IN THE SUPREME COURT OF MISSOURI
NO. SC85696

MISSOURI COALITION FOR THE ENVIRONMENT, THOMAS J. SAGER, JAMES E. KAUFMANN, AND HARRIET GRAHAM,

Plaintiffs-Appellants,

v.

THOMAS A. HERRMANN, Chair, COSETTE D. KELLY, DAVIS D. MINTON, KRISTIN PERRY, ARTHUR HEGI, JAMES GREENE, Members of the Missouri Clean Water Commission, MISSOURI CLEAN WATER COMMISSION, U.S. ARMY ENGINEERING CENTER, AND FORT LEONARD WOOD,

Defendants-Respondents.

On appeal from the Circuit Court of the City of St. Louis
Cause No. 004-02358
The Honorable Robert H. Dierker, presiding

Transferred post-opinion of the
Missouri Court of Appeals, Eastern District
No. ED 81790

BRIEF OF AMICUS CURIAE PREMIUM STANDARD FARMS, INC. AND CONTIGROUP COMPANIES, INC.

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Introduction to *Amicus Curiae* Premium Standard Farms and ContiGroup Companies

The Eastern District's case, *Missouri Coalition for the Environment, et al. v. Herrmann, et al.*, No. E.D. 81780 (2003 WL 21488873) (Mo. App. E.D. June 30, 2003), to which this Court has granted transfer, is in direct conflict with the Western District Court of Appeal's decision *Craven v. State ex rel. Premium Standard Farms, Inc.*, 19 S.W.3d 160 (Mo. App. W.D. 2000). The Supreme Court has granted transfer of *Missouri Coalition* to resolve these inconsistent rulings.

Premium Standard Farms, Inc. (PSF) and ContiGroup Companies, Inc. [1] (ContiGroup) were the prevailing parties in *Craven*. *Id*. In *Craven*, the Western District held that wastewater permits issued to PSF and ContiGroup could not be appealed to the Clean Water Commission by third parties. *Id*. Understandably, PSF and ContiGroup are interested in preserving *Craven's* favorable ruling and submit this *Amicus Curiae* brief for the Court's consideration.

In the present appeal, both the appellants and the respondents disagree with the holding in *Craven* and support the Eastern District's holding that Missouri law allows persons other than the applicant (third parties) to appeal water permits. Therefore, neither the appellants nor the respondents are motivated to submit arguments to this Court in support of the holding in *Craven* that only the "applicant," and not "affected"

[1] Since the *Craven* decision, Continental Grain Company has been renamed ContiGroup Companies, Inc.

third parties, may appeal permits. If this Court were to affirm the holding of *Missouri Coalition*, it would overrule the holding in *Craven* and may, in certain circumstances, allow third parties to appeal permits issued to PSF and ContiGroup. Therefore, *amicus curiae* PSF and ContiGroup believe it is necessary to file this brief to thoroughly brief the issue from an opposing point of view that would otherwise not be presented to this Court.

Regardless of whether the "Executive Secretary" or the "Director" issues wastewater permits, Missouri law only allows the "applicant" to appeal wastewater permits. In *Craven* and *Missouri Coalition*, the decisions of the Eastern and Western District Courts of Appeal hinged on whether the "Executive Secretary" of the Missouri Clean Water Commission or the "Director" of the Missouri Department of Natural Resources issues wastewater permits. If the Director issues wastewater permits, the Eastern District held that § 640.010.1, RSMo allows "affected" third parties to appeal wastewater permits to the Clean Water Commission. If the "Executive Secretary" of the Clean Water Commission issues wastewater permits, as the Western District believed, § 640.010.1, RSMo, which allows "decisions" of the "director" to be appealed by "affected" third parties would clearly have no application and "affected" third parties would have no standing to appeal.

However, in the spring of 2000, the Missouri General Assembly settled this debate by amending the Missouri Clean Water Law to clarify that the "director" now issues wastewater permits. S.B. No. 741 (2000). Specifically, Senate Bill 741 amended the Missouri Clean Water Law, §§ 644.006 – 150, RSMo, by replacing every reference to "executive secretary" with the word "director," meaning the director of the Department

of Natural Resources.[2] For example, Senate Bill 741 amended § 644.051.3, RSMo as follows: "If the director determines that the source meets or will meet the requirements of sections 644.006 to 644.141 and the regulations promulgated pursuant thereto, the director shall issue a permit . . . ." § 644.051.3, RSMo (Cum. Supp. 2002) (Emphasis added). Following the enactment of S.B. 741, it is clear that permits are now issued by the Director and not the Executive Secretary of the Clean Water Commission.

Despite this change to the Missouri Clean Water Law, *amicus curiae* argue that Missouri law continues to only allow permit "applicants" to appeal permits to the Clean Water Commission. In this brief, *amicus curiae* PSF and ContiGroup will argue that a more specific, later enacted statute allows only "applicants" and not "affected parties," to appeal permits to the Commission.

[2] § 644.016(5), RSMo defines "Director" as "the director of the department of natural resources." (Cum. Supp. 2002).

ARGUMENT

I. Assuming arguendo that the Director of the Department of Natural Resources issued Ft. Leonard Wood's permit, the Clean Water Commission did not err by dismissing the Coalition's appeal of Ft. Leonard Wood's permit because § 644.051.6 limits permit appeal standing to the "applicant" in that Missouri Coalition was not the applicant, and § 644.051.6, which is a statute specifically defining the Clean Water Commission's jurisdiction, takes precedence over § 640.010.1 which is a more broadly drafted, general statute authorizing "decisions" of the Director to be appealed the pertinent "board or commission."

A. Standard of review.

In accordance with § 536.140, RSMo, judicial review "may extend to a determination of whether the action of the agency (1) Is in violation of constitutional provisions; (2) Is in excess of the statutory authority or jurisdiction of the agency; (3) Is unsupported by competent and substantial evidence upon the whole record; (4) Is, for any other reason, unauthorized by law; (5) Is made upon unlawful procedure or without a fair trial; (6) Is arbitrary, capricious or unreasonable."

This Court reviews the decision of the Clean Water Commission and not that of the Circuit Court or the Court of Appeals. *See Scheble v. Missouri Clean Water Commission*, 734 S.W.2d 541, 550 (Mo. App. 1987). In the case at bar, there are only questions of law. "Questions of law are matters for the independent judgment of the court. . . . [T]here is no discretion lodged in the administrative body that in anyway

restricts or limits the right and duty of the court to interpret the law applicable to the case before it." *Id*. at 550 – 551 (citations omitted).

B. Specific statute prevails over general statute.

When "two statutes addressing the same subject matter conflict, the more specific statute is given precedence over the more general one." *Missouri Hosp. Ass'n v. Air Conservation Comm'n*, 874 S.W.2d 380, 394 (Mo. App. W.D. 1994) (citing *State ex rel. Tate v. Turner*, 789 S.W.2d 240, 241 (Mo. App. 1990)) (specific enabling statute limited the Missouri Air Conservation Commission's rulemaking authority over asbestos projects that would have otherwise been proper under a more general, broadly drafted enabling statute). "When one statute deals with a particular subject in a general way, and a second statute addresses a part of the same subject in a more detailed way, the more general should give way to the more specific." *Atkinson v. Timothy Peterson/T & P Found.*, 962 S.W.2d 912, 916 (Mo. App. 1998).

Chapter 640, RSMo is titled "Department of Natural Resources." Section 640.010 is the first section in this chapter, and it is broadly titled "Department created – director, appointment, powers, duties – transfer of certain agencies." Subsection 1 provides in pertinent part: "He [the director] shall faithfully cause to be executed all policies established by the boards and commissions assigned to the department [of natural resources], be subject to their decisions as to all substantive and procedural rules and his decisions shall be subject to appeal to the board or commission on request of the board or commission or by affected parties." § 640.010.1, RSMo (Emphasis added).

In the broadest of terms, § 640.010.1 provides that "decisions" of the Director are subject to appeal by "affected parties." § 640.010.1, RSMo. This statute does not define which or what types of decisions may be appealed nor does it identify to which boards or commissions the Director's decisions may be appealed. This statute provides administrative appeal jurisdiction in the most general of terms.

Contrast § 640.010.1's general appeal provision with the specific and narrowly crafted appeal provision of § 644.051.6, RSMo. Section 644.051 is found in Chapter 644, which is titled "Water Pollution." Within Chapter 644 are §§ 644.006 – 150 which are grouped under the heading "Missouri Clean Water Law."[3] It is the Missouri Clean Water Law that creates and defines the powers and duties of the Missouri Clean Water Commission. §§ 644.021, 644.026, RSMo. Section 644.051 is one of several statutes grouped under the Chapter 644 subheading "Missouri Clean Water Commission." Section 644.051, applying solely to the issuance of permits for water contaminant and point sources,[4] the type of permit at issue here, is codified within the Missouri Clean Water Law.

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[3] § 644.006, RSMo states that "[t]his subchapter shall be known and may be cited as the "Missouri Clean Water Law."

[4] § 644.051.2, RSMo states that "[i]t shall be unlawful for any person to build, erect, alter, replace, operate, use or maintain any water contaminant or point source in this state that is subject to standards, rules or regulations promulgated pursuant to the provisions of

Section 644.051.6 states that "[t]he applicant may appeal to the commission from the denial or any condition in any permit by filing a notice of appeal with the commission . . . ." (Emphasis added). This statute applies specifically to permits issued under the auspices of the Missouri Clean Water Law, Chapter 644, RSMo. Moreover, this statute specifically applies to appeals to the Clean Water Commission. The Court in *Craven* held that the "unambiguous language of § 644.051.6 gives an appeal right based on issuance of a permit to the permit applicant only." *Craven* at 166.

The provision in § 640.010.1, RSMo authorizing "affected parties" to appeal to boards and commissions directly conflicts with the provision of § 644.051.6, RSMo, which only authorizes "applicants" the right to appeal to the Clean Water Commission. Having compared the two statutes, it is clear that § 640.010.1 is a more general statute. Section 644.051.6 deals with the Clean Water Commission permit appeal jurisdiction in a much more detailed manner. Therefore, under the principals set forth above, § 640.010.1 must defer to the more detailed requirements and limitations set forth in § 644.051.6.

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sections 644.006 to 644.141 unless such person holds a permit from the commission. . . ." (Emphasis added).

II. Assuming arguendo that the Director of the Department of Natural Resources issued Ft. Leonard Wood's permit, the Clean Water Commission did not err by dismissing the Coalition's appeal of Ft. Leonard Wood's permit because § 644.051.6 limits permit appeal standing to the "applicant" in that § 644.051.6, which provides more detailed treatment of the Commission's jurisdiction, was enacted subsequent to § 640.010.1 and therefore qualifies, limits and takes precedence over appellate jurisdiction conferred by § 640.010.1, the more general statute.

A. Standard of Review.

In accordance with § 536.140, RSMo, judicial review "may extend to a determination of whether the action of the agency (1) Is in violation of constitutional provisions; (2) Is in excess of the statutory authority or jurisdiction of the agency; (3) Is unsupported by competent and substantial evidence upon the whole record; (4) Is, for any other reason, unauthorized by law; (5) Is made upon unlawful procedure or without a fair trial; (6) Is arbitrary, capricious or unreasonable."

This Court reviews the decision of the Clean Water Commission and not that of the Circuit Court or the Court of Appeals. *See Scheble v. Missouri Clean Water Commission*, 734 S.W.2d 541, 550 (Mo. App. 1987). In the case at bar, there are only questions of law. "Questions of law are matters for the independent judgment of the court. . . . [T]here is no discretion lodged in the administrative body that in anyway restricts or limits the right and duty of the court to interpret the law applicable to the case before it." *Id*. at 550 – 551 (citations omitted).

B. More detailed, subsequently enacted statutes take precedence over more general, previously enacted statutes.

"[W]hen a general statute conflicts with one which is subsequently enacted with more detailed treatment of the same subject matter, the specific one is regarded as a qualification of the general statute." *Missouri Hosp. Ass'n v. Air Conservation Comm'n*, 874 S.W.2d 380, 394 (Mo. App. W.D. 1994) (citing *Evans v. State*, 779 S.W.2d 253, 254 (Mo. App. 1989)). "When two statutes conflict, the later enacted statute, even when there is no specific repealing clause, repeals the first statute to the extent of any conflict with the second." *Corvera Abatement Technologies, Inc. v. Air Conservation Commission, et al.*, 973 S.W.2d 851, 859 (Mo. banc 1998).

Subsection 1 of § 640.010, RSMo was enacted in 1973. (L. 1973, 1st Ex. Sess. S.B. 1, § 10, A.L. 1995 S.B. 65). Although § 640.010 was amended in 1995, subsection 1 has never been amended since its enactment. § 640.010, Mo. Ann. Stat.

As discussed above, § 644.051.6 of the Missouri Clean Water Law specifically addresses who has standing to appeal wastewater permits. Since the Circuit Court of Cole County granted a writ of prohibition in the *Craven* case on May 9, 1999,[5] § 644.051 has been amended no fewer than three times. (Mo. Ann. Stat., L.1999, S.B. No. 160, § A; L.2000, S.B. No. 741, § A; L.2002, S.B. Nos. 984 & 985, § A.). In fact, subsection 6 alone was amended twice, in 1999 and again in 2002. However, none of these amendments changed or qualified the sentence that allows only the "applicant" to appeal its permit to

[5] Substitute Appendix to Substitute Appellants Brief, Tab 9, p. A37.

the Clean Water Commission. If the General Assembly had wanted to grant persons other than the applicant standing to appeal wastewater permits, it could have easily amended the statute – on three different occasions – but it did not.

In light of the fact that § 644.051 was amended twice after the circuit court's *Craven* decision in May 1999 and then again amended after the Western District's opinion in *Craven* was handed down on May 30, 2000, there can be no doubt that the General Assembly intended to maintain the status quo that only "applicants" may appeal wastewater permits to the Clean Water Commission. Since § 644.051.6 is the more specific statute and was enacted subsequent to § 640.010.1, the General Assembly must have intended § 644.051.6 to qualify and limit the application of the more general § 640.010.1.

III. The Eastern District erred in holding that § 640.010.1 grants "affected" third parties standing to appeal permits to the Clean Water Commission because the Court improperly relied on the *Lake Lotawana* case in that *Lake Lotawana* was an exhaustion of administrative remedies case that did not address whether an "affected" third party had standing to appeal a permit to the Commission.

A. Standard of Review.

In accordance with § 536.140, RSMo, judicial review "may extend to a determination of whether the action of the agency (1) Is in violation of constitutional provisions; (2) Is in excess of the statutory authority or jurisdiction of the agency; (3) Is unsupported by competent and substantial evidence upon the whole record; (4) Is, for any

other reason, unauthorized by law; (5) Is made upon unlawful procedure or without a fair trial; (6) Is arbitrary, capricious or unreasonable."

This Court reviews the decision of the Clean Water Commission and not that of the Circuit Court or the Court of Appeals. *See Scheble v. Missouri Clean Water Commission*, 734 S.W.2d 541, 550 (Mo. App. 1987). In the case at bar, there are only questions of law. "Questions of law are matters for the independent judgment of the court. . . . [T]here is no discretion lodged in the administrative body that in anyway restricts or limits the right and duty of the court to interpret the law applicable to the case before it." *Id*. at 550 – 551 (citations omitted).

B. Eastern District improperly relied on *Lake Lotawana* exhaustion of remedies case.

In the present case, the Eastern District relied in part on *State ex rel. Lake Lotawana Dev. Co. v. Mo. Dep't of Natural Res.,* 752 S.W.2d 497 (Mo. App. 1988) to support its holding that the Missouri Coalition for the Environment had standing to appeal Fort Leonard Wood's permit to the Clean Water Commission. *Missouri Coalition*, 2003 WL 21488873, at *6. Although *Lake Lotawana* was handed down prior to *Craven*, it does support the proposition that third parties have jurisdiction to appeal permits to the Clean Water Commission.

In *Lake Lotawana,* the lake's homeowners' association appealed to the Commission a construction permit issued by the Department of Natural Resources to the developer of a subdivision and wastewater treatment plant adjacent to the lake. *Id.* Before the Commission heard the appeal, the homeowners' association filed for a writ of mandamus with the circuit court. *Id*. The Department filed a motion to dismiss the

petition for failure to exhaust administrative appeals before the Clean Water Commission. *Id.* The circuit court sustained the Department's motion to dismiss the homeowners association's writ petition and the Western District affirmed. *Id.*

In *Lake Lotawana*, the permit applicant was the developer of the subdivision. *Id*. The developer did not appeal the permit and did not intervene in the homeowners' association appeal. Therefore, the developer/permit applicant was not a party to the appeal before the Clean Water Commission nor to the writ of mandamus action filed in the circuit court. None of the litigants challenged the homeowners' association's standing to file an appeal to the Commission. Although the homeowners' association filed duplicitous actions, it was for obvious reasons not motivated to argue the Clean Water Commission did not have jurisdiction to hear its appeal. As is apparent from their briefs, the Department of Natural Resources and the Clean Water Commission were under the misimpression that third parties had jurisdiction to appeal permits to the Commission. Therefore, none of the *Lake Lotawana* litigants raised to the Western District the issue of third party standing to appeal permits. Consequently, the Western District did not address the issue in its opinion.

There is no indication that the Western District considered its *Craven* opinion to be inconsistent with the decision it rendered twelve years earlier in *Lake Lotawana*. The *Lake Lotawana* case did not even address the central issue in *Craven*. At best, *Lake Lotawana* touches at the issue through implied dicta. It is more accurate to characterize *Lake Lotawana* as irrelevant to the case at bar.

IV. The Clean Water Commission did not err by dismissing the Coalition's appeal of Ft. Leonard Wood's permit because § 644.051.6 limits permit appeal standing to the "applicant" in that the Clean Water Commission's regulation 10 CSR 20-6.020.6(D) which grants permit appeal standing to "any other [third] person[s] with an interest which is or may be adversely affected" was promulgated by the Commission in excess of its authority and is therefore void.

A. Standard of Review.

In accordance with § 536.140, RSMo, judicial review "may extend to a determination of whether the action of the agency (1) Is in violation of constitutional provisions; (2) Is in excess of the statutory authority or jurisdiction of the agency; (3) Is unsupported by competent and substantial evidence upon the whole record; (4) Is, for any other reason, unauthorized by law; (5) Is made upon unlawful procedure or without a fair trial; (6) Is arbitrary, capricious or unreasonable."

This Court reviews the decision of the Clean Water Commission and not that of the Circuit Court or the Court of Appeals. *See Scheble v. Missouri Clean Water Commission*, 734 S.W.2d 541, 550 (Mo. App. 1987). In the case at bar, there are only questions of law. "Questions of law are matters for the independent judgment of the court. . . . [T]here is no discretion lodged in the administrative body that in anyway restricts or limits the right and duty of the court to interpret the law applicable to the case before it." *Id*. at 550 – 551 (citations omitted).

B. Commission's regulation promulgated in excess of authority and is therefore void.

Appellants' brief gives passing reference to a Clean Water Commission regulation that grants adversely affected third parties standing to appeal wastewater permits. App. Brief p. 25. Appellants cite to 10 CSR 20-6.020.6(D) which reads as follows:

> (D) The appeals referenced previously in subsection (6)(A) of this rule may be made by the applicant, permittee or any other person with an interest which is or may be adversely affected.

In *Craven*, the Western District held the "unambiguous language of § 644.051.6 gives an appeal right based on the issuance of a permit to the permit applicant only." *Craven* at 166. The regulation's attempt to expand permit appeal standing "is clearly in excess of the statute. *Id*. "Administrative regulations . . . are . . .void if they attempt to modify or extend the statute." *Id*. (citations omitted). Consequently, the Western District in *Craven* correctly held "that portion of the regulation that gives an affected party the right to appeal the issuance of a permit to the Commission is declared void." *Id*. at 167.

CONCLUSION

The Clean Water Commission did not err by following *Craven* and dismissing the Missouri Coalition for the Environment's appeal of Ft. Leonard Wood's permit because § 644.051.6 limits permit appeal standing to the "applicant." Section § 644.051.6, which provides more detailed treatment of the Commission's jurisdiction, was enacted subsequent to § 640.010.1 and therefore qualifies, limits and takes precedence over appellate jurisdiction otherwise conferred by § 640.010.1, the more general statute. Therefore, *amicus curiae* Premium Standard Farms, Inc. and ContiGroup Companies, Inc. pray the Court reverse the decision of the Eastern District and affirm the Clean Water

Commission's decision dismissing the Missouri Coalition for the Environment's appeal of the Ft. Leonard Wood permit.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, on this 19th day of February, 2004, to:

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CERTIFICATE PURSUANT TO RULE 84.06(c) AND 84.06(g)

I hereby certify that the foregoing Brief of *Amicus Curiae* Premium Standard Farms, Inc. and ContiGroup Companies, Inc. complies with the limitations contained in Rule 84.06(b) and, according to the word count of the word processing system used to prepare the Brief (excepting therefrom the cover, certificate of service, this certificate, and the signature block and the appendix), contains 4,018 words. I hereby further certify that the disk containing this Brief and submitted to the Court has been scanned for viruses and that the scan indicated it is virus free.

Respectfully submitted,

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