

IN THE COLE COUNTY CIRCUIT COURT
STATE OF MISSOURI

STOP LAND USE DAMAGING OUR)
GROUND AND ENVIRONMENT, LLC,)

RELATOR,)

V.)

Case No. _____

Division _____

MISSOURI DEPARTMENT OF)
NATURAL RESOURCES,)

RESPONDENT)

PETITION

COMES NOW Relator, by and through the undersigned counsel, and for its

Petition states as follows:

Parties

1. Relator – Stop Land Use Damaging Our Ground and Environment, LLC (“SLUDGE”) is a Missouri limited liability company in good standing, with its principal place of business at 19223 Wallaby Road, Fairview, Missouri.

Relator’s members and supporters are Missouri residents and Missouri taxpayers

whose taxes support Respondent’s implementation of the Missouri Solid Waste

Management Law, §§ 260.200 - 260.345, RSMo and Missouri Clean Water Law,

Chapter 644, RSMo. Relator’s members and supporters own property and reside

near two earthen basins located near Fairview, Missouri and Stella, Missouri.

Relator, its members, and supporters are adversely affected by the effects on their

health, property values, loss of recreational opportunities, and the presence of

offensive odors, insects, and other harms caused by the earthen basins described

herein, and by Respondent's actions in excess of its statutory authority by allowing the construction and operation of these earthen basins without the necessary permits specifically required by the Missouri Solid Waste Management Law, § 260.205.1, RSMo.

2. Respondent – Missouri Department of Natural Resources is a state agency created by Article IV, § 47(a) of the Missouri Constitution. Respondent has the statutory duty to enforce and implement the Missouri Solid Waste Management Law, §§ 260.200 – 260.345, RSMo, including § 260.205.1, RSMo.

Jurisdiction and Venue

3. This Court has jurisdiction over this matter in accordance with Article V, § 14 of the Missouri Constitution. Venue is proper in this Court because Respondent's official place of business is located in Cole County, Missouri.

Statement of Facts

4. Denali Water Solutions, LLC ("Denali") is an Arkansas limited liability company. According to its corporate website, "DENALI IS A SPECIALTY WASTE AND ENVIRONMENTAL SERVICES COMPANY" (emphasis added). Further, Denali states on its corporate website, "Our team is on a mission to create a positive impact on how waste disposal is utilized, as there is limitless potential for what can be done with organic waste." (emphasis added). In addition, Denali states on its corporate website, "Denali is an innovative waste disposal and recycling company that is committed to repurposing waste to create value and make our economy more

circular.” (emphasis added). *See* Exhibit 1, attached hereto and incorporated herein.

5. The Arkansas Department of Environmental Quality has issued over 250 permits to Denali in connection with its operations in Arkansas. In these permits, Denali’s Primary Standard Industrial Classification Code (“SIC”) is listed as “4953 – Refuse Systems.” *See* Exhibit 2, attached hereto and incorporated herein, pp. 1 - 28.

6. According to the Occupational Safety & Health Administration (“OSHA”), SIC 4953 includes “Establishments primarily engaged in the collection and disposal of refuse by processing or destruction or in the operation of incinerators, waste treatment plants, landfills, or other sites for disposal of such materials” (emphasis added). *See* Exhibit 3, attached hereto and incorporated herein.

7. Between 2018 and 2021, Denali constructed earthen basins known as Denali-Evans Lagoon, Quince Road, Fairview, Missouri, and Denali-Gideon Lagoon, Able Road, Stella, Missouri (the “earthen basins”).

8. On information and belief, each of the earthen basins is approximately 600’ long x 240’ wide x 20’ deep.

9. On information and belief, after the construction of the two earthen basins, Denali collects wastes from food and vegetable processing plants, animal processing plants, animal food processing plants, process wash-down rinse water, Dissolved Air Flotation skimmings, waste activated sludge, grease trap waste, and

other wastes from its commercial and industrial customers and places such wastes in each of the earthen basins.

10. On information and belief, prior to the commencement of the construction and operations of these earthen basins, Denali did not apply for and Respondent did not issue any permit of any kind relating to the earthen basins.

11. On information and belief, neither of the two earthen basins has any aeration or engineered treatment.

12. On its website at <https://dnr.mo.gov/water/business-industry-other-entities/water-pollution-control-sites-interest>, Respondent states, On June 30, 2023, the department issued a statement to a select list of entities previously authorized to land apply certain sludges, biosolids and other process wastes without a permit according to 10 CSR 20-

6.015(3)(B)8. Due to a recent decision by the Missouri Fertilizer Control Board, these companies and businesses will no longer be exempt from department permitting requirements. . . .”

13. In a June 30, 2023 memo, Respondent states, *inter alia*, “Any entity previously operating under the 10 CSR 20-6.015(3)(B)8 permit exemption for which the license is not renewed after June 30 will lose that authorization to land apply formerly exempt products under the Missouri Clean Water Law. *See* Exhibit 4, attached hereto and incorporated herein.

14. In the same June 30, 2023 memo, Respondent stated, “In the event there are other violations of the Missouri Clean Water Law and its implementing

regulations, the Department will initiate formal enforcement action which may include penalties of up to \$10,000 per day per violation.” *Id.*

15. On August 30, 2023, Respondent received applications from Denali for Clean Water Act permits allowing for the land application of the commercial and industrial wastes that are placed in the earthen basins.

16. On October 20, 2023, a 6,000 gallon waste spill occurred on Wallaby Road across from the earthen basin near Fairview, Missouri from a spreader truck operated by Denali. *See <https://www.koamnewsnow.com/news/joplin-news-first/slurry-spill-in-newton-county-closes-roadway-dnr-responding-for-investigation/article>.*

17. On information and belief, Respondent has not taken any enforcement action against Denali regarding the October 20, 2023 sludge spill.

COUNT I

18. Relator restates and realleges the allegations in paragraphs 1 to 17.

19. Section 260.200.1(56), RSMo defines “Solid Waste” as “garbage, refuse and other discarded materials including, but not limited to, solid and semisolid waste materials resulting from industrial, commercial, agricultural, governmental and domestic activities, but does not include hazardous waste as defined in sections 260.360 to 260.432, recovered materials, post-use polymers, recovered feedstocks, overburden, rock, tailings, matte, mill scale and slag or other waste material resulting from mining, milling or smelting.” *See* Exhibit 5, attached hereto and incorporated herein.

20. Section 260.200.1(62) defines “Solid Waste Processing Facility” as “any facility where solid wastes are salvaged and processed.” *Id.*

21. Section 260.205.1, RSMo states, “It shall be unlawful for any person to operate a solid waste processing facility or solid waste disposal area of a solid waste management system without first obtaining an operating permit from the department. It shall be unlawful for any person to construct a solid waste processing facility or solid waste disposal area without first obtaining a construction permit from the department pursuant to this section. . . .” *See* Exhibit 6, attached hereto and incorporated herein.

22. Section 260.205.1 contains an exemption from the foregoing permit requirements: “A permit shall not be required to operate a waste stabilization lagoon, settling pond or other water treatment facility which has a valid permit from the Missouri clean water commission even though the facility may receive solid or semisolid waste materials.” *Id.*

23. All the different types of wastes collected by Denali and stored in each of the earthen basins are “solid waste” as defined by § 260.200.1(56).

24. Each of the earthen basins constructed and operated by Denali is a “solid waste processing facility” as defined by § 260.200.1(62).

25. Under § 260.205.1, Respondent has a nondiscretionary legal duty to require Denali to obtain a construction permit before Denali constructed each solid waste processing facility/earthen basin.

26. Under § 260.205.1, Respondent has a nondiscretionary legal duty to require Denali to obtain an operating permit before Denali begins any operations at each solid waste processing facility/earthen basin.

27. By allowing Denali to construct and operate each of the earthen basins without requiring Denali to obtain a construction permit and operating permit under § 260.205.1, Respondent is exceeding its lawful authority and failing to comply with its nondiscretionary legal duty to enforce § 260.205.1.

COUNT II

28. Relator restates and realleges the allegations in paragraphs 1 to 27.

29. A “waste stabilization lagoon” and “settling pond” are components of a publicly-owned or privately-owned wastewater treatment works used to treat domestic, municipal, and industrial wastewater. *See* U.S. EPA, Office of Water, *Wastewater Technology Fact Sheet, Facultative Lagoons* (2002), attached hereto and incorporated herein as Exhibit 7.

30. U.S. EPA states, “Facultative waste stabilization ponds, sometimes referred to as lagoons or ponds, are frequently used to treat municipal and industrial wastewater in the United States. The technology associated with facultative lagoons has been in widespread use in the United States for at least 90 years, with more than 7,000 facultative lagoons in operation today. These earthen lagoons are usually 1.2 to 2.4 m (4 to 8 feet) (emphasis added).” *Id.*

31. On information and belief, neither of these earthen basins were constructed or are operated as part of a publicly-owned or privately-owned municipal wastewater treatment works.¹

32. Because neither of the earthen basins are part of a publicly-owned or privately-owned wastewater treatment works, neither of the earthen basins is a “waste stabilization lagoon” or “settling pond.”

33. Because neither of the earthen basins provides any aeration or engineered treatment, neither of the earthen basins is a “treatment facility.”

34. Because neither of the earthen basins is a “waste stabilization lagoon,” “settling pond,” or “treatment facility,” the permit exemption in § 260.205.1 is not applicable to the earthen basins.

35. Because Denali has constructed and is operating each earthen basis/solid waste processing facility without first obtaining a construction permit and an operating permit under § 260.205.1, and because the permit exemption is not applicable, Respondent is allowing Denali to violate the permit requirements in § 260.205.1 by constructing and operating each of these solid waste processing facilities without a construction permit or operating permit.

¹ EPA defines “treatment system” as “Federally owned, publicly owned, or privately owned device or system used to treat (including recycle or reclaim) either domestic sewage or a combination of domestic sewage and industrial waste of a liquid nature.” U.S. EPA, Office of Compliance and Enforcement, *Land Application of Sewage Sludge, A Guide for Land Appliers on the Requirements of the Federal Standards for the Use or Disposal of Sewage Sludge*, 40 CFR Part 503 (1994), at 9.

36. By unlawfully applying the permit exemption in § 260.205.1 to the earthen basins and not requiring Denali to obtain construction permits and operating permits, Respondent is exceeding its lawful authority and failing to comply with its nondiscretionary legal duty to enforce § 260.205.1.

COUNT III

37. Relator restates and realleges the allegations in paragraphs 1 to 36.

38. Prior to June 30, 2023, Respondent did not require Denali to obtain any permits for either of the earthen basins because of 10 CSR 20-6.015(3)(B)8, promulgated by the Clean Water Commission, which states, *inter alia*,

(B) The following are exempt from no-discharge permit requirements unless required under subsection (2)(B):

...

8. Products containing or derived from sludges, biosolids or other process wastes when such products are licensed under the Missouri Fertilizer Law, sections 266.291 through 266.351, RSMo and regulations and the products do not exceed pollutant standards for protection of public health and the environment as established by the department. To receive this exemption, the manufacturer or distributor shall submit an initial report to the department on the pollutant content of the product and shall file periodic monitoring reports as determined necessary by the department;

39. On information and belief, Respondent is currently processing permit applications under the Missouri Clean Water Law, § 655.051, RSMo, that will allow Denali to continue to operate each earthen basin in accordance with a “No

Discharge Permit” issued under 10 CSR 20-6.015.

40. 10 CSR 20-6.015(2)(A) states,

All persons who operate, use, or maintain water contaminant sources, point sources facilities for storage, treatment, land application, or disposal of process wastes which are operated so as not to discharge to waters of the state or will have infrequent discharges shall apply for permits unless exempted under section (3) of this rule.

41. 10 CSR 20-6.015(1)(B)1 defines the term “biosolids” as “An organic fertilizer or soil amendment produced by the treatment of wastewater sludge.”

42. 10 CSR 20-6.015(1)(B)13 defines the term “sludge” as “The solid, semisolid or liquid residue removed during the treatment of wastewater. Sludge includes septage removed from septic tanks.”

43. 10 CSR 20-6.015(1)(B)10 defines the term “process wastes” as:

The waste, wastewater, sludges, biosolids and residuals originating from sanitary conveniences, or generated during manufacturing or processing, or results from the production or use of any raw material, intermediate product, finished product, by-product, or waste product and includes discharges from land application fields that occur as a result of the land application process;

44. The definition of “process waste” promulgated by the Clean Water Commission in 10 CSR 20-6.015(1)(B)10 includes the same types of wastes that the General Assembly has defined as “solid wastes” in § 260.200.1(56).

45. A conflict exists between: (i) § 260.205.1, which requires a solid waste processing facility to obtain construction and operating permits, and (ii) 10 CSR 20-

6.015(2)(A), which allows a facility to discharge what the General Assembly has defined as “solid waste” without receiving such construction and operating permits.

46. Respondent and the Clean Water Commission lack any legal authority to promulgate a rule (10 CSR 20-6.015) under the Missouri Clean Water Law that conflicts with the statutory permit requirements established by the General Assembly in § 260.205.1.

47. To the extent that 10 CSR 20-6.015 conflicts with § 260.200.1(56) and 260.205.1, 10 CSR 20-6.015 is void and unenforceable.

48. To the extent Respondent implements 10 CSR 20-6.015 to excuse Denali from complying with § 260.205.1, Respondent is exceeding its lawful authority and failing to comply with its nondiscretionary legal duty to enforce § 260.205.1.

COUNT IV

49. Relator restates and realleges the allegations in paragraphs 1 to 48.

50. U.S. EPA has promulgated Federal regulations at 40 CFR Part 503 which establish standards for managing sewage sludge.

51. The Federal regulations “consist of general requirements, pollutant limits, management practices, and operational standards, for the final use or disposal of sewage sludge generated during the treatment of domestic sewage in a treatment works.” 40 CFR § 503.1(a)(1).

52. The Federal regulations apply to “any person who prepares sewage sludge, applies sewage sludge to the land, or fires sewage sludge in a sewage sludge incinerator and to the owner/operator of a surface disposal site.” 40 CFR § 503.1(b).

53. The term “sewage sludge” is defined at 40 CFR § 503.9(w) as “solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in a treatment works.”

54. In accordance with 40 CFR § 503.3(a), the requirements in the Federal regulations are implemented through:

A. a permit issued to a “treatment works treating domestic sewage” that is issued either by EPA or a State having an EPA-approved sludge management program;

B. a permit issued under subtitle C of the Solid Waste Disposal Act;

C. a permit issued under part C of the Safe Drinking Water Act;

D. a permit issued under the Marine Protection, Research, and Sanctuaries Act of 1972;

E. a permit issued under the Clean Air Act.

55. In accordance with 40 CFR § 503.3(b), “No person shall use or dispose of sewage sludge through any practice for which requirements are established in this part except in accordance with such requirements.”

56. In lieu of complying with the Federal regulations in 40 CFR Part 503, such materials may be placed “in a municipal solid waste landfill unit, as defined in

40 CFR 258.2, that complies with the requirements in 40 CFR part 258.” 40 CFR § 503.4.

57. On information and belief, Respondent does not implement an EPA-approved sludge management program.

58. On information and belief, Denali does not possess any of the permits listed in 40 CFR § 503(a).

59. To the extent that 10 CSR 20-6.015 authorizes Denali to operate the earthen basins and land apply biosolids and sewage sludge in a manner inconsistent with or in conflict with the Federal regulations, 10 CSR 20-6.015 is preempted by 40 CFR Part 503 and is void and unenforceable.

60. To the extent Respondent implements 10 CSR 20-6.015 in a manner relating to biosolids and sewage sludge storage and disposal that is inconsistent with or in conflict with 40 CFR Part 503, Respondent is exceeding its lawful authority and any such action is void and unenforceable.

RELIEF REQUESTED

Because Respondent has clearly exceeded its authority and failed to properly enforce the Missouri Solid Waste Management Law, specifically § 260.205.1, this Court should issue a Preliminary and Peremptory Writ in Mandamus, or alternatively, a Preliminary and Peremptory Writ in Prohibition commanding Respondent:

1. Refrain from allowing any person or facility operating an earthen basin to store or dispose of any solid wastes, sludges, and biosolids without

requiring the person or facility to be permitted as a solid waste processing facility until further order of this Court; and

2. Refrain from any further action concerning any pending Missouri Clean Water Law permit applications submitted by any person or facility that operates an earthen basin to store or dispose of solid wastes, sludges, and biosolids until further order of the Court.

SUGGESTIONS ON WHY THE WRITS SHOULD ISSUE

I. The Petition properly seeks the remedies of a Writ in Mandamus, and in the alternative, Writ of Prohibition.

In the Petition, Relator seeks relief in the form of an extraordinary writ. Because, as noted in several cases, the legal distinctions between a remedy in mandamus and a remedy in prohibition can be so similar, requesting both of these remedies as alternative relief is appropriate. In this regard, the Missouri Supreme Court recently stated,

... this Court has noted, "[T]he distinction between prohibition and mandamus is often elusive and sometimes only serves to create confusion for parties." *State ex rel. Unnerstall v. Berkemeyer*, 298 S.W.3d 513, 515-16 (Mo. banc 2009). *Unnerstall* notes that this confusion has led the court of appeals to hold that distinctions between the two types of writs are anachronistic and that, in modern practice, "[t]he distinction between mandamus and prohibition is at best blurred, at worst nonexistent, and the subject matter to which the two writs apply overlap to a great extent." *Id.* at 516 (internal citations omitted). For example, prohibition has also been used to prevent a waste of judicial resources through unnecessary, inconvenient and expensive litigation. *State ex rel. Springfield Underground, Inc. v. Sweeney*, 102 S.W.3d 7, 8-9 (Mo. banc 2003); *See also State ex rel. Police Ret. Sys. of St. Louis v. Mummert*, 875 S.W.2d 553 (Mo. banc.1994).

State ex rel. Hewitt v. Kerr, 461 S.W.3d 798, 806 - 807 (Mo. banc 2015).

For example, in *State ex rel. Auto Owners v. Messina*, 331 S.W. 3d 662, 663 (Mo. banc 2011), the Relator’s petition sought both a writ of prohibition and a writ in mandamus. In *State ex rel. Atchison, Topeka & Santa Fe Railway Co. v. O’Malley*, 898 S.W.2d 550, 551 (Mo. banc 1995), “Santa Fe filed a petition seeking writs in prohibition and mandamus from this Court, and this Court issued preliminary writs in prohibition and mandamus,” and the Court made the writs absolute. In *City of Cottleville v. St. Charles County*, 91 S.W.3d 148, 149 (Mo. App. E.D. 2002), the city’s petition sought both a writ in prohibition and a writ in mandamus.

Moreover, the Missouri Supreme Court has long recognized the blurred distinction between prohibition and mandamus and has granted relief even if one writ is more appropriate than the writ requested.

Relator in this case filed a petition for a writ of prohibition. This Court has treated petitions for writs of prohibition as petitions for writs of mandamus when the remedy sought by the relator is more appropriate under mandamus practice than prohibition practice.

State ex rel. Leigh v. Dierker, 974 S.W.2d 505, 506 (Mo. banc 1998).

Furthermore, the cases cited by Respondent are all distinguishable. In this context, the language cited by Respondent from *Brannum v. City of Poplar Bluff*, 439 S.W.3d 825 (Mo. App. S.D. 2014) and *State ex rel. Mack v. Scott*, 235 S.W.2d 106 (Mo. App. E.D. 1950) (“We note that our courts have discouraged such double-barreled petitions for both writs of prohibition and mandamus, or joining a request

for a writ of prohibition with any other action...”) and the language cited by Respondents in *State ex rel. Consumer Programs Inc. v. Dowd*, 941 S.W.2d 716 (Mo. App. E.D. 1997) (“A temporary writ cannot be joined with any other cause of action...”), has been rejected by the more recent Missouri Supreme Court decisions in *State ex rel. Leigh v. Dierker* and *State ex rel. Hewitt v. Kerr* where the Court clearly addressed petitions seeking both extraordinary writs.

Accordingly, based on clear precedent from the Missouri Supreme Court, the Petition properly seeks relief in the form of a writ in mandamus, and in the alternative, a writ in prohibition.

II. Regulatory Background.

The Missouri Supreme Court has succinctly stated the purpose for the Missouri Solid Waste Management Law, §§ 260.200 - 260.345, RSMo.

The legislature enacted §§ 260.200--245 to prevent public nuisances, public health hazards, and the despoliation of the environment that necessarily accompany the accumulation and unmanaged disposal of garbage, refuse, and filth. Throughout human history this menace has led to and intensified disease and plague. The legislature, in its wisdom, has forbidden the dumping of solid waste on the ground, in streams, springs, and other bodies of water except through licensed solid waste processing facilities, solid waste disposal areas, and other means that do not create public nuisances or adversely affect the public health.

Craig v. City of Macon, 543 S.W.2d 772, 773 (Mo. banc 1976).

In this context, § 260.205, RSMo establishes a comprehensive process by which a solid waste processing facility or disposal area obtains permits. Initially, an applicant is required to conduct a preliminary site investigation (“PSI”), which involves a technical investigation into environmental and geologic conditions at a

proposed site. Then, once Respondent approves the PSI, the applicant is required to conduct a detailed site investigation (“DSI”), which involves a more rigorous investigation, including subsurface borings, groundwater sampling, and the installation of groundwater monitoring wells. Once the Respondent approves the DSI, the applicant is required to obtain a construction permit prior to the start of any construction of the solid waste facility. Once the facility is constructed and the construction is approved by the Respondent, the applicant is required to obtain an operating permit prior to the acceptance of any solid wastes.

III. Denali is primarily engaged in the waste disposal industry and required to obtain permits under § 260.205.1, RSMo.

It cannot be reasonably disputed that Denali is in the waste disposal industry. Denali admits this fact on its own website when it states, “Denali is an innovative waste disposal and recycling company.” In addition, if Denali was not primarily engaged in waste disposal, then the Arkansas Department of Environmental Quality would not have issued and Denali would not have accepted over 250 permits with the SIC Code “4953 - Refuse Systems.”

Concerning the contents in the Fairview and Stella earthen basins, Denali - consistent with its own description of its operations - likely collects refuse, garbage, dissolved floatation skimmings, grease trap waste, and other discarded waste materials from its commercial and industrial customers. In this context, it cannot be reasonably disputed that refuse, garbage, dissolved floatation skimmings, grease, and the other waste materials collected by Denali are “solid wastes” as defined by § 260.200.1(56). Moreover, because Denali uses these earthen basins to store these

“solid wastes” and then land applies these “solid wastes,” each earthen basin is a “solid waste processing facility” as defined by § 260.200.1(62).

IV. The earthen basins are not subject to the permit exemption in § 260.205.1, RSMo.

Further, it cannot be reasonably disputed that neither earthen basin is a “waste stabilization lagoon,” “settling pond” or “water treatment facility.” In this regard, neither earthen basin receives any “aeration or engineered treatment” of any kind. More importantly, a “waste stabilization lagoon” and “settling pond” are typical components of public or private wastewater treatment works used to provide treatment for domestic, commercial, and industrial wastewater. *See* Missouri

Department of Natural Resources, WASTEWATER GUIDELINES AND STANDARDS

DOCUMENT - PUB2754 (February 2019). Clearly, neither of Denali’s earthen basins fit that bill.

Moreover, the U.S. EPA has established Federal regulations at 40 CFR Part 503 that establish requirements for management of sewage sludge. In this regard, EPA defines “sewage sludge” as “is solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in a treatment works” (emphasis added).

40 CFR § 503.9(w). Further, EPA defines “treatment works” as “either a federally owned, publicly owned, or privately owned device or system used to treat (including recycle and reclaim) either domestic sewage or a combination of domestic sewage and industrial waste of a liquid nature.” 40 CFR § 503.9(aa). Clearly, neither of these earthen basins are designed as part of a wastewater “treatment works.”

As a result, because neither earthen basin is a “waste stabilization lagoon,” “settling pond” or “water treatment facility,” the permit exemption in § 260.205.1 is inapplicable.

V. The earthen basins do not appear to comply with 40 CFR Part 503.

The Federal regulations at 40 CFR Part 503 require that any sewage sludge facility must have a specific type of permit. *See* 40 CFR § 503.3(a). Significantly, it appears that Denali does not possess any of the types of permits listed in 40 CFR § 503.3(a). More importantly, the EPA specifically recognizes that sludge wastes - like what Denali places in the earthen basins - can be disposed of as solid wastes in a municipal solid waste landfill, and, if the solid wastes are disposed of in such manner, the requirements in 40 CFR Part 503 do not apply. *See* 40 CFR § 503.4.

Thus, the Federal regulations recognize that these sludge wastes are “solid wastes.” Consequently, because these wastes are “solid wastes,” the permitting requirements in § 260.205.1 apply to Denali and to Respondent.

VI. Respondent exceeded its authority in applying the permit exemption and not requiring Denali to obtain permits under § 260.205.1, RSMo.

Instead of requiring Denali to comply with the construction and operating permit requirements under § 260.205.1, Respondent is unlawfully using its purported “enforcement discretion” to allow Denali to continue to operate these earthen basins. *See* Exhibit 4. Further, Respondent is currently processing permit applications submitted by Denali which would allow these earthen basins to continue to operate pursuant to No Discharge Permits under 10 CSR 20-6.015.

However, by relying on 10 CSR 20-6.015 as the basis to allow Denali to operate the earthen basins with No Discharge Permits instead of requiring Denali to obtain solid waste permits under § 260.205.1, Respondent is unlawfully acting in excess of its legal authority because to the extent there is a conflict between § 260.205.1 and 10 CSR 20-6.015, § 260.205.1 will always prevail in that Respondent and the Clean Water Commission cannot override the legislative intent expressed in § 260.205.1. *See* § 536.014(2), RSMo (a rule in conflict with state statute is void).

VIII. Relator lacks any effective administrative remedy.

Relator has no effective administrative remedy that could afford it any of the requested relief. If Respondent finalizes the pending water permits, Relator could certainly appeal the issuance of the water permit under § 644.051, RSMo. But, any such appeal would only address issues within the purview of the Missouri Clean Water Law, Chapter 644, RSMo. Any administrative appeal of a water permit would not address issues arising under any other Missouri environmental statutes, such as the Missouri Solid Waste Management Law, §§ 260.200 - 260.345, RSMo. *See Curdt v. Missouri Clean Water Commission*, 586 S.W.2d 58 (Mo. App. E.D. 1979). Further, if any issue relating to solid waste permits was raised in an administrative appeal of a water permit, it is highly likely that Respondent would vigorously resist the consideration of any such issues based on *Curdt*. Finally, Relator would continue to experience all the adverse impacts, including noxious odors and insects, emanating from the toxic stew in the earthen basins.

As a result, it is apparent that an administrative appeal of a water permit would not address the issues raised in the Petition and could not afford any relief to Relator.

IX. The Court should enter a Writ of Mandamus, or in the alternative, a Writ in Prohibition, to refrain Respondent from acting in excess of its authority under § 260.205.1, RSMo.

The essential function of prohibition is to correct or prevent inferior courts and agencies from acting without or in excess of their jurisdiction. *State ex rel.*

State ex rel. Douglas Toyota v. Keeter, 804 S.W. 2d 750, 752 (Mo banc 1991);

McDonnell Douglas Corp. v. Gaertner, 601 S.W.2d 295, 296 (Mo.App.1980).

Based on the foregoing, it is evident that Respondent unlawfully applied the permit exemption to Denali. Consequently, the Court should exercise its authority and issue a Writ of Mandamus, or in the alternative, a Writ in Prohibition, to

refrain Respondent from continuing to act in excess of its statutory authority and

instead command Respondent to require Denali to cease any and all activities and

operations at any solid waste processing facility/earthen basin in Missouri used to

store food waste residuals and related wastes until such time Respondent has

issued Denali a construction permit and an operating permit under § 260.205.1 for

any such facility. *State ex rel. State ex rel. Douglas Toyota v. Keeter, supra*;

McDonnell Douglas Corp. v. Gaertner, supra.

PRAYER

Relator prays the Court sustain its Petition and issue a Preliminary and Permanent Writ of Mandamus, or in the alternative, Writ of Prohibition, against

Respondent, find that Respondent's actions are not substantially justified, command Respondent to require Denali to cease any and all activities and operations at any solid waste processing facility/earthen basin in Missouri storing food waste residuals until such time Respondent has issued Denali a construction permit and an operating permit under § 260.205.1, award Relator its reasonable attorneys' fees and costs, and award such further relief the Court deems appropriate.

Respectfully submitted,

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