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 REPLY BRIEF

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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. Hickory Neighbors has a Due Process right under Article I, § 10 of the Missouri Constitution to have its permit appeal heard by a properly appointed and constituted Clean Water Commission.

In its brief, the State consistently mischaracterizes the nature of Appellant's constitutional issue. *See, e.g., State's Substitute Brief at 23* ("It is entirely a matter of conjecture and speculation whether a differently constituted Commission would have rendered the same or a different decision …"). Contrary to the State's repeated assertions that Appellant's challenge to the "composition" is really a challenge to the qualifications of the individual members of the Clean Water Commission ("CWC"), Appellant's challenge is predicated on its Due Process right to have its permit appeal decided by a properly appointed and constituted CWC composed of members appointed pursuant to a constitutional statute.

In this regard, any action taken based on an unconstitutional statute is void. *See State ex rel. Bloomquist v. Schneider*, 244 S.W.3d 139, 143-144 (Mo. banc 2008) ("The

general rule is that unconstitutional statutes are void *ab initio*. As stated in *State ex rel. Miller v. O'Malley*, 342 Mo. 641, 117 S.W.2d 319, 324 (Mo. banc 1938), 'An unconstitutional statute is no law and confers no rights. This is true from the date of its enactment, and not merely from the date of the decision so branding it'"); and *O'Reilly v. City of Hazelwood*, 850 S.W.2d 96, 99 (Mo. banc 1993) ("Therefore, § 72.400 RSMo Supp.1991, was unconstitutional. Likewise, County Ordinance No. 14628 and the acts of the Boundary Commission in approving the annexation are void").

Because the amendment to § 644.021.1, RSMo made by HB 1713 is unconstitutional, any subsequent action taken based on that unconstitutional statute is void. Therefore, because the appointments made in October and December 2017 to the CWC were made pursuant to an unconstitutional statute, the appointments were void, the CWC was improperly constituted, and any subsequent action taken by the CWC is void.

B. Hickory Neighbors timely raised its constitutional challenges to the validity of HB 1713.

Appellant properly raised its constitutional challenge to HB 1713 before the Court of Appeals, which was exercising its original jurisdiction in the review of the CWC's decision. While the State asserts that Appellant should have raised the constitutional challenge before the Administrative Hearing Commission ("AHC") and the CWC, the cases cited by the State do not support that conclusion. In *St. Louis County v Prestige Travel*, 344 S.W.3d 708 (Mo. banc 2011), *Land Clearance for Redevelopment Authority of Kansas City v. Kansas University Endowment*, 805 S.W.2d 173 (Mo. banc 1991), and *City of St. Louis v. Butler Co.*, 219 S.W.2d 372 (Mo. 1949), the courts all held that

constitutional challenges should have been made at a trial court. Significantly, none of the cases cited by the State concern administrative hearings, where the agency lacks any power to resolve constitutional questions.[1] Moreover, because neither the AHC nor CWC has authority to resolve constitutional questions, Appellant was not required to raise its constitutional challenge before either the AHC or CWC. As a result, the challenge was properly raised at the Court of Appeals in the direct review of the agency decision. *See Westwood Partnership v. Gogarty*, 103 S.W.3d 152 (Mo. App. E.D. 2003) ("Deciding constitutional issues is beyond the authority of an administrative agency, and the courts must review agency actions that present constitutional questions").

> The reason for the rule logically suggests that raising the constitutional challenge is to permit a ruling on the constitutional issue by the body before whom the matter is pending. Administrative agencies lack the jurisdiction to determine the constitutionality of statutory enactments. *City of Joplin v. Industrial Commission of Missouri*, 329 S.W.2d 687 (Mo. banc 1959). Raising the constitutionality of a statute before such a body is to present to

[1] Even the decisions the State relies upon emphasize that the "earliest opportunity" is dependent upon "the circumstances of the given case." *E.g., St. Louis Cty. v. Prestige Travel, Inc.*, 344 S.W.3d 708, 712 (Mo. 2011). Apart from the fact that a constitutional challenge to the administrative body is "useless and futile," a challenge made to that body that it is not properly appointed and constituted would only create animosity between the agency and the party bringing the challenge. Accordingly, the circumstances here would not justify raising the constitutional issue during the proceedings before the Clean Water Commission.

> it an issue it has no authority to decide. The law does not require the doing of a useless and futile act.

Duncan v. Missouri Bd. for Architects, Prof'l Engineers & Land Surveyors, 744 S.W.2d 524, 531 (Mo. App. E.D. 1988). *Accord*, *Tadrus v. Missouri Bd. of Pharmacy*, 849 S.W.2d 222, 225 (Mo. App. W.D. 1993) ("since an administrative hearing commission is not empowered to determine the constitutionality of statutes, a party is not required to raise those issues at that level").

As a result, Appellant was not required to raise the constitutional challenge to HB 1713 before the AHC or CWC.

C. Hickory Neighbors has standing to challenge the composition of the Clean Water Commission.

This Court recently stated,

> "For a party to have standing to challenge the constitutionality of a statute, he must demonstrate that he is adversely affected by the statute in question" to ensure "there is a sufficient controversy between the parties [so] that the case will be adequately presented to the court." *W.R. Grace & Co. v. Hughlett*, 729 S.W.2d 203, 206 (Mo. banc 1987) (internal quotations omitted) (alteration in original). Standing further requires a petitioner to demonstrate a personal stake in the outcome of the litigation, meaning "a pecuniary or personal interest directly at issue and subject to immediate or prospective consequential relief." *Schweich v. Nixon*, 408 S.W.3d 769, 775 (Mo. banc 2013).

Mo. Coalition for the Environment v. State, Case SC97591, slip op. at 4 (Mo. July 16, 2019).

In contrast to *Mo. Coalition for the Environment v. State, supra,* Appellant has shown that it has a legally cognizable interest arising from a threatened or actual injury in order to have standing to challenge HB 1713. In this context Appellant was adversely affected by HB 1713 when an improperly constituted CWC considered and denied the underlying permit appeal. Appellant is not claiming that a CWC made up of different individual members may have reached a different decision - its challenge has nothing to do with the CWC's membership. Further, Appellant is not asserting a general grievance, but rather has suffered a direct injury (the denial of its permit appeal) resulting from an improperly constituted CWC.

Moreover, in *Mo. Coalition for the Environment v. State, supra,* this Court stated there are three bases to establish taxpayer standing, including "a direct expenditure of funds generated through taxation." *Id*., slip op. at 4. It cannot be disputed that the CWC makes direct expenditures of public funds generated through fee revenues in order to fund its operations. S*ee, e.g.,* § 644.026.1(22), RSMo; § 644.052, RSMo; § 644.053; and § 644.054, RSMo. In addition, it cannot be disputed that provisions in HB 1713 authorize Respondent-DNR to make direct expenditures of public funds. In this context, § 256.438, RSMo states, *inter alia*, "3. Upon appropriation, the department of natural resources shall use money in the fund created by this section for the purposes of carrying out the provisions of sections 256.435 to 256.445 . . . ;" and § 256.443, RSMo states, *inter alia*, "4. Approved water resource projects may be granted funds from, and remit

contributions to, the multipurpose water resource program fund pursuant to section 256.438." *See Appendix to Appellant's Substitute Brief at A-066 - 067*. As a result, because the CWC makes such direct expenditures and because HB 1713 authorizes Respondent-DNR to make such direct expenditures, taxpayer standing could also exist to challenge HB 1713.

As a result, Appellant has standing to challenge HB 1713.

D. Hickory Neighbors' claims are redressable.

Redressability is "a likelihood that the requested relief will redress the alleged injury." *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 103 (1998). To redress the injury caused by the consideration and determination of the underlying permit appeal by an improperly constituted CWC, Appellant seeks the invalidation of the amendment to § 644.021 made by HB 1713 and the reversal of the decision approving the Trenton Farms permit, which would defer any future decision until such time that the CWC is properly constituted pursuant to a lawful statute.

However, the State once again attempts to convert Appellant's constitutional challenge into a challenge to the individual members' qualifications when it states, "To assert a redressable injury, Hickory Neighbors must identify at least one Commissioner or set of Commissioners whose appointment was unlawful because of the alleged invalidity of HB 1713." *State's Brief at 27*. But, the qualifications of any individual member of the CWC has nothing to do with whether Appellant's claims are redressable based on the improper composition of the CWC. Thus, the State's argument must fail.

As a result, Appellant's claims are redressable.

E. Because Hickory Neighbors is not seeking to disqualify any Commissioner or set of Commissioners, a *quo warranto* action is not the exclusive remedy.

To rebut the Respondents' assertions that *quo warranto* is the exclusive action to challenge an unconstitutional appointment, it is important to consider there are three elements necessary for the appointment of a public official: (1) lawful constitutional and statutory authority to make the appointment; (2) a proper Appointing Authority making the appointment; and (3) a properly qualified Appointee.

Significantly, none of the cases cited by Respondents concern the first element - whether there is lawful constitutional and statutory authority to make the appointment. Rather, these cases concern either whether an official is qualified to serve or what is the proper subject matter of a *quo warranto* action:

In *Benne v. Abb Power T & D Co*., 106 S.W.3d 595 (Mo. App. W.D. 2003), an administrative law judge awarded an employee disability compensation in a work-related injury claim. The employee appealed to the Labor and Industrial Relations Commission claiming his disability determination should have been greater. Before the appeal was decided, the Governor made a temporary appointment naming Madigan to serve as acting chairman of the Commission. After the hearing when Commission increased the disability award, the employer appealed. On appeal, the issue concerned how long the temporary appointment could serve. *Benne*, 106 S.W.3d at 587 ("The question of how long a temporary appointee may hold office has not been addressed"). Thus, the issue in *Benne* concerned whether Madigan was qualified to continue to serve under the

temporary appointment - the case did not concern whether there was lawful constitutional and statutory authority to make the appointment in the first place.

In *State Ex Inf. Dykhouse v. City of Columbia*, 509 S.W.3d 140 (Mo. App. W.D. 2017), the City Counselor improperly filed an action in *quo warranto* seeking to enjoin the City of Columbia from implementing certain tax increment financing projects. The Court held the City Counselor had no authority to bring a *quo warranto* action and the City's alleged violations were not the proper subject of a *quo warranto* action.

In *State ex rel. Nixon v. Kinder*, 89 S.W.3d 454 (Mo. en banc 2002), the attorney general filed a *quo warranto* action in Osage County seeking to prevent two Cole County circuit judges from exercising authority over certain receivership funds. The Court held that the alleged actions were not the proper subject of a *quo warranto* action.

In *Dryer v. Klinghammer*, 832 S.W.2d 3 (Mo. App. E.D. 1992), a resident filed suit to remove from office a fire district director who had given a job to a relative in violation of the constitutional nepotism prohibition. The Court held that *quo warranto* is an appropriate remedy for enforcing a forfeiture resulting from violation of the Missouri constitutional ban on nepotism.

In *State ex rel. City of O'Fallon v. Collier Building Corp.*, 726 S.W.2d 339 (Mo. App. E.D. 1986), the City of O'Fallon sought to prevent the incorporation of the Town of Weldon Springs. One week later, the City dismissed its petition. The issue before the Court was whether the permission of the attorney general was required before the City, as the real party in interest, could dismiss its case.

In *State ex rel. Graham v. Hurley*, 540 S.W.2d 20 (Mo. banc 1976), a resident filed a *quo warranto* action to oust from office a county judge who had voted to appoint his son-in-law as county ambulance service director. The Court held that quo warranto is an appropriate remedy for enforcing a forfeiture resulting from violation of the Missouri constitutional ban on nepotism.

In *Boggess v. Pence*, 321 S.W.2d 667 (Mo. banc 1959), a resident filed a declaratory judgment regarding the validity of two municipal ordinances. On appeal, the Court stated, "It is apparent that the issue present in both cases is the validity, of the city's ordinances and action with reference to the condemnation case and the bond issue in question, as affected by the activities of councilman Pence. *Id*., 321 S.W.2d at 670.

To further rebut the Respondents' position that Appellant is required to assert its claim in a *quo warranto* action, § 536.140.4, RSMo states, ". . . The court may in any case hear and consider evidence of alleged irregularities in procedure or of unfairness by the agency, not shown in the record." As a result, as Appellant asserted at the Court of Appeals, the Court has statutory authority under § 536.140.4 to consider whether a decision made by an improperly constituted CWC is irregular and unfair.

Both *United States v. Ryder*, 515 U.S. 177 (1995) and *Daniels v. Industrial Commission*, 775 N.E.2d 936 (Ill. 2002) support Appellant's position that it may bring its challenge on direct review. These cases stand for the proposition that a party has a constitutional right to have its case decided by a properly constituted decision-maker. *Ryder*, 515 U.S. at 182-183 ("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").

Significantly, the State does not address either *Ryder* or *Daniels* except for two brief sentences stating that "these cases have little persuasive value here" and neither case addressed the *quo warranto* procedure. *State's Substitute Brief at 33*. Moreover, Trenton Farms dispenses with any analysis of *Ryder* or *Daniels* in one sentence, "The main focus of *Ryder* and *Daniels* was the application of the de facto doctrine in light of the trespass upon the Executive branch's power to appoint the decision makers." *Trenton Farms' Substitute Brief at 16*.

While the Respondents fail to discuss *Ryder*, it is important to note that the U. S. Supreme Court recently applied the same reasoning and cited *Ryder* regarding the unconstitutional appointment of a decision-maker to reverse an administrative decision made by the Securities and Exchange Commission. In *Lucia v. SEC*, 585 U.S.__, 138 S. Ct. 2044, 201 L. Ed. 2d 464 (2018), it was undisputed that the SEC Administrative Law Judge who issued the underlying decision was not constitutionally appointed to his position. Writing for the Court, Justice Kagan stated,

> The only issue left is remedial. For all the reasons we have given, and all those *Freytag* gave before, the Commission's ALJs are "Officers of the United States," subject to the Appointments Clause. And as noted earlier, Judge Elliot heard and decided Lucia's case without the kind of appointment the Clause requires. *See supra*, at 2051. This Court has held that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case" is entitled to relief. *Ryder v. United States*, 515 U.S. 177, 182-183, 115 S. Ct. 2031, 132 L.Ed.2d 136 (1995). Lucia made just such a timely challenge: He contested the validity of Judge Elliot's appointment before the Commission, and continued pressing that claim in the Court of Appeals and this Court. So

> what relief follows? This Court has also held that the "appropriate" remedy for an adjudication tainted with an appointments violation is a new "hearing before a properly appointed" official. *Id*., at 183, 188, 115 S.Ct. 2031. And we add today one thing more. That official cannot be Judge Elliot, even if he has by now received (or receives sometime in the future) a constitutional appointment. Judge Elliot has already both heard Lucia's case and issued an initial decision on the merits. He cannot be expected to consider the matter as though he had not adjudicated it before. To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled.

Lucia, 138 S. Ct. at 2055.

In contrast to the foregoing cases cited by Respondents, *Lucia*, *Ryder*, and *Daniels* all concern the second element - whether the officials who made the appointments were the proper officials to do so. In these cases, the Courts clearly held that a legal challenge raising such issue could be brought on direct review. More importantly, because these cases did not involve the third element - the qualifications of the appointee - the doctrine of *quo warranto* was not even discussed because it was not implicated.

The case before the Court clearly concerns the first element - whether § 644.021.1, as amended by HB 1713, can serve as lawful statutory authority to appoint anyone to the CWC. Because this first element does not concern the personal qualifications of any CWC members, all the cases cited by Respondents are clearly distinguishable. Furthermore, because the nature of Appellant's legal challenge is akin to that asserted in *Lucia*, *Ryder*, and *Daniels*, the legal challenge is not required to be asserted exclusively in a *quo warranto* action.

Accordingly, because Appellant asserts that the 2017 appointments to the CWC were based on an unconstitutional statute and does not challenge the qualifications of any

particular member of the CWC, Appellant may bring such challenge in the direct review of the CWC decision, and, thus, the remedy of *quo warranto* is not the exclusive remedy.

F. While HB 1713's title is "the regulation of water systems," the changes to the composition of the Clean Water Commission do not fairly relate to that single subject and is not fairly expressed in the title.

HB 1713 contained nine statutory sections. While several of these sections concern "the regulation of water systems," the Respondents fail to show how altering the membership composition of the CWC concerns that subject. In this regard, the other eight sections in HB 1713 - § 67.5070, RSMo, § 256.437, RSMo, § 256.438, RSMo, § 256.440, RSMo, § 256.443, RSMo, § 256.447, RSMo, § 640.136, RSMo, and § 644.200, RSMo - concern either public water systems or actions to be taken by the Department of Natural Resources in connection with water systems. In fact, none of these other sections even mention or refer to the CWC or any of its authority, duties, or obligations. Moreover, the challenged section - § 644.021.1, RSMo - concerning the composition of the CWC is not "fairly relate[d] to the same subject, have a natural connection therewith or are incidents or means to accomplish its purpose." *See Rizzo v. State*, 189 S.W.3d 576, 579 (Mo. banc 2006). Further, the Respondents have failed to conclusively show how the number of public, agricultural, industrial, and mining representatives on the CWC reasonably relates to "the regulation of water systems." Because the membership requirements of the CWC may only incidentally relate to any of the other provisions in HB 1713, the change in the membership requirements falls outside of the subject of "the regulation of water systems."

Consequently, the composition of the CWC is not fairly related to the subject of HB 1713 and is not fairly expressed in the title of HB 1713.

G. HB 1713's original purpose of regulating water systems changed during the bill's passage through the General Assembly.

It is undisputed that the original purpose of HB 1713 related to the regulation of water systems. Throughout the course of the 2016 legislative session, several new sections were added to HB 1713. However, these additional sections relating to water systems and obligations of the Department of Natural Resources were all germane to the original purpose of HB 1713. But, with the addition of Senate Amendment 1 changing the membership requirements on the CWC, the original purpose of HB 1713 was altered because the membership requirements on the CWC are not relevant or germane to the original purpose of the bill.

As this Court previously stated, the purpose of Article III, § 21 is 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). In this context, the inclusion of Senate Amendment 1 late in the legislative session is a textbook example of "logrolling." As a result, the amendment to § 644.021.1 in HB 1713 changed the original purpose of HB 1713 in violation of Article III, § 21.

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. Because Trenton Farms injected the issue concerning the scope and effect of Van Maanen's PE certification in its Respondent's Brief at the Court of Appeals, the Court is authorized to consider this additional point under Rule 84.04(g).

Under Supreme Court Rule 84.04(f), "The respondent's brief may also include additional arguments in support of the judgment that are not raised by the points relied on in the appellant's brief." In this context, the point concerning the legal effect of Mr. Van Maanen's PE certification (*ROA at 1461*) was injected at the Court of Appeals by Trenton Farms in its Respondent's Brief, which it was entitled to do under Rule 84.04(f). There, Trenton Farms asserted that the certification provided by Mr. Van Maanen is competent and sufficient evidence that is binding on DNR to conclude that the facility complies with the applicable DNR floodplain rules. *Respondent-Trenton Farms Brief at*

23 (“Mr. Van Maanen certified that the permit ‘application and supporting materials meets all of the design requirement, including the need to protect certain parts of the operation from inundation and damage from a 100 year flood event. . . .’ ROA001460-1461; A28. MDNR is required to rely on this certification to ascertain compliance with 10 CSR 20-8.300 (4)(A).”

While Trenton Farms’ only obligation in its Respondent’s Brief at the Court of Appeals was to respond to Hickory Neighbors’ points, Trenton Farms placed the new point at issue regarding the scope and effect of Van Maanen’s PE certification by including this new point in its Respondent’s Brief.

> . . . a respondent must respond to the points preserved and argued by the appellant to seek reversal of the trial court's order and may marshal every argument available in support of the judgment. This duty does not require a respondent to divine every conceivable outcome on appeal and argue against it. "Neither the language of the rules nor any case law [of which] we are aware ... compels the inclusion in the respondent's brief of alternative or conditional points not raised by the appellant." *Noll*, 774 S.W.2d at 150.

Boyer v. Grandview Manor Care Center, Inc., 793 S.W.2d 346, 347-348 (Mo. banc 1990).

Moreover, it cannot be disputed that independent points first raised in a respondent's brief may be considered on appeal. *See Boswell v. Steel Haulers, Inc*., 670 S.W.2d 906, 910-911 (Mo. App. W.D. 1984) (“Respondent also briefs and argues in the

affirmative five additional grounds of error not presented or discussed in appellants' brief").

Thus, this is not a situation where the new point regarding Van Maanen's PE certification was first raised by Hickory Neighbors in its Reply Brief and the Respondents were deprived of the ability to respond. Rather, because Trenton Farms injected this point, Hickory Neighbors properly responded to this additional point in its Reply Brief at the Court of Appeals and during oral argument in accord with Rule 84.04(g). *See Appellant's Reply Brief at 7 - 10*. Further, in its Substitute Respondent's Brief before this Court, Trenton Farms fails to address or even discuss the fact that it injected the issue regarding Van Maanen's PE certification before the Court of Appeals. Rather, Trenton Farms merely restates the obvious facts that Hickory Neighbors did not raise Van Maanen's PE certification before the AHC or in its Appellant's Brief at the Court of Appeals. *See Trenton Farms' Substitute Brief at 30 - 31*.

As a result, the Court of Appeals is incorrect when it stated, "During oral argument, Hickory Neighbors challenged for the first time the legal sufficiency of professional engineering certifications relied on by the AHC to make its findings. This issue is not preserved for our review as it exceeds the scope of the point relied on." *Opinion, p. 9, fn. 6.*

Consequently, this issue concerning Van Maanen's PE certification is properly before the Court.

B. The Clean Water Commission incorrectly applied the law because there is no competent and substantial evidence in the record that the manure storage areas located in the FEMA-designated 100-flood plain will be protected from inundation from the 100-year flood.

The State asserts three grounds to support their position that there is substantial and competent evidence in the record that the manure storage structures are protected from inundation from the 100-year flood:

- ¶¶ 33 and 36 in the AHC's Recommended Decision (*State Respondents' Brief at 45*);
- "certifications of two Trenton Farms' engineers (*State Respondents' Brief at 45-46*);" and
- "Appellant's own expert (*State Respondent's Brief at 46*)."

However, none of the foregoing supports such a conclusion. In this regard, neither ¶ 33 nor ¶ 36 in the AHC Recommended Decision contains any citation to any testimony or evidence in the record to support these conclusions. *ROA at 1788 and 1789.* Rather, ¶¶ 33 and 36 are merely conclusory statements, which do not serve as competent and substantial evidence that the manure storage structures are protected from flood inundation. *See State ex rel. Noranda Alumninum, v. Public Service Comm.*, 24 S.W.3d 243 (Mo. App. W.D. 2000) ("[w]ithout specific findings of fact . . ., it is impossible to determine whether the action of the [agency] was supported by substantial evidence").

Concerning the "certifications of two Trenton Farms' engineers," the PE certification provided by John Holmes has absolutely nothing to do with whether any

manure storage structures are protected from flood inundation. *ROA at 1260*. Also, Van Maanen's PE certification fails to comply with § 327.411, RSMo because there is no evidence in the record that he conducted, prepared, or supervised the Flood Study Report, as required by the statute. *ROA at 1787*. Thus, neither of the two PE certifications constitute competent and substantial evidence that the manure storage structures are protected from flood inundation.

Finally, the State fails to cite any portion of the deposition testimony of Paul Reitz. PE, as support for its position. Rather, a review of the transcript of Mr. Reitz' deposition testimony shows that he testified: (1) he has conducted over 50 similar flood studies, (2) the specific locations of the proposed structures are important in the context of performing the flood study, and (3) the Allstates Flood Study does not provide any geographic coordinates to provide the locations for the proposed structures. *ROA at 1221; 1238 - 1239*. Consequently, based on the transcript of Mr. Reitz' deposition testimony, Mr. Reitz never testified that the Allstates Flood Study conclusively shows that the manure storage buildings are protected from flood inundation.

As a result, none of the grounds cited by the State are supported by the record and do not serve as competent and substantial evidence to support the CWC's issuance of the permit.

In its Substitute Brief, Trenton Farms states several purported facts as support for its position that there is competent and substantial evidence that the manure storage structures are protected from inundation from the 100-year flood:

> Mr. Holmes calculated a base flood elevation of 744.35 feet. ROA001470; A33. Trenton Farms' gestation building would be inundated if a flood reached an elevation of 757.8 feet. ROA001463, 1470. That is 13.45 feet above the 100-year base flood elevation. ROA001470. In fact, the bottom of the concrete pad the gestation barns' concrete pit is at an elevation of 747.8 feet which is 3.45 feet higher than the calculated 100-year base flood elevation. ROA001463, 1470. Therefore, according to Allstate's Floodplain Modeling Report, the Trenton Farms buildings would not be in the 100-year floodplain, and thus, the buildings would be protected from inundation. ROA000245.

Trenton Farms' Substitute Brief at 26.

However, a review of the foregoing citations to the Record on Appeal shows that the referenced pages do not support Trenton Farm's purported facts. In this regard, page 1470 in the Record on Appeal is a single page out of the Allstates Flood Study Report. Significantly, that page states there are eight (8) different "calculated base flood elevations" for eight (8) different locations. At which location does Trenton Farms refer?

Further, page 1463 in the Record on Appeal is an AutoCAD drawing labelled "C 103 Site Plan/Aerial Map" prepared by Stockwell Engineers. Contrary to Trenton Farms' assertion, neither page 1463 nor page 1470 state whether or not "Trenton Farms' gestation building would be inundated if a flood reached an elevation of 757.8 feet." Moreover, neither page 1463 nor page 1470 state whether or not "the bottom of the concrete pad the gestation barns' concrete pit is at an elevation of 747.8 feet which is

3.45 feet higher than the calculated 100-year base flood elevation." Finally, at no time during his AHC testimony did Mr. Holmes testify regarding drawing C 103. *See ROA at 207 - 276*. In fact, Mr. Holmes testified that Stockwell altered his own Allstates Flood Study Report by adding several 11" x 17" AutoCAD drawings to the front of his report and he was not familiar with these drawings. *See ROA at 271* (". . . it was added by Stockwell and in front of my Floodplain Modeling Report;" and "Those [drawings] are not mine").

Finally, page 245 in the Record on Appeal is page 156 from the transcript of Mr. Holmes' AHC testimony. Significantly, there is nothing shown in page 245 of the Record on Appeal that Mr. Holmes testified "the Trenton Farms buildings would not be in the 100-year floodplain, and thus, the buildings would be protected from inundation." In fact, at no time during his AHC testimony did Mr. Holmes ever testify that the Trenton Farms' manure storage structures were protected from inundation from the 100-year flood. *See ROA at 207 - 276*.

What Trenton Farms is attempting to do is to improperly bolster its case by making its own interpretations of several engineering drawings and technical calculations and then stating its own interpretations as facts. In this regard, Trenton Farms called Mr. Holmes as an expert witness, but never asked him whether the manure storage structures were protected from inundation by the 100-year flood. Further, based on Mr. Holmes' testimony, the Allstates Flood Study Report was altered by Stockwell Engineering (Van Maanen's employer) which added several AutoCAD drawings to front of the report. Then, Trenton Farms used Mr. Van Maanen's PE certification to "connect the dots"

between the altered Allstates' Flood Study Report, which included the added AutoCAD drawings, and the ultimate conclusion concerning whether the manure storage structures were protected from flood inundation without ever calling him to testify as an expert at the AHC hearing.

In this regard, expert testimony is necessary to "connect the dots," and the portions of the record cited by Trenton Farms do not reflect such testimony. *See Biggerstaff v. Nance*, 769 S.W.2d 470, 473 (Mo. App. S.D. 1989) ("In our opinion, the question of whether concrete retaining walls are constructed in accordance with sound engineering principles should be answered by expert opinion testimony, rather than by lay witnesses who have no knowledge of the engineering principles in question …").

As a result, the purported facts cited by Trenton Farms in its Substitute Brief have no support in the record and do not provide competent and substantial evidence to support the issuance of the underlying permit.

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 Reply Brief complies with the limitations contained in Rule 84.06(b).

2. Appellant's Substitute Reply Brief contains 7,744 words, exclusive of the cover, certification of compliance, and signature block.

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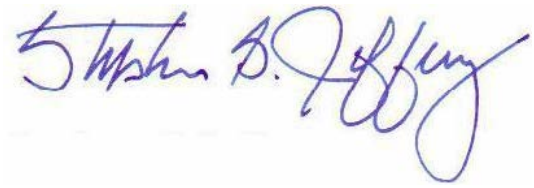

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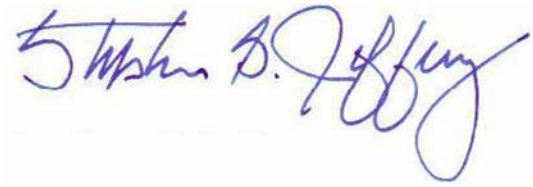
CERTIFICATE OF SERVICE

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 5th day of August 2019.



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