Missouri Clean Water Commission Meeting
Department of Natural Resources
1730 East Elm Street
Jefferson City, Missouri

February 17, 2016

Administrative Hearing Commission's Recommended Decision for Trenton Farms RE, LLC Permit Number MOGS10500
Appeal 15-1345 CWC

Issue: This agenda item request a decision from the Missouri Clean Water Commission regarding appeal No. 15-1345 CWC. This appeal is of general permit number MOGS10500.

Background: On August 28, 2015, Hickory Neighbors United, Inc. filed an appeal challenging the department's issuance of the permit to Trenton Farms RE, LLC. The complaint consisted of various items all of which are documented in the Administrative Hearing Commission's (AHC's) recommended decision as well as in the hearing record. A hearing was held on October 23, 2015 and the Administrative Hearing Commission filed its recommended decision on December 24, 2015.

AHC Recommendation: The Administrative Hearing Commission recommends that the Missouri Clean Water Commission sustain the department's decision granting the permit.

Recommended Action: The department recommends the Commission hear from the attorneys of the parties and make a decision within the statutory deadline of 180 days of the appeal.

List of Attachment:

- Administrative Hearing Commission's Recommended Decision

Before the
Administrative Hearing Commission
State of Missouri

IN RE. TRENTON FARMS, LLC, PERMIT NO. MO-GS10500	)	No. 15-1345 CWC

RECOMMENDED DECISION

The Administrative Hearing Commission recommends that the Missouri Clean Water Commission ("CWC") sustain the Department of Natural Resources' ("Department") decision to issue Trenton Farms RE, LLC, ("Trenton Farms") a Missouri State Operating Permit ("the permit") to operate a concentrated animal feeding operation ("CAFO").

Procedure

On August 28, 2015 Hickory Neighbors United, Inc. ("Hickory Neighbors") filed a complaint appealing the Department's decision to issue the permit. On September 11, 2015, the permittee, Trenton Farms, filed a motion to intervene, which we granted on September 14, 2015. On September 18, 2015, Trenton Farms filed a motion for a more definite statement, which we granted, and on September 22, Hickory Neighbors filed its amended complaint. On October 1, 2015, the Department filed its answer and on October 2, 2015, Trenton Farms filed its answer. On October 15, we held a pre-hearing conference to discuss discovery motions and scheduling. By orders dated October 16, 2015, we granted in part and denied in part Hickory Neighbors'

motion to compel discovery, and denied its motion for a continuance. We held a hearing on October 22. Stephen Jeffery and Ryan Manger appeared for Hickory Neighbors, Timothy Duggan appeared for the Department, and Robert Brundage appeared for Trenton Farms. The matter became ready for our recommended decision on December 11, the date reply briefs were due.

Findings of Fact

1. Hickory Neighbors United, Inc., is a Missouri corporation registered with the Secretary of State. Its corporate purpose is, in part, to promote public awareness of environmental impacts relating to CAFOs that may be located in and near Grundy County, Missouri.

2. Hickory Neighbors' bylaws include a purpose statement that lists the following purposes:

   a. To promote educational awareness regarding the adverse economic and environmental impacts related to concentrated animal feeding operations;
   b. To promote public awareness regarding the potential presence of concentrated animal feeding operations in and near Grundy County, Missouri;
   c. To attend and participate in any and all activities conducted by the Missouri Department of Natural Resources and/or U.S. Environmental Protection Agency regarding concentrated animal feeding operations;
   d. To retain accountants, legal counsel, and other persons to provide assistance to the Corporation in its activities; and

e. To participate in litigation and other legal and/or administrative activities regarding any concentrated animal feeding operation proposed to be located in or near Grundy County, Missouri.

3. Hickory Neighbors has over 70 members, including persons with homes or farms near a CAFO that Trenton Farms proposes to build and operate in Grundy County.

4. Lee Ann Searcy, James Williams, Rex Searcy, and John Rice are members of Hickory Neighbors. They testified at the hearing and expressed concerns with the proposed CAFO ranging from odors and flies to the impact on overall environmental quality.

5. Rice's property is adjacent to some of Trenton Farms' proposed land application fields, and is subject to flooding from three different streams, on average, about twice a year.

6. The Department issued the permit to Trenton Farms on August 12, 2015.

7. Hickory Neighbors timely filed a complaint to appeal the Department's issuance of the permit, pursuant to § 621.250.

8. Trenton Farms filed a motion to intervene, which was granted.

9. Greg Caldwell was primarily responsible for reviewing the permit application to assure that it met all requirements for an operating permit.

10. The permit allows Trenton Farms to operate a Class IC CAFO for 2,838 animal units at State Highway W, Trenton, Grundy County, Missouri.

11. The permit application shows that Trenton Farms, as owner, will be the continuing authority for the operation, maintenance, and modernization of the facility.

12. The operating permit is a "general permit" based on a template adopted by the Clean Water Commission. A "general permit" is distinguished from a "site-specific permit" that is written specifically for the conditions at the site or operation.

13. Additional conditions may not be imposed on a general permit.

14. The permit for this CAFO is a Non-NPDES ("National Pollution Discharge Elimination System") permit, the type of general permit that does not allow discharges from the operation.

15. The application included an engineer's certification that "the manure management and containment system is designed in general conformance with applicable laws codes and regulations as of the date of signing."

16. The application contained engineering drawings of the proposed CAFO, showing three rectangular buildings of different sizes, depending upon the number of animals to be confined, and a mortality composter. Each building has a rectangular, concrete pit beneath the animals for storing manure. For one building, the pit will be eight feet deep; for another it will be ten feet deep; and the third building will have a pit that is two feet deep that will be drained to one of the other building's pits.

17. The facility will have in excess of 180 days of manure storage capacity. No discharges are permitted from the pits.

18. The application included printouts of maps from a Web site maintained by the Center for Agriculture, Resource and Environmental Systems ("CARES"), which is part of the University of Missouri, attempting to show that the facility will be located outside the 100-year flood zone.

19. Both Hickory Neighbors' expert witness (Kathy Martin, P.E. - an engineer registered in Oklahoma and New Mexico) and Caldwell attempted to compare floodplain maps produced by the Federal Emergency Management Agency with maps located on the CARES Web site to determine whether any portion of the facility will be located in a 100-year floodplain.

20. Martin, relying upon maps she created using the CARES Web site, opined that a portion of one of the buildings intersected with the floodplain identified by FEMA.

21. Caldwell found that it was too difficult to compare where the buildings were placed on the paper map that accompanied the application with the map shown on the CARES Web site.

22. Caldwell used soil survey maps of the area to assist him in determining whether the area was subject to flooding. The soil survey maps are reviewable on a Web site maintained by the Natural Resources Conservation Service ("NRCS") of the U.S. Department of Agriculture.

23. Caldwell determined that the soil found at the location is the "Pershing series." He is personally familiar with this soil type from his work in soil surveying. The series is an upland soil type, which means that it is found in areas not subject to flooding.

24. Glen Briggs, the Grundy County Emergency Management Director and the Grundy County Flood Plain Administrator, submitted an affidavit that contains his conclusion that the building site is not located in the Zone A floodplain.

25. As part of its application, Trenton Farms submitted a Nutrient Management Plan ("NMP") describing the location and manner in which manure will be land applied on agricultural fields identified in the NMP.

26. Trenton Farms submitted a Revised Nutrient Management Plan to the Department on July 17 at Caldwell's request. This document represents the NMP that is part of the approved permit.

27. The NMP covers five years, but the focus of the testimony during the hearing was the first two years. All fields under the CAFO owner's operational control are to receive nitrogen and phosphorous from the manure applied to them.

28. The NMP is required to include application rates to ensure that nutrients applied do not exceed the requirements for the crops that are to be grown for the expected yield by more than 10%.

29. Three tables in the nutrient management plan projected an application of nitrogen that would be one pound over the recommended rate.

30. The rate projected in the NMP is based on a book value (county-wide average for a ten-year period) that is less than what the crop actually needs.

31. The rate is adjusted according to variations in the crop yields from year to year.

32. One pound of nitrogen per acre over the recommended rate is a *de minimis* amount.

33. Under the NMP, some fields will receive excess phosphorous during the first two years.

34. Phosphorous may be, and often is, over-applied when using the nitrogen rate.

35. Application based on the nitrogen rate is appropriate until an assessment indicates a high risk of loss for phosphorus (when the soil phosphorous becomes too high).

36. Midwest Laboratories, Inc., created a soil analysis report that is part of the NMP. Soil samples were taken from the various fields that make up the land application area. The "depth" of the samples is listed as "0-6." This describes a six-inch sample that begins at the surface and reaches six inches into the ground.

37. Trenton Farms is a limited liability company organized in Missouri on March 25, 2015.

38. According to its Articles of Organization, its duration is perpetual.

39. The Department checked with the Missouri Secretary of State and found that Trenton Farms is a limited liability company in good standing and has a registered agent in the state.

40. According to Trenton Farm's Operating Agreement, the only member of Trenton Farms is PVC Management II, LLC ("PVC"). PVC has not yet made a capital contribution to Trenton Farms.

41. PVC adopted and approved an Operating Agreement for Trenton Farms on or about October 19, 2015.

42. PVC also ratified, confirmed, and approved the designation of Dr. Luke Minion as Manager of Trenton Farms on or about October 19, 2015.

43. On March 25, 2015, Dr. Luke Minion executed on behalf of Trenton Farms an Assignment and Assumption Agreement that assumed the rights to an option to purchase the property on which the Trenton Farms CAFO is proposed to be constructed.

44. The sole member of Trenton Farms ratified, confirmed and approved any and all actions and deeds taken by Dr. Minion on or prior October 19, 2015 on behalf of Trenton Farms.

45. Trenton Farms secured a $7.7 million loan commitment from Farm Credit Services of America to construct a CAFO.

46. Trenton Farms did not submit any documents regarding the organizational or fiscal status of its company with its permit application, and the Department did not request or review any such documents.

47. The Department has never requested any financial documents from any CAFO or industrial facility applying for an operating permit.

Conclusions of Law

We have jurisdiction to conduct the hearing on appeal from a clean water permit and recommend a decision to CWC, under contested case procedure. Section 621.250. The Department bears the burden of proof in this case. Section 640.012.

Standing

Neither Trenton Farms nor the Department challenges Hickory Neighbors' standing to bring this action. We will briefly address the issue because if a party lacks standing, a tribunal cannot grant the relief requested and the case must be dismissed. *Brunner v. City of Arnold*, 427 S.W.3d 201, 211 (Mo. App., E.D. 2013). "[T]he question of a party's standing can be raised at any time, even *sua sponte* by [the Supreme Court]." *State ex rel. Mathewson v. Bd. of Election Comm'rs.*, 841 S.W.2d 633, 634 (Mo. banc 1992).

10 CSR 20-6.020 confers standing upon "any person . . . with an interest which is or may be adversely affected."[1] Section 621.250.2, under which we have authority to hear a case on behalf of the CWC, provides: "Except as otherwise provided by law, any person or entity who is a party to, or who is aggrieved or adversely affected by, any finding, order, decision or assessment for which the authority to hear appeals was transferred to the administrative hearing commission . . . may file a notice of appeal with the administrative hearing commission . . ."

An organization may claim associational standing to bring a challenge on behalf of its members if 1) its members would otherwise have standing to bring suit in their own right; 2) the interests it seeks to protect are germane to the organization's purpose; and 3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Mo. Bankers Ass'n v. Dir. of Mo. Div. of Credit Unions*, 126 S.W.3d 360, 363 (Mo. banc 2003), *quoted in Saxony Lutheran High School v. Mo. Land Reclamation Comm'n,* 392 S.W.3d 52, 54 n.2 (Mo. App. W.D. 2013).

[1] 10 CSR 20-6.020 includes a corporation within the definition of "person."

The testimony of Lee Ann Searcy, James Williams, Rex Searcy, and John Rice establishes that they are aggrieved or adversely affected by the Department's decision to issue Trenton Farms a permit to operate a CAFO. "A showing of harm to the environmental well-being of parties seeking judicial review" was sufficient to establish the organization's standing in *Citizens for Rural Preservation, Inc. v. Robinett,* 648 S.W.2d 117, 133 (Mo. App. W.D. 1983). The record reflects that they are members of Hickory Neighbors, and that they are sympathetic to its purposes. The corporation itself is authorized to participate in litigation and other legal and/or administrative activities regarding any CAFO proposed to be located in or near Grundy County, Missouri. And neither the nature of the claim nor the relief requested requires the participation of the individual members for a proper adjudication of the issues. *See Citizens for Rural Preservation,* 648 S.W.2d at 134 n. 15.

We conclude that Hickory Neighbors has associational standing to challenge the permit, and address the individual counts of its complaint.

Count I. 100 Year Floodplain

Hickory Neighbors contends that the Department failed to comply with Missouri Executive Order 98-03 and 10 CSR 20-8.300(5)(A) by failing to impose any permit requirements to address the fact that Trenton Farms' structures are to be located in the 100-year floodplain. EO 98-03 provides in part, "(4) All state agencies shall take flood hazards into account when evaluating programs, plans and projects and shall provide for measures to prevent or guard against such flood hazards, appropriate to the degree of hazard involved." To the extent this may require the Department or the CWC to take flood hazard into account when evaluating *others'* plans and projects, as when evaluating a permit application, we believe they have implemented EO-98-03 for purposes of CAFO permitting by promulgating 10 CSR 20-8.300(5)(A), which provides, "Manure storage structures, confinement buildings, open lots, composting pads, and

other manure storage areas in the production area shall be protected from inundation or damage due to the one hundred- (100-) year flood." 10 CSR 20-6.300 further defines the term "production area" as "[t]he non-vegetated portions of an operation where manure, litter, or process wastewater from the AFO is generated, stored, and/or managed." Caldwell characterized these areas as "areas where manure can be piled in some quantity." Tr. at 37.

The parties framed as a central dispute in this case whether any of the planned buildings in the production area of Trenton Farms' CAFO are to be constructed in the 100-year flood zone. The 100-year floodplain, also known as Zone A, is an area designated by FEMA, with a probability – a one percent chance – of flooding in any given year. Tr. 238. *See also,* 44 CFR §9.4. This Commission was presented with at least four sources of evidence on this point.

First, Caldwell testified that it was difficult to determine from the maps submitted with Trenton Farms' permit application whether the buildings were subject to the 100-year flood. Tr. at 28. As a result, he turned to his training as a soil scientist to gather additional data. He consulted soil data for Grundy County at the location of the proposed production area, and found that the soils located there are not flood soils. While we ultimately find his testimony credible and his expertise reliable, the soil data he examined led him to the only to the conclusion that the site of the proposed buildings in the production area are not subject to flooding. This ignores the root question of whether the proposed buildings are to be located within the 100-year flood area designated by FEMA. And although the reports he generated for the site say "this is not a floodplain unit," there are many floodplains – the testimony at the hearing indicated that rivers and creeks in the area exceed their banks up to several times per year – and no testimony or evidence connects his conclusion directly with the FEMA Zone A designation.

Second, Martin used the Web-based mapping tools of CARES to produce maps that show the proposed locations of the buildings and the FEMA Zone A map layer. She concluded that a southern corner of the largest proposed building will be located in the flood zone. Martin testified that she exercised care in placing the buildings on the maps, and we believe her. She testified as to visual landmarks she used to aid her, her use of the measuring tools available through the CARES Web-based application, and her examination of the site plan submitted with Trenton Farms' permit application. Her exhibits were admitted over Trenton Farms' objection. In explaining his objection, counsel asserted, "[s]he is no more qualified to guess where these buildings are on her maps than you are. So that's not any part of expert testimony whatsoever." Tr. 241. As to their admissibility, we believe an adequate foundation was laid as to the method employed in preparation of the maps. As to the weight they should be given, we agree with Trenton Farms' counsel. Were the question whether the proposed facility lies to the east or the west of state Highway W, we would have no trouble accepting as a fact, based on a visual inspection of these maps, that it lies to the west. The question here, however, turns on a matter of a few feet, and is based on interpretation of multiple map layers, made at different times, for different purposes, by different organizations, and with different margins of error. No witness appeared at the hearing who was competent to reconcile these differences. Martin's testimony does not conclusively establish that the proposed building lies in the 100-year floodplain.

Third, Glen Briggs, the Grundy County Emergency Management Director and the Grundy County Flood Plain Administrator, submitted an affidavit that contains his conclusion that the building site is *not* located in the Zone A floodplain. Hickory Neighbors objected to the introduction of the affidavit pursuant to § 536.070(12). A copy of the affidavit was served on Hickory Neighbors' counsel on October 14, eight days before the hearing. Hickory Neighbors served its objection to the admission of the affidavit on Trenton Farms' counsel on October 21,

at 5:36 p.m. Trenton Farms sought to have the affidavit introduced into evidence pursuant to § 536.070(12), contending that Hickory Neighbors' objection was not timely served because it arrived by e-mail after 5:00 p.m. of the seventh day after service. This Commission admitted the affidavit on this basis. Hickory Neighbors contends there is no "5:00 rule," and that service was therefore timely at any time before midnight on October 21.

The rules that govern practice before this Commission are silent as to service, filing or delivery of documents by e-mail. And although the Missouri Supreme Court's civil rules are not strictly applicable to practice before this Commission, we look to them for guidance in situations such as this. Rule 43.01 provides in part: "Service by facsimile transmission or electronic mail is complete upon transmission, except that a transmission made on a Saturday, Sunday, or legal holiday, or after 5:00 p.m. shall be complete on the next day that is not a Saturday, Sunday, or legal holiday." By its terms the rule applies to "[e]very written notice, appearance, demand, offer of judgment, order, and similar paper that by statute, court rule, or order is required to be served."

We believe that attorneys who avail themselves of customs and conveniences not contemplated by the rules governing practice before this Commission should be held to the accompanying strictures that govern the practice of law in Missouri. Under the ordinary rules governing practice before the circuit courts, service of documents on another party by e-mail after 5:00 p.m. is deemed complete on the next day that is not a Saturday, Sunday, or legal holiday. Rule 43.01. Under the statute, therefore, Hickory Neighbors failed to serve a timely objection and waived "all objections to the introduction of such affidavit... on the ground that it is in the form of an affidavit, or that it constitutes or contains hearsay evidence, or that it is not, or contains matters which are not, the best evidence...." Section 536.070(12).

According to the affidavit, Briggs' conclusion is based on two attachments that he refers to collectively as the "construction plans." He assumed that the buildings would be located north of a line at state plan grid coordinate 1517235.8. The line is identified with a handwritten notation on a survey map that is one of the two attachments, and the buildings are indeed shown to be north of that line. But it is evident from a side-by-side comparison that the buildings drawn on the attachment are in a different configuration than in the site plan submitted as part of the permit application. Briggs did not consider the site plan that was submitted with the permit application, and we do not have the benefit of his testimony to determine whether the differences are relevant to his conclusion. His conclusion is therefore not relevant or persuasive evidence.

The fourth source of evidence in the record is the permit application itself. As part of the permit application, Todd Van Maanen, a Missouri licensed civil engineer, certified above the seal of his profession that to the best of his knowledge, information and belief, "the manure management and containment system is designed in general conformance with applicable laws, codes, and regulations as of the date of signing." Ex. 1, p. 8. Caldwell and the Department were entitled to rely on this certification to ascertain compliance with 10 CSR 20-8.300(5)(A). *See*, § 327.411. Regardless of whether or not any building in the production area is to be located in the 100-year flood zone, the engineer has certified that the buildings will be protected from inundation or damage due to the 100-year flood as required by the rule. If they are not, the Board of Architects, Professional Engineers, Professional Land Surveyors and Landscape Architects may seek to discipline or revoke Van Maanen's professional engineer's license. But the record reflects that the land where the largest building is to be situated will be re-graded so that the building sits on "an elevated pad of dirt." Tr. 119. The building – and the concrete pit beneath it – are to be situated at a higher elevation than they would be if they were constructed at grade as it exists today. In other words, the contours of the earth will change as a result of the

construction of this facility. Floodwater will flow to different areas. The expertise of an engineer is necessary, and an engineer has certified that, when built, the structures and other manure storage areas in the production are will be protected from inundation and damage. The Department has carried its burden to demonstrate that the permit is not deficient with regard to protection from inundation and damage from the 100-year flood.

Count II. Runoff from Land Application

Hickory Neighbors contends that the permit application is deficient because Trenton Farms' nutrient management plan permits land application of manure in excess of the amounts allowed by the Department's CAFO Nutrient Management Plan Technical Standard ("NMTS"), which is incorporated by reference into 10 CSR 6.300(3)(G)2. It also contends that improperly calculated application rates could result in runoff from land application fields that could adversely affect the Topeka Shiner, an endangered species of fish. Hickory Neighbors further alleges that such land application could result in violations of the Missouri water quality standards in violation of the Missouri Clean Water Law.

A nutrient management plan is required to be submitted as part of the application by 10 CSR 20-6.300. The CAFO owner is responsible for following the nutrient management plan for fields that are under the CAFO owner's operational control. All fields under the CAFO owner's operational control are to receive nitrogen and phosphorous. According to the NMTS, the nutrient management plan must include application rates to ensure that nutrients applied do not exceed the requirements for the crops that are to be grown for the expected yield by more than 10%. The nutrient management plan covers five years, but the focus of the testimony during the hearing was the first two years. In fact, only the first two years of the Revised Nutrient Management Plan submitted to the Department on July 17 are part of the record. *See,* Ex. D.

Hickory Neighbors implies in its brief that there is something nefarious about the fact that Trenton Farms submitted a revised NMP at Caldwell's request. To the contrary, Caldwell followed 10 CSR 20-6.300(2)(F)6, which provides in part, "[w]hen 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." The revised NMP corrects discrepancies Caldwell noted in his review.

10 CSR 20- 6.300(3)(G)2.A requires "a field specific assessment of the potential for phosphorus transport from the field to surface waters . . . .". The process to perform this "field specific assessment" is described in the NMTS. Ex. 16, p. 006. The field-specific phosphorus loss assessment is a two-step process. First, it requires a review of the soil test phosphorus levels. If the soil test phosphorus rating is very low, low, medium or optimum, the CAFO may land apply at the nitrogen rate. Second, if the soil test phosphorus rating is high or very high, the CAFO must calculate a Missouri P-Index rating. If the Missouri P-Index rating is low or medium, the CAFO may apply at the nitrogen rate. Ex. 16, p. 006, NMTS Section III.A2.(2)a. If the Missouri P-Index rating is high, or the soil test phosphorus rating is high and the field has not been assessed using the Missouri P-Index, manure must be land applied at the phosphate removal capacity (phosphorus application rate). Ex. 16-006, NMTS Section III.A2.(2)b.

Using nitrogen as the limiting factor, application rates in the NMP are within the regulatory requirements. Several tables in the NMP projected an application of nitrogen that would be one pound per acre over the recommended rate, but Caldwell testified that the Department considers this insignificant and within allowable limits. The rate projected in this nutrient management plan is based on a book value (county- wide average for a ten-year period) that is less than what the crop actually needs. Nutrient amounts in the manure pits vary, and Trenton Farms is required to test the manure every year. The rate of application will be adjusted

according to variations in the crop yields from year to year. Under the plan, some fields will receive excess phosphorous during the first two years. But in all cases, the soil test phosphorus rating is very low, low or medium, which allows phosphorous to be applied at the nitrogen rate until an assessment indicates a high risk.

Hickory Neighbors also contends that soil samples were collected improperly, calling into question the nutrient levels used to develop the NMP. The NMTS Section III.A1(1)e. requires that "soil sampling depth should be six to eight inches." We read this to mean a sample extending from the surface to a depth of at least six inches but not more than eight inches. We read the laboratory reports in the NMP as describing a six-inch sample that begins at the surface and reaches six inches into the ground. The samples were therefore compliant with the standard.

Trenton Farms' permit is based on the master general permit template. It is a no-discharge permit. The NMP is a required element of the permit, and is designed to ensure proper and safe application of manure. Trenton Farms' permit requires it to exercise careful management. Manure may not be discharged into waters of the state. Compliance with the permit means there will be no discharges or nutrient runoff that could endanger aquatic life or result in violations of Missouri's water quality standards. The Department has carried its burden to demonstrate that the permit is not deficient with regard to any runoff from land application of manure.

Count III. Continuing Authority

Hickory Neighbors argues that the Department's issuance of the permit failed to comply with 10 CSR 20-6.010(3) ("the continuing authority rule"). It argues that Trenton Farms failed to submit proof that it is a permanent organization with sufficient financial resources to be responsible for the operation, maintenance, and modernization of the proposed CAFO. It further argues that Trenton Farms cannot be a continuing authority because it has no assets, and logic dictates that an entity with no assets cannot be financially responsible for the operation,

maintenance, and modernization of the facility or for environmental issues after the facility has gone out of business.

The Department and Trenton Farms argue that the CWC has no authority or criteria to evaluate the financial strength of a continuing authority as part of the permitting process. Consistent with this lack of authority, the Department has never asked any CAFO applicant for its operational documents or financial information. The Department and Trenton Farms also point out that Callaway's duration of existence, as it is registered with the Secretary of State, is "perpetual", which is a synonym for permanent. Section 347.037.3, RSMo 2000, provides "Each copy of the articles of organization stamped 'filed' and marked with the filing date is conclusive evidence that all conditions precedent required to be performed by the organizers have been complied with and that the limited liability company has been legally organized and formed under sections 347.010 to 347.187 and is notice for all purposes of all other facts required to be set forth therein."

While we find it somewhat disturbing that the Department could put itself in the position of approving a permit application where, for example, the continuing authority's operating documents prohibited it from taking financial responsibility for a CAFO, or it had filed for bankruptcy under Chapter 7 of the U.S. Bankruptcy Code – essentially announcing its intention to terminate its existence – that is not the case here. Trenton Farms was lawfully organized and is in good standing. The company was not required to adopt an operating agreement at the time it was organized. It has since done so, and has subsequently appointed a manager and begun the process of capitalizing itself and acquiring loans. We can find no legal authority requiring that a continuing authority have any particular level of capitalization or assets. Trenton Farms points out that there is no reason for it to receive additional capital or assume loan payments until this process becomes final and all legal challenges to the permit have been finally decided.

We conclude that the Department met its burden to prove that Trenton Farms' CAFO application adequately identified and satisfied the continuing authority requirement found in 10 CSR 20-6.010(3).

Count IV. Additional Permit Deficiencies

Hickory Neighbors asserts that the Department's issuance of the permit failed to comply with a number of other requirements raised in its comments during the permitting process.

A. Trenton Farms' Mortality Composter fails to Comply With Applicable Missouri Requirements

This Commission sustained an objection to evidence on this point because the design requirements for a mortality composter are found in § 269.020, RSMo 2000, the administration and enforcement of which are vested in the Department of Agriculture, and not the CWC. Caldwell testified as follows on the point:

> Q. Okay. Another part of her comment concerns the failure of the composter to follow the University of Missouri Extension Guides. Did you do an analysis of that?
>
> A. No.
>
> Q. Why not?
>
> A. There is nothing in the Missouri Clean Water Law that requires specific guidance documents to be used in the construction of a mortality composter.
>
> Q. So for purposes of this permit, what do you care about in terms of the composting of the dead animals?
>
> A. That there be no discharge from the composter.

Tr. 63.

To the extent that compliance with section 269.020 is a part of the permit at issue here, Hickory Neighbors made an offer of proof indicating that the proposed composting bins are deeper and have more capacity than is recommended by the University of Missouri Extension

Service. If that is not an "efficient design" as required by the statute, we assume the Department of Agriculture will take appropriate action. In this Commission's view, more capacity lessens the chance of a discharge into the waters of the state. The Department has met its burden to demonstrate that the permit is not deficient with regard to the design of mortality composters.

B. In Computing the P-Index, Trenton Farms Overestimated the Distance to Water Features at Several Land Application Sites

With regard to two land application fields, Martin testified and presented exhibits 41 and 42. The exhibits show her measurements from a point she estimated to be the center of the field to nearby bodies of water. Her measurement was significantly less than the figures used by Trenton Farms in calculating the P-Index for those fields. She explained that putting too far a distance into the P-Index underestimates the risk of phosphorus getting into the water body. Tr. 274. It may be that Martin's measurements are preferable to those used by Trenton Farms. She did not, however, offer an alternate calculation of the relevant P-Indices, and on cross examination, she admitted she did not know whether using the distances as she measured them would trigger an increase in the risk from low to moderate. Tr. 293. Moreover, the soil test phosphorus rating for the two fields at issue were low. As noted above, when the soil test phosphorus rating is neither high nor very high, manure may be applied at the nitrogen rate without resorting to the P-Index. Tr. 317. Under those circumstances, the relevant figure for calculating land application rates is the soil test phosphorus rating, not the P-Index. The Department has carried its burden to demonstrate that the permit is not deficient with regard to the calculation of distances for purposes of the P-Index.

Summary

The Department has met its burden of proving that the operating permit for Trenton Farms was issued in accordance with current law. We recommend that the CWC sustain the Department's decision granting the permit.

SO RECOMMENDED on December 24, 2015.

BRETT W. BERRI
Commissioner