

Missouri Clean Water Commission Meeting
Department of Natural Resources
1101 Riverside Drive
Jefferson City, Missouri

January 11, 2017

RNR Farm, LLC Appeal No. 16-3308 CWC

Issue: This agenda item is for the Missouri Clean Water Commission to reach a decision regarding the appeal of the RNR Farm, LLC permit appeal.

Background: On July 6, 2016, the department issued general permit number MOGS10513 to RNR Farms, LLC for a proposed CAFO operation in McDonald County, Missouri. On August 2, 2016, K Tre Holdings, Sharon Engle, Frances Hare, and Jes Blair filed a petition for review challenging the department's issuance of the permit. The petition consisted of various items all of which are documented in the Administrative Hearing Commission's (AHC's) recommended decision as well as the hearing record, which have been previously provided to the Commission. The AHC held a hearing on October 21, 2016 and filed its recommended decision on November 14, 2016. The AHC recommended that the Missouri Clean Water Commission uphold the issuance of the CAFO permit to RNR Farm, LLC.

Recommended Action: The department recommends the Commission hear from the attorneys of the parties and reach a decision.

List of Attachments:

- Administrative Hearing Commission's Recommended Decision
- Hearing Materials (provided previously)

Before the
Administrative Hearing Commission
State of Missouri

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K TRE HOLDINGS, LP,
SHARON ENGLE,
FRANCES HARE and JES BLAIR,

Petitioners,

vs.

MISSOURI DEPARTMENT OF
NATURAL RESOURCES,

Respondent.

No. 16-3308

RECOMMENDED DECISION

The Administrative Hearing Commission (AHC) recommends that the Missouri Clean Water Commission (CWC) uphold the Department of Natural Resources' (DNR) decision to issue RNR Farm, LLC (RNR Farm) a Missouri State General Operating Permit (Permit) to operate a concentrated animal feeding operation (CAFO).

Procedure

On August 2, 2016, K Tre Holdings, LP, Sharon Engle, Frances Hare, and Jes Blair (Petitioners) filed a petition for review challenging DNR's issuance of the Permit to RNR Farm. On September 2, 2016, DNR filed an answer. On September 22, 2016, RNR Farm filed an answer and a motion to intervene. On September 27, 2016, we granted RNR Farm's motion to intervene. On October 21, 2016, we held a hearing on the petition. Petitioners were represented by attorneys Jordan L. Paul and Stephen G. Jeffery. DNR was represented by Assistant Attorney General Timothy A. Blackwell. RNR Farm was represented by attorney Nimrod T. Chapel, Jr.

On November 1, 2016, Petitioners filed a post-hearing brief. On November 1, 2016, DNR and RNR Farm filed a proposed recommended decision. On November 4, 2016, Petitioners filed a reply brief. On November 4, 2016, DNR filed a reply brief and on November 8, 2016, RNR Farm adopted DNR's reply brief. This matter became ready for our decision on November 4, 2016.

On October 19, 2016, Petitioners and DNR filed stipulations of fact wherein DNR reserved relevancy objections to certain exhibits attached to the stipulated facts. At hearing, DNR waived its relevancy objections, and RNR Farm objected only to the relevancy of the stipulated facts in that this Commission has de novo review of the matter. We overrule all outstanding relevancy objections, and we adopt the stipulated facts into our findings of fact below.¹

Findings of Fact

1. Petitioner K Tre Holdings, LP, is a Texas limited partnership authorized to do business in the state of Missouri, and owns property located near the City of Goodman, McDonald County, State of Missouri.
2. Petitioner Sharon Engle is a resident of property located near the City of Goodman, McDonald County, State of Missouri.
3. Petitioners Frances Hare and Jes Blair are residents of property located near the City of Goodman, McDonald County, State of Missouri.

¹ On November 4, 2016, DNR filed a supplement to paragraph 51 of the stipulation and attached a copy of *In Re Callaway Farrowing, LLC* Case No. 14-1978 (Mo. Clean Water Comm'n Oct. 5, 2016). On November 4, 2016, Petitioners filed a motion to exclude consideration of this case in that only three members of CWC signed the decision, and § 644.066.3(3), RSMo 2000, requires at least four members for a final decision. On November 8, 2016, DNR and RNR Farms filed a response to the motion to exclude. Petitioners' motion to exclude decision is granted.

4. Petitioners are the adjoining owners or residents of property located within one and one-half times the buffer distances specified in § 640.710, RSMo 2000.²

5. On November 30, 2015, RNR Farm received articles of organization from the Missouri Secretary of State. It is a Missouri limited liability company.

6. Roger Renner (Renner) is the registered agent for RNR Farm.

7. Renner, on behalf of RNR Farm, issued a neighbor notice letter dated December 28, 2015.³

8. On or about February 10, 2016, Renner/RNR Farm sent to his neighbors a document titled Nutrient Management System Plan (Plan).

9. The Plan was prepared by the Natural Resources Conservation Service, and it was sent to the neighbors without a cover letter or a copy of the December 28, 2015 neighbor notice letter.

10. The Plan is a project summary explaining the waste handling system to be used by RNR Farm, and it contained design, production, and storage information regarding the CAFO.

11. On February 16, 2016, Renner/ RNR Farm submitted an application to DNR for a CAFO Operating Permit that contains, in relevant part:

- a) Part 1.1, "Operation Name" lists "Roger Renner, 1600 May Road, Goodman Missouri" in blue ink. "RNR Farm" is written next to this in black ink.

² DNR and RNR Farm do not contest that the Petitioners have standing to bring their petition for review. Petitioners have standing pursuant to § 621.250.2. Statutory references are to RSMo Cum. Supp. 2013 unless otherwise indicated.

³ A waste management plan was referenced in the letter, but not enclosed.

- b) Part 1.2, "Owner (Provide Legal Name)" lists "same".
- c) Part 1.3, "Continuing Authority (If Different Than The Owner)" lists "same."
- d) Part 12, "Signature" lists "Roger Renner"; "Title" lists "Owner"; and "Signature" lists "Roger Renner."⁴

12. The February 16, 2016 application was filled out entirely in blue ink except Renner's signature was in black ink and he also inserted "RNR Farm" in black ink in the line for the Operation Name at the time he signed the application.

13. DNR issued a deficiency letter/incomplete application letter to RNR Farm dated March 1, 2016, that required RNR Farm to:

- a) "[p]rovide an aerial map showing the extent of the production area including; all confinement buildings, open lots, manure storage structures, surface water and areas subject to a one hundred year flood event within or adjacent to the production area, and production area setback distances."
- b) "submit copies of the certified mail receipts from the second neighbor notice letter. . . ."
- c) "have your engineer send in a copy of your proposed building plans with his seal stamped indicating that the proposed CAFO is designed to regulation specifications."
- d) "address how you will remove/ work around . . . a couple of water structures (ponds) in the proposed building site."⁵

14. In response to DNR's deficiency letter, Renner/RNR Farm submitted to DNR the following documents:

⁴ Stipulation, ¶¶29-33, Ex. 2.

⁵ Stipulation, ¶¶17-21, Ex. 3.

- a) An aerial map from Google Earth that did not contain a legend, scale, a label mapping distance, or any indication to show setback distance.
- b) Certified mail receipts from the second neighbor notice.
- c) A second copy of Form W, which is DNR's application form for the operating permit for a CAFO, that had an engineer's seal from the project engineer, Kevin Sprengle, declaring that the facility was designed in accordance with the regulations,⁶ and that contained, in part:
 - 1. Part 1.1, "Operation Name" lists "Roger Renner, 1600 May Road, Goodman Missouri."
 - 2. Part 1.2, "Owner (Provide Legal Name)" lists "same."
 - 3. Part 1.3, "Continuing Authority (if Different Than The Owner)" lists "same."
 - 4. Part 13, "Engineer Certification" lists "Operation Name" as "Roger Renner, 1600 May Road, Goodman, MO 64843."
- d) An e-mail dated March 17, 2016, that stated:

There is only 1 pond on the property, and will be at least 150' from the poultry houses and construction. I am forwarding an email of the map also. I'm not sure if it is a clearer or not... [.]⁷

15. The aerial map provided to DNR by Renner/RNR Farm satisfied DNR's request for an aerial map because DNR only needed an aerial map with better resolution.

16. DNR's Environmental Specialist, Gorden Wray, created a flood map from the CARES Web site to show that the property was not located in a 100-year flood plain. The map

⁶ The second form appears to be on a different version of DNR's Form W.

⁷ Stipulation, ¶27, Ex. 11. Regulation 10 CSR 20-8.300(5) requires that water structures be 100 feet from the production area.

does not contain a legend or label to indicate distance.

17. On March 17, 2016, Gorden Wray e-mailed Renner. The e-mail stated in relevant part:

After review of your application to build a poultry CAFO we at the department feel it is in your best interest to provide additional information on how you as the continuing authority can prove that you can financially take care of operation, maintenance and modernization of the facility. In 10 CSR 20-6.010(3)(A) it gives a description of continuing authority. I am requesting this information based on a recent ruling by the clean water commission on another CAFO application being appealed based on issues with continuing authority...⁸

18. Neither Renner nor anyone on behalf of RNR Farm submitted any documentation regarding the organizational status of RNR Farm or the fiscal status of Renner or RNR Farm.

19. On or about April 7, 2016, DNR published notice of a public meeting to be held on the matter on April 25, 2016, in Anderson, Missouri.

20. On or about April 25, 2016, DNR held a public meeting on the matter in Anderson, Missouri.

21. On or about July 6, 2016, DNR issued the Permit to RNR Farm.

22. The Permit is for "export only," which means that all the manure is shipped off-site. The treatment of the wastewater will occur during storage of the waste.

23. DNR checked the Missouri Secretary of State's Web site, and confirmed that RNR Farm is in good standing.

⁸ Stipulation ¶40, Ex. 12.

24. At the time of issuing the permit, DNR:
- a. Did not know the identity of the members of RNR Farm, LLC.
 - b. Did not know RNR Farm's organizational structure or its key employees and their responsibilities.
 - c. Did not know what capital contributions, if any, had been made to RNR Farm, or by whom, and they could have been zero.
 - d. Had not obtained or reviewed a copy of RNR Farm's financial statements, including its balance sheet, income statement, and cash flow statement.
 - e. Had not obtained or reviewed a copy of RNR Farm's federal or state tax returns.
 - f. Had not obtained or reviewed a copy of any insurance policy insuring RNR Farm.
25. DNR's Environmental Engineer, Diane Reinhardt, has extensive experience and expertise in the area of civil engineering.

Conclusions of Law

We have jurisdiction to conduct the hearing on this appeal and to make a recommended decision to the CWC. Section 621.250.3. DNR bears the burden of proof to demonstrate the lawfulness of the Permit. Section 640.012.

Petitioners pled that the Permit is not lawful for three main reasons.⁹ First, RNR Farm issued a neighbor notice letter that did not contain "a brief summary of the waste

⁹ Petitioners' petition for review contained five counts. Petitioners subsequently voluntarily dismissed Count II. Counts IV alleges that DNR did not establish that Renner complied with the continuing authority requirement contained in 10 CSR 20-6.010(3), and Count V alleges the same except for RNR instead of Renner.

handling plan” as required by 10 CSR 20-6.300(3)(C).1.B.¹⁰ Second, RNR Farm failed to comply with DNR’s March 1, 2016 deficiency letter and, therefore, failed to comply with 10 CSR 20-6.300(2)(F). Third, DNR did not establish that RNR Farm or Renner complied with the “continuing authority” requirement contained in 10 CSR 20-6.010(3) because the application was in the name of Renner as opposed to RNR Farm, and DNR did not establish that RNR Farm or Renner has the ability to operate, maintain, and modernize the CAFO once built.

Notice

Petitioners argue that 10 CSR 20-6.300(3)(C).1 requires a single neighbor notice instead of two incomplete notices. Petitioners assert that the December 28, 2015 neighbor notice letter did not contain "a brief summary of the waste handling plan" as required by 10 CSR 20-6.300(3)(C).1.B.

The version of 10 CSR 20-6.300(3)(C) in effect at the time the December 28, 2015 neighbor notice was mailed only applied to construction permit applications.¹¹ RNR Farm applied for an operating permit.¹² RNR Farm had no legal requirement to send a neighbor notice, and certainly not one that contained a brief summary of the waste handling plan. Accordingly, we find no grounds to deny the Permit based on a violation of 10 CSR 20-6.300(3)(C).1.B.

¹⁰ All references to “CSR” are to the Missouri Code of State Regulations as current with amendments included in the Missouri Register through the most recent update.

¹¹Due to recent changes in the law, a construction permit is no longer required for a CAFO unless it has an earthen basin, which is not the case here. Section 644.051.3.

¹² Regulation 10 CSR 20-6.300(3)(C).1 was amended, effective October 30, 2016. It now makes neighbor notice requirements applicable to operating permits.

Application Deficiency

Petitioners argue that RNR Farm failed to comply with DNR's March 1, 2016 deficiency letter and, therefore, failed to comply with 10 CSR 20-6.300. More specifically Petitioners argue that the application process required RNR Farm to show production area setback distances.

The version of 10 CSR 20-6.300(2) in effect at the time RNR Farm applied for the Permit states in relevant part:

(F) Construction and Operating Permit Applications. This section describes the application process and requirements for CAFO construction and general NPDES and state no-discharge operating permits.

6. When an application is submitted incomplete and missing key components, the department may return the entire permit application back to the applicant for re-submittal. When an application is submitted sufficiently complete, but is otherwise deficient, the applicant and the applicant's engineer will be notified of the deficiency and will be provided time to address department comments and submit corrections. Processing of the application may be placed on hold until the applicant has corrected identified deficiencies.
7. Applicants who fail to correct deficiencies and/or fail to satisfy all department comments after two (2) certified department comment letters shall have the application returned as incomplete and the construction and operating permit fees shall be forfeited...[.]

DNR's March 1, 2016 deficiency letter required RNR Farm to "[p]rovide an aerial map showing the extent of the production area including; all confinement buildings, open lots, manure storage structures, surface water and areas subject to a one hundred year flood event within or adjacent to the production area, and production areas setback distances." Stip., Ex 5.

The evidence established that Stipulation Exhibit 6 was the only document DNR received from RNR Farm pertaining to this request. Petitioners argue that because Exhibit 6 does not contain a legend, scale, or any other indicia of distance it is not possible for Exhibit 6 to show production area setback distances.¹³ Moreover, Petitioners argue that even if all other documents submitted subsequent to the deficiency letter are examined, namely Exhibits 7 and 8, RNR Farm still did not produce documentation to show production area setback distances.

At hearing, DNR's Environmental Engineer, Diane Reinhardt, qualified herself as having extensive experience in civil engineering. She testified that she has bachelor's degrees in agricultural and civil engineering; and she worked for DNR for nine years, the Natural Resources Conservation Service for 20 years, and the City of Columbia's Public Works Department for six years. Tr. pp. 19-20. She testified that the map contained on page 7 of the application is a general layout map that showed the setbacks and buffer distances relative to the production barns. She stated that Exhibit 6 was produced to determine the buffer areas for neighbor notification, and it satisfied DNR's requirement for an aerial map in its deficiency letter because DNR only needed a map with better resolution that also depicted the dwellings.

Petitioners did not present evidence to discredit Reinhardt's testimony. Furthermore, RNR Farm submitted a new Form W that contained an engineer's seal and certification attesting that the system was designed in accordance with the design regulations contained in 10 CSR 20-8.300.¹⁴ DNR presented credible evidence that the alleged deficiencies were corrected. This is further evidenced by the fact that DNR did not send RNR Farm a second deficiency letter as

¹³ The setback requirements were set forth in 10 CSR 20-8.300(5)(B), which was renumbered to 10 CSR 20-8.300(4)(B), effective October 30, 2016.

¹⁴ The new form was in the name of Renner, but it pertained to the same facility as stated on the original application in the name of RNR Farm.

addressed in 10 CSR 20-6.300(2)(F)(6). Accordingly, we find no grounds to deny the Permit based on application deficiencies pled by Petitioners.

Continuing Authority

Petitioners pled that Renner made insufficient capital contributions to RNR Farm to qualify as a “continuing authority” pursuant to 10 CSR 20-6.010(3). Petitioners pled that RNR Farm may have no insurance, may lack sufficient financial recourse, did not submit any documents regarding its organizational or fiscal status to DNR, and DNR failed to request or review any such documents. Petitioners claim that DNR failed to establish RNR Farm has sufficient financial resources to be responsible for the “operation, maintenance and modernization” of the proposed CAFO as required by 10 CSR 20-6.010(3).

DNR argues that the plain language of 10 CSR 20-6.010(3) does not require it to present or gather additional evidence as to the financial status of an applicant. It only requires that the entity be a permanent organization, which RNR Farm is because it is registered with the Missouri Secretary of State as a limited liability company in good standing.

Regulation 10 CSR 20-6.010(3)(A) provides:

All applicants for construction permits or operating permits shall show, as part of their application, that a permanent organization exists which shall serve as the continuing authority for the operation, maintenance, and modernization of the facility for which the application is made_ Construction and first-time operating permits shall not be issued unless the applicant provides such proof to the department and the continuing authority has submitted a statement indicating acceptance of the facility.

(Emphasis added).

Regulations are interpreted according to the same rules as statutes. *Teague v. Mo. Gaming Comm'n*, 127 S.W.3d 6790, 685, (Mo. App. W.D. 2003). Accordingly, we must give the words “their plain and ordinary meaning.” *Id.* at 686.

Petitioners argue that the phrase “for the operation, maintenance, and modernization of the facility” stands alone as a requirement, and as such it is consistent with the purpose for the continuing authority rule, which Petitioners state is to “ensure that a sufficiently capitalized business organization exists that has sufficient financial resources to be responsible for all activities associated with the facility, including financial responsibility in the event of an environmental release.”¹⁵ Petitioners further argue that the regulation requires an applicant’s continuing authority to exist at the time the permit application is filed with DNR, and it requires more than an entity to be merely registered as a permanent business entity with the Secretary of State.

The evidence is clear that DNR did not require RNR Farm to provide information regarding its financial status, and no such evidence was introduced into the record. DNR did request this information from RNR Farm in an e-mail dated March 17, 2016, but RNR Farm did not respond.

Petitioners argue that DNR is bound by and subject to CWC’s decision in *In re. Trenton Farms, LLC*, Case No. 15-1345 CWC, (Mo. Clean Water Comm’n, February 24, 2016), that concerns the interpretation of the continuing authority requirement in 10 CSR 20-6.010.3(A).¹⁶ Petitioners cite to § 640.010.1 for authority. The statute states in relevant part that:

¹⁵ Petitioner’s brief p. 13. Petitioners cite no authority for this purpose statement.

¹⁶ The decision is currently on appeal before the Missouri Court of Appeals, Western District.

There is hereby created a department of natural resources in charge of a director . . . The director shall administer the programs assigned to the department relating to environmental control and the conservation and management of natural resources. . . **[The Director] shall faithfully cause to be executed all policies established by the boards and commissions assigned to the department, be subject to their decisions as to all substantive and procedural rules** and his or her decisions shall be subject to appeal as provided by law. . .^[17]

(Emphasis added).

CWC in *Trenton Farms* determined that a CAFO permit was improperly issued by DNR because the agency failed to “prove Trenton Farm can operate, maintain, and modernize the CAFO facility it intends to build.” *Id.* at 3. CWC stated that “[i]f duly filed corporate document were enough, then the sentence would not include the phrase ‘which will serve as the continuing authority for the operation, maintenance, and modernization of the facility.’” *Id.*¹⁸

CWC promulgated the regulation pursuant to its rulemaking authority. Section 644.026.1(8). It did not choose to define the term “continuing authority.” Regulations duly promulgated by an administrative agency have the force and effect of law if properly promulgated. *United Pharmacal Co. of Missouri Inc. v. Missouri Bd. of Pharmacy*, 159 S.W.3d 361, 365 (Mo. banc 2005).

Administrative agencies are not bound by stare decisis. *McKnight Place Extended Care, LLC v. MO Health Facilities Review Committee*, 142 S.W.3d 228, 234 (Mo. App. W.D. 2004). Administrative tribunals’ previous decisions do not have precedential authority. *Central*

¹⁷ CWC is assigned to the DNR pursuant to § 640.010.3.

¹⁸ The Administrative Hearing Commission recommended to CWC that DNR’s decision to issue Trenton Farms a CAFO operating permit be sustained, and found “no legal authority requiring that a continuing authority have any particular level of capitalization or assets.” *In re. Trenton Farms, LLC*, Case No. 15-1345 CWC (Mo. Admin. Hearing Comm’n, December 24, 2015), p.17.

Hardware Co. v. Director of Revenue, 887 S.W.2d 593, 596 (Mo. banc 1994). “The mere fact that an administrative agency departs from a policy expressed in prior cases which it has decided is not grounds alone for a reviewing court to reverse the decision.” *McKnight*, 142 S.W.3d at 235. Instead, courts are concerned that an agency’s action is “not otherwise arbitrary or unreasonable.” *Id.*

The applicable rule of law is the language of the regulation itself as properly promulgated pursuant to the administrative rulemaking process set forth in Chapter 536. Section 640.010.1, which sets forth DNR’s authority as it relates to boards and commissions assigned to DNR, does not change this. An agency may interpret its own regulations, but the language of the regulation is what controls. See *State ex rel. Stewart v. Civil Serv. Comm’n of St. Louis*, 120 S.W.3d 279, 286 (Mo. App. E.D. 2003)

In *Department Social Services v. Senior Citizens Nursing Home District of Ray County*, 224 S.W.3d 1, 15 (Mo. App. W.D. 2007), the court stated:

While it is logical to say that a regulation adopted by an agency pursuant to a statute the agency administers *is* the agency’s interpretation of that statute, it is not necessarily logical, and we question whether it is sound judicial policy, to say that a court should give deference to the agency’s *interpretation* of that regulation. For, as noted *supra*, when interpreting a regulation, a court looks to the words used and gives each its plain and ordinary meaning. *Teague v. Mo. Gaming Comm’n*, 127 S.W.3d 679, 686 (Mo. App. W.D. 2003). Thus, it would be inappropriate for a court to defer to an agency’s interpretation of its own regulation that was in any way expanding upon, narrowing, or otherwise inconsistent with the plain and ordinary meaning of the words used in the regulation.

(emphasis in original).

DNR did all that was necessary to establish that RNR Farm was a "permanent organization." We must respectfully disagree with CWC’s decision in *Trenton Farms*, and submit our recommended decision based upon our independent review.

Regulation 10 CSR 20-6.010(3) requires that a permanent organization exists that will “serve as the continuing authority for the operation, maintenance, and modernization of the facility for which the application is made.” The plain meaning of the regulation does not require that an applicant be a permanent entity that establishes that it has the capacity, financial or otherwise, to operate, maintain and modernize the facility for an unspecified period of time into the future. It requires that the entity that will operate, maintain and modernize the facility be a permanent entity. In its application, RNR Farms stated it will be the owner and continuing authority of the facility. RNR Farm established itself to be a permanent entity when it registered as a limited liability company with the Missouri Secretary of State.

Here, the permit application established that the permit applicant and the continuing authority were one and the same. The fact that “RNR Farm” was written in black ink on the application while the remaining application was filled out in blue ink, except for the signature, does not support a finding that the application was not originally submitted without RNR Farm listed as the Operation Name. Instead, a reasonable conclusion is that Renner inserted RNR Farm at the time he signed the application. Although we have no experience in handwriting analysis, we note that the handwriting appears very similar.

Accordingly, we find no grounds to deny the Permit based on RNR Farm’s failing to fulfill the continuing authority requirement contained in 10 CSR 20-6.010(3).

Summary

We recommend that the Clean Water Commission uphold the issuance of the CAFO permit to RNR Farm, LLC.

SO RECOMMENDED on November 14, 2016.


RENEE T. SLUSHER
Commissioner