

Stroh Brewery Co. v. State, 954 S.W.2d 323 (Mo. banc 1997).

Point II

THE CLEAN WATER COMMISSION ERRED IN APPROVING PERMIT MOGS-10520 BECAUSE SUCH APPROVAL IS UNSUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE AND IS IN VIOLATION OF 10 CSR 20-8.300(5) IN THAT TWO OF THE MANURE CONTAINMENT STRUCTURES ARE LOCATED IN THE 100-YEAR FLOODPLAIN AND A PROFESSIONAL ENGINEER'S SEAL AND CERTIFICATION OF A FLOOD STUDY REPORT FOR WHICH THERE IS NO EVIDENCE THAT HE PERSONALLY CONDUCTED, PREPARED, REVIEWED, OR SUPERVISED VIOLATES § 327.411.1, RSMo AND CANNOT SERVE AS COMPETENT AND SUBSTANTIAL EVIDENCE TO SHOW OTHERWISE.

Albanna v. State Bd. Regis. Healing Arts, 293 S.W.3d 423, 428 (Mo. banc 2009).

§ 327.411.1, RSMo.

10 CSR 20-8.300(5).

ARGUMENT

Point I

THE CLEAN WATER COMMISSION ERRED IN APPROVING PERMIT MOGS-10520 BECAUSE THE COMMISSION WAS UNLAWFULLY CONSTITUTED IN THAT THE COMMISSIONERS APPOINTED PURSUANT TO § 644.021.1, RSMO, AS AMENDED BY HB 1713 (2016), WERE UNLAWFULLY APPOINTED BECAUSE HB 1713 IS UNCONSTITUTIONAL IN THAT HB 1713 WAS ENACTED IN VIOLATION OF ARTICLE III, §§ 21 AND 23 OF THE MISSOURI CONSTITUTION.

A. Appellant's constitutional challenge to the amendment to § 644.021.1, RSMo made by HB 1713 presents a justiciable controversy.

A justiciable controversy exists "where [1] the plaintiff has a legally protectable interest at stake, [2] a substantial controversy exists between parties with genuinely adverse interests, and [3] that controversy is ripe for judicial determination." *Schweich v. Nixon*, 408 S.W.3d 769, 773 (Mo. banc 2013). In this regard, the facts show that Appellant is a corporation in good standing with the Missouri Secretary of State. *ROA at 1871*. Also, during the AHC hearing, Lee Ann Searcy, Rex Searcy, Cathy Rice and James Williams testified about how they were members and supporters of Appellant and the manner in which they each would be adversely affected by the Trenton Farms CAFO. *ROA at 1781 - 1782*. In addition, Appellant was not aggrieved by the HB 1713 amendment to § 644.021.1 until the Clean Water Commission made the substantive decision on December 12, 2017 to approve the Trenton Farms CAFO permit. In this

context, the composition of the Clean Water Commission was not changed after HB 1713's enactment until the appointments made in December 2017. As a result, in accordance with § 516.500, RSMo, Appellant could not reasonably have brought an action challenging HB 1713, or the newly constituted Commission, any time before this present action.

> In Missouri, an entity has "associational standing" to bring a challenge on behalf of its members if: "1) its members would otherwise have standing to bring suit in their own right; 2) the interests it seeks to protect are germane to the organization's purpose; and 3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Mo. Bankers Ass'n v. Dir. of Mo. Div. of Credit Unions*, 126 S.W.3d 360, 363 (Mo. banc 2003) (*citing Mo. Health Care Ass'n v. Att'y Gen.*, 953 S.W.2d 617, 620 (Mo. banc 1997)).

Saxony Lutheran High Sch., Inc. v. Mo. Land Reclamation Comm'n, 392 S.W.3d 52, 54 (Mo. App. W.D. 2013), fn 2.

As a result, Appellant's members and supporters would be adversely affected by the Trenton Farms permit. Also, they have legally protected interests, and a substantial controversy exists regarding the issues presented. Further, this controversy is ripe for review. Accordingly, this case presents a justiciable controversy, and Appellant had associational standing to pursue its constitutional claims.

B. Appellant's constitutional challenge to the composition of the Clean Water Commission may be brought on direct review.

"[R]eview of administrative decisions is ... limited to matters raised in the petition for review." *Morfin v. Werdehausen*, 448 S.W.3d 343, 349 (Mo. App. W.D. 2014); *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 58 (Mo. App. E.D.1990). As its

first Ground for Appeal in its Petition for Judicial Review, Appellant raised a specific challenge to the constitutionality of the 2016 amendment to § 644.021, RSMo by the enactment of House Bill 1713.

Where a party timely challenges the composition of a decision-making body, as opposed to a challenge to the qualifications of individual members of the decision-making body, (1) such a challenge is not required to be brought as an action in quo warranto, (2) the de facto doctrine does not apply, and (3) the challenging party is entitled to a resolution of such challenge because the party is entitled to a hearing before a properly constituted decision-making body.

Several cases support this view. In *Ryder v. United States*, 515 U.S. 177, 115 S. Ct. 2031, 132 L.Ed.2d 136 (1995), a service member raised a constitutional challenge that two members of the Court of Military Review reviewing his court martial were not properly appointed under the Appointments Clause. Despite finding a constitutional violation in the appointment of two judges, the Court of Military Appeals affirmed his conviction based on the de facto doctrine. In a unanimous decision written by Justice Rehnquist, the Supreme Court reversed. "In the case before us, petitioner challenged the composition of the Coast Guard Court of Military Review while his case was pending before that court on direct review." *Id*., 515 U.S. at 182. Further, the Supreme Court stated,

> . . . We think that one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred. Any other rule

> would create a disincentive to raise [constitutional] challenges with respect to questionable … appointments.

Id., 515 U.S. at 182 - 183.

The Supreme Court concluded, "We therefore hold that the Court of Military Appeals erred in according de facto validity to the actions of the civilian judges of the Coast Guard Court of Military Review. Petitioner is entitled to a hearing before a properly appointed panel of that court." *Id*., 515 U.S. at 188.

In *State v. Ralls*, 8 S.W.3d 64 (Mo. banc 1999), this Court showed its reluctance to apply the de facto doctrine when faced with questions involving "strong policy concerning the proper administration of judicial business." *Id.*, 8 S.W.3d at 65. In *Ralls*, the Court cited with approval *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) ("when the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the proper administration of judicial business, this Court has treated the alleged defect as 'jurisdictional' and agreed to consider it on direct review..."). *Id*.

In *Daniels v. Industrial Commission*, 775 N.E.2d 936 (Ill. 2002), the Illinois Supreme Court considered a case where the composition of the Illinois Industrial Commission was alleged to be improperly appointed. The Illinois Supreme Court considered the composition of the commission to be jurisdictional, and because the Court found that two members were improperly appointed to the commission, the commission lacked jurisdiction to make its underlying decision. *Id*., 775 N.E.2d at 940. In addition, the Court held that a void agency action could be challenged at any time either in a direct or collateral proceeding. *Id*. ("The qualifications of Kane and Reichart were not

challenged prior to the appeal to the appellate court. That, however, is of no consequence. Because agency action for which there is no statutory authority is void, it is subject to attack at any time in any court, either directly or collaterally").

The Illinois Supreme Court also rejected the application of the de facto doctrine to justify the action of an improperly constituted commission:

> Finally, we reject the Commission's claim that the decision in this case can be validated on the grounds that Kane and Reichart were de facto officers. The doctrine recognizing de facto public officers prevents third parties or members of the public from raising collateral challenges to a public officer's qualifications to hold office if considerations of public policy require the officer's acts to be considered valid. *See People ex rel. Rusch v. Wortman*, 334 Ill. 298, 301-02, 165 N.E. 788 (1928). No considerations of public policy militate in favor of preventing workers' compensation claimants from challenging the legal status of the commissioners who passed on their claims where, as here, the challenge is raised on direct review of the workers' compensation award and the commissioners were appointed in a manner that threatens the Act's basic objectives. *Daniels v. Industrial Com'n*, 775 N.E.2d 936, 201 Ill.2d 160, 266 Ill. Dec. 864 (Ill. 2002).

Daniels, 775 N.E.2d at 940.

In deciding *Daniels*, the Illinois Supreme Court held that the appointments were void, vacated the underlying administrative decision, and remanded the case back "for a decision by a properly constituted panel." *Id*.

Significantly, in *Ryder* and *Daniels*, neither the Supreme Court nor the Illinois Supreme Court suggested that such a challenge to the composition of a decision-making body could only be brought as a quo warranto action. In fact, neither Court even mentions quo warranto in discussing a challenge to the composition of the decision-

making body.[2] Also, like in *Ryder* and *Daniels*, Appellant's challenge to the composition of the Commission is brought in a direct review of the underlying decision. Finally, like *Ryder* and *Daniels*, Appellant timely preserved and presented its constitutional challenge at the first opportunity.[3]

The de facto doctrine has no application to this matter for an additional reason - the public has not had to rely in good faith on the legitimacy of the appointments to its detriment. As this Court explained long ago,

> The foundation stone of this whole doctrine of a de facto officer, as gathered from all the authorities, seems to be that of preventing the public or third persons from being deceived to their hurt by relying in good faith upon the genuineness and validity of acts done by a pseudo officer. However much color of authority may clothe the person who assumes to perform the function of an office and discharge its duties, yet, if the public or third persons are not deceived thereby,-if they know the true state of the case,-the reason which gives origin or existence to the rule which validates the act of an officer de facto ceases; and with it cease, also, all of its ordinary validating incidents and consequences.

State ex rel. Cosgrove v. Perkins, 139 Mo. 106, 40 S.W. 650, 652 (1897).

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[2] The *Benne* and *Dykhouse* cases cited in the Court of Appeals' opinion as authority for its view that Appellant's challenge can only occur in a quo warranto action are factually distinguishable. *Benne* involved a challenge to the qualifications of an individual member of the Labor & Industrial Relations Commission and *Dykhouse* concerned whether a county counselor had legal authority to initiate a quo warranto action. In the present appeal, however, Appellant is not challenging the personal qualifications of individual members.

[3] Because neither the Administrative Hearing Commission nor the Clean Water Commission has lawful authority to resolve constitutional issues, Appellant was not required to first raise its constitutional claim there. *See Carter v. Treasurer of Mo.*, 532 S.W.3d 203 (Mo. App. W.D. 2017), fn 2.

That the General Assembly violated Article III, sections 21 and 23 of the Missouri Constitution in enacting House Bill 1713 was a matter of public record. The Missouri Senate's adoption of the unlawful amendment was a matter of public record, as was the Governor's veto of the resulting unlawful statute. The General Assembly's later action to override the Governor's veto was a matter of public record as well. Consequently, the public was, and continues to be, well aware of the true state of the unlawful appointments. Moreover, the public will suffer no harm if the unlawful action is set aside. Instead, the public continues to suffer from the General Assembly's unlawful action. As a result of the unlawful composition, there continues to be less public representation on the Clean Water Commission. There is no longer a requirement that at least four members of the Commission represent the public. Public representation has been severely curtailed. Further, the public continues to suffer the procedural injury which results from the General Assembly having violated the Missouri Constitution.

C. The amendment to § 644.021, RSMo in House Bill 1713 (2016) is unconstitutional because House Bill 1713 was enacted in violation of Article III, §§ 21 and 23 of the Missouri Constitution.

Senate Amendment 1, which amended § 644.021.1 to revise the composition of the Clean Water Commission, was added to HB 1713 late in the 2016 legislative session without a committee hearing. Article III, Section 21, of the Missouri Constitution mandates that "no bill shall be so amended in its passage through either house as to change its original purpose." *National Solid Waste Management Ass'n v. Director of Dept. of Natural Resources*, 964 S.W.2d 818, 819 (Mo. banc 1998). Further, Article III,

Section 23 requires that "[n]o bill shall contain more than one subject which shall be clearly expressed in its title." *Id.* "[T]hese constitutional limitations function in the legislative process to facilitate orderly procedure, avoid surprise, and prevent 'logrolling,' in which several matters that would not individually command a majority vote are rounded up into a single bill to ensure passage." *Stroh Brewery Co. v. State*, 954 S.W.2d 323, 325-326 (Mo. banc 1997).

Prior to 2016, § 644.021.1, RSMo provided that the Commission was comprised of four members representing the public, one member knowledgeable about the wastewater industry, and no more than two members representing agriculture, industry, and mining. *Appendix to Appellant's Substitute Brief at 065-070*. In 2016, over the Governor's veto, the legislature enacted HB 1713, which significantly altered the Commission. In this regard, on May 5, 2016, Senator Munzingler first offered Senate Amendment 1 to HB 1713, which amended § 644.021.1 to revise the Commission membership to require at least two members representing agriculture, industry, and mining, and allow no more than four members representing the public. *Appendix to Appellant's Substitute Brief at 063-064*. Significantly, the substance of Senate Amendment 1 never received any legislative hearing. *Appendix to Appellant's Substitute Brief at 071*.

The title of HB 1713 is "To repeal sections 256.437, 256.438, 256.439, 256.440, 256.443, and 644.021, RSMo, and to enact in lieu thereof nine new sections relating to the regulation of water systems, with an emergency clause for a certain section." *Appendix to Appellant's Substitute Brief at 065*. Other than the amendment to §

644.021.1, none of the other statutory provisions contained in HB 1713 are relevant or germane to the Clean Water Commission or any of its statutory duties. Moreover, while several of the provisions in HB 1713 may concern "water systems," these provisions concern public water systems - a subject matter over which the Clean Water Commission has no authority or jurisdiction.[4]

In *American Eagle Waste Indus., LLC v. St. Louis County*, 379 S.W.3d 813, 825 (Mo. banc 2012), this Court stated,

> . . . Article III, section 23 states that "[n]o bill shall contain more than one subject which shall be clearly expressed in its title." This constitutional provision limits the legislature in two distinct but related ways by creating a single subject rule and a clear title requirement. *See Jackson Cty. Sports Complex Auth. v. State*, 226 S.W.3d 156, 161 (Mo. banc 2007). "This Court will resolve doubts in favor of the procedural and substantive validity of an act of the legislature." *Hammerschmidt v. Boone Cty.*, 877 S.W.2d 98, 102 (Mo. banc 1994). . . .

Further, this Court explained,

> "A bill will not violate the single subject requirement so long as "the matter is germane, connected and congruous." *Id*., citing *State v. Mathews*, 44 Mo. 523, 527 (1869). A "subject" within the meaning of article III, section 23 "includes all matters that fall within or reasonably relate to the general core purpose of the proposed legislation." *Id*. The subject of a bill may be "clearly expressed by ... stating some broad umbrella category" when a bill has "multiple and diverse topics" within a single, overarching subject. *Jackson Cty. Sports Complex Auth.*, 226 S.W.3d at 161.

American Eagle Waste Ind., 379 S.W.3d at 826.

In *National Solid Waste Management Ass'n, supra*, the Supreme Court held that provisions relating to "hazardous waste management" inserted late in the 1995 legislative

[4] Public water systems are regulated by the Safe Drinking Water Commission. *See* §§ 640.100 - 640.140, RSMo (*Appendix to Appellant's Substitute Brief at 013-040)*.

session into SB 60 were unconstitutional because the title of SB 60 related to "solid waste management." In this context, this Court stated,

> The title's reference to solid waste management reflects neither the specific subjects contained in the bill, which are both solid waste management and hazardous waste management, nor any larger subject such as environmental control or waste management in general, under which both solid waste management and hazardous waste management would be covered. As such, the subject of the bill is not clearly expressed in the title. In view of the clear title violation, SB 60 is unconstitutional to the extent that it pertains to the subject of hazardous waste management.

National Solid Waste Management Ass'n, 964 S.W.2d at 821-822.

In the present case, the title of HB 1713 was "the regulation of water systems." *Appendix to Appellant's Substitute Brief at 065*. In this regard, HB 1713 did contain several provisions affecting "water systems," i.e. design-build contracts for public water supply systems; establishing a Multipurpose Water Resource Program under Chapter 256, RSMo; notification of changes in fluoridation by a public water system; and requiring DNR to provide community assistance to municipalities. However, by including Senate Amendment 1 and changing the Commission membership, HB 1713 violated Article III, § 21 because the Commission's membership is not relevant or germane to any of the other provisions in HB 1713 or "the regulation of water systems." Moreover, because the subject matter of Senate Amendment 1 is not clearly encompassed in the title of the HB 1713, HB 1713 violated the "clear title" provisions in Article III, § 23.

Consequently, the amendment to § 644.021.1, RSMo made by HB 1713 is unconstitutional, and, as a result, the previous version of § 644.021.1, RSMo, which

limits the number of agriculture, industry, and mining representatives on the Commission to two members and requires four public members on the Commission, is in full force and effect. *See Schaefer v. Koster*, 342 S.W.3d 299 (Mo. banc 2011), fn 2 (*citing Williams Lumber & Manufacturing Co. v. Ginsburg*, 347 Mo. 119, 146 S.W.2d 604, 605 (1940) which held if a new statutory section is unconstitutional, the repealing clause is likewise invalid, and the old statutory section remains in force).

Point II

THE CLEAN WATER COMMISSION ERRED IN APPROVING PERMIT MOGS-10520 BECAUSE SUCH APPROVAL IS UNSUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE AND IS IN VIOLATION OF 10 CSR 20-8.300(5) IN THAT TWO OF THE MANURE CONTAINMENT STRUCTURES ARE LOCATED IN THE 100-YEAR FLOODPLAIN AND A PROFESSIONAL ENGINEER'S SEAL AND CERTIFICATION OF A FLOOD STUDY REPORT FOR WHICH THERE IS NO EVIDENCE THAT HE PERSONALLY CONDUCTED, PREPARED, REVIEWED, OR SUPERVISED VIOLATES § 327.411.1, RSMo AND CANNOT SERVE AS COMPETENT AND SUBSTANTIAL EVIDENCE TO SHOW OTHERWISE.

A. Two of the proposed manure storage structures at the Trenton Farms CAFO are located below the FEMA 100-Year Floodline in the 100-Year Floodplain.

To show the location of the 100-year floodline, Trenton Farms submitted "Site Plan C-101," prepared by Stockwell Engineers. *ROA at 1075*. Hickory Exhibit 14 is a color copy of "Site Plan C-101. *Appendix to Appellant's Substitute Brief at 072-073.*

In this context, Trenton Farms admits "the blue line ('Layer-FLOODLAIN-CALCULATED') shown in the attached Hickory Exhibit 14 represents the location of the calculated Base Flood Elevation (100-year flood line) line as calculated by John Holmes, Allstates Consultants, in connection with the work he conducted in relation to

the proposed Trenton Farms RE, LLC CAFO." *ROA at 1095-1096 (Hickory Exhibit 18, ¶ 9).*

In addition, Trenton Farms admits "the green line (Layer 'FLOODPLAIN-REGULATORY') shown in the attached Hickory Exhibit 14 shows the location of the official FEMA 100-year flood line as determined by John Holmes, Allstates Consultants, in connection with the work he conducted in relation to the proposed Trenton Farms RE, LLC CAFO." *ROA at 1096 (Exhibit 18, ¶ 10*.

Significantly, the "green line" representing the 100-year flood line runs directly through Trenton Farms' Proposed GDU Barn and the Proposed Gestation Barn, both of which serve as manure containment structures.

B. The only evidence relied on by DNR to conclude the Trenton Farms facility is protected from inundation from a 100-year flood is Exhibit L

During the AHC hearing, on cross-examination by Hickory Neighbors, DNR Permit Writer Gordon Wray testified that the only evidence relied on by DNR to show the structures at the Trenton Farms CAFO were protected from inundation as required by 10 CSR 20-8.300(5) was Exhibit L, the Allstates Consultants' Flood Study Report:

Q: And based on this report, isn't it true this is what you concluded, that the site was protected from the 100-year flood?

A: Correct.

Q: Is there any other documents or any other evidence that you relied on to draw that conclusion other than Exhibit L?

A: No.

Q: So Exhibit L is the sole document DNR relied on in drawing the conclusion about the floodplain issue?

A: Correct.

ROA at 196 (Transcript, May 4, 2017, page 107, lines 9-20).

C. The calculated 100-year flood line in Exhibit L is "for information only" and is not "what must be referenced for determining whether the project is in the floodplain"

Concerning the conclusions of Exhibit L, the Flood Study Report, John Holmes, the author of the study, acknowledges in his e-mail to Stockwell Engineers that two buildings are in the 100-year floodplain: "As I interpret the site plan, it appears that there are two buildings in the floodplain, …" *ROA at 1307; Appendix to Appellant's Substitute Brief at 074.*

In addition, Mr. Holmes unequivocally advises that, "The calculated 100 year floodplain is included <u>for information only</u>. The 100-year floodplain limits shown on the FEMA Map and included in the drawing on the 'FLOODPLAIN-REGULATORY' layer are still what must be referenced for determining whether the project is in the floodplain" (emphasis added). Significantly, the "'FLOODPLAIN-REGULATORY' layer" Mr. Holmes is referring to is the green line shown in Hickory Exhibit 14. *ROA at 1307.*

After completing the Flood Study Report, Mr. Holmes attached his professional engineer seal to the report. *ROA at 1467.* His certification states, "The final results indicated that 100 year flood on Hickory Creek is the critical flood for determining base

flood elevation at the site regardless of whether tailwater conditions were set by Thompson River." *ROA at 1467*. Thus, the Flood Study, Exhibit L, as certified by Mr. Holmes, does not establish that any structures are protected from flood inundation.

In his e-mail, Mr. Holmes advised Stockwell Engineers that two buildings are located in the floodplain; the "blue line" showing the calculated base flood elevation is "for information only;" and the green 100-year flood line depicted in Hickory Exhibit 14 should be used to determine whether the CAFO is in the floodplain. Nonetheless, Mr. Van Maanen subsequently issued his P.E. certification that the Trenton Farms facility complied with the flood inundation requirements in 10 CSR 20-8.300(5).[5] *ROA at 1461.*

However, there is no evidence in the record to show that Mr. Van Maanen conducted or supervised the flood study or that he prepared the Flood Study Report, Exhibit L. Further, there is no evidence in the record that Mr. Van Maanen conducted any independent review of the Flood Study Report. Significantly, Mr. Van Maanen never testified at all. Thus, what he may have done in connection with the flood study is only supposition. Rather, the only evidence in the record concerning the flood study is Mr. Holmes' testimony that he conducted the study and prepared the report. *ROA at 208, lines 17 - 19, and 213, line 23 to 214, line 7.*

Section 327.411.1, RSMo states,

> 1. Each . . . professional engineer . . . shall have a personal seal . . . , and he or she shall affix the seal to all final technical submissions. Technical submissions shall include [submissions] prepared by the licensee, or under such licensee's immediate personal supervision. Such licensee

[5] The flood inundation provisions in 10 CSR 20-8.300(5) were previously numbered as 10 CSR 20-8.300(4).

> shall either prepare or personally supervise the preparation of all documents sealed by the licensee . . .

In this context, Mr. Holmes attached his professional engineer seal to the Flood Study Report. *ROA at 1467*. Significantly, Mr. Holmes did not certify that the proposed Trenton Farms CAFO is located above the 100-year flood line or that any of the structures are protected from flood inundation. *ROA at 1467*. However, Mr. Van Maanen purports to draw such conclusions in his letter to DNR to which he affixed his own professional engineer certification. *ROA at 1461*. Because there is no evidence in the record that Mr. Van Maanen conducted, prepared, or supervised the flood study work of Mr. Holmes, or that Mr. Van Maanen conducted any independent review of the flood study, Mr. Van Maanen's baseless certification cannot serve as competent and substantial evidence. Further, Mr. Van Maanen's certification that the facility is protected from the 100 year flood violates § 327.411.1, RSMo.

As a result, there is no competent and substantial evidence in the record to support the conclusion that the manure storage structures comply with 10 CSR 20-8.300. Accordingly, the Commission's December 12, 2017 decision approving the Trenton Farms permit is unlawful, is not supported by competent and substantial evidence as required by *Albanna v. State Bd. of Registration for Healing Arts, supra,* and should be reversed.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that the Commission's decision of December 12, 2017 approving Permit MOGS-10520 issued to Trenton Farms be reversed.

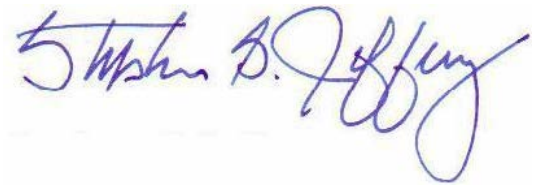
CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b)

Counsel for Appellant certifies to this Court as follows:

1. Appellant's Substitute Brief complies with the limitations contained in Rule 84.06(b).

2. Appellant's Substitute Brief contains 5,644 words.

JEFFERY LAW GROUP, LLC



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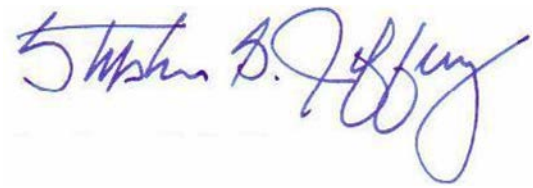
CERTIFICATE OF SERVICE

I certify that a true copy of Appellant's Substitute Brief was served on all counsel of record via the Court's e-filing system on this 20th day of May 2019.



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