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

April 5, 2017

Administrative Hearing Commission's Recommended Decision for
Callaway Farrowing, LLC
Appeal 14-1978 CWC

Issue: This agenda item requests a decision from the Missouri Clean Water Commission regarding appeal No. 14-1978 CWC.

Background: On December 19, 2014, Friends of Responsible Agriculture appealed the permit issued to Callaway Farrowing, LLC. The Administrative Hearing Commission conducted a hearing on the matter on February 10, 2015, and made a recommendation to the Clean Water Commission on April 17, 2015.

Recommended Action: The department recommends the Commission uphold the permit as originally issued by the Department.

List of Attachments:

- Administrative Hearing Commission's Recommended Decision

Before the
Administrative Hearing Commission
State of Missouri

IN RE: CALLAWAY FARROWING, LLC,)
PERMIT NUMBER GS10485,)

No. 14-1978 CWC

RECOMMENDED DECISION

The Administrative Hearing Commission ("AHC") recommends that the Missouri Clean Water Commission ("CWC") sustain the Department of Natural Resources' ("DNR") decision to issue Callaway Farrowing, LLC, ("Callaway") a Missouri State Operating Permit ("the Permit") to operate a concentrated animal feeding operation ("CAFO"). We recommend that the Permit be amended to require the depth and volume tables as required by 10 CSR 20-8.300(3)(A)1.F(V).

Procedure

On December 19, 2014, Friends of Responsible Agriculture ("Friends") filed a complaint challenging DNR's issuance of the Permit to Callaway. On January 15, 2015, Callaway filed an answer and a motion to intervene. On January 16, 2015, we granted Callaway's motion to intervene and ordered that its answer be filed as of January 15, 2015. On January 21, 2015, DNR filed an answer.

On February 10, 2015, we held a hearing on the complaint. Friends was represented by Stephen G. Jeffery, of the Jeffery Law Group, and Joshua K. T. Harden. DNR was represented by Assistant Attorneys General Timothy P. Duggan and Laura Elsbury. Callaway was

represented by Robert J. Brundage of Newman, Comley & Ruth P.C., Glen R. Ehrhardt of Rodgers, Ehrhardt, Weber & Howard, L.L.C., and Michael Blaser of Brown, Winick, Graves, Gross, Baskerville and Schoenebaum, P.L.C.

The matter became ready for our decision on March 23, 2015, the date the last written argument was filed.

Findings of Fact

Friends of Responsible Agriculture

1. Friends of Responsible Agriculture is a nonprofit, public benefit corporation that was incorporated on July 9, 2014. Its principal place of business is 3474 County Road 230, Fulton, Missouri. According to the by-laws, the purposes of the corporation include:

> A. To promote educational and public awareness regarding the adverse economic and environmental impacts related to concentrated animal feeding operations that may be located in and near Callaway County, Missouri;
>
> B. To protect the environment from the potential adverse environmental impacts of any concentrated animal feeding operations in and near Callaway 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 Callaway County, Missouri.

Exhibit R.

2. Friends does not have members, but it has officers and directors. None of Friends' officers or directors own property directly adjacent to Callaway's proposed CAFO site, but a number of them own property in Callaway County.

3. Jefferson Jones and Shirley Kidwell are officers and directors of Friends. Jones is the president and Kidwell is the secretary of Friends.

4. Kidwell owns a farm located at 3475 County Road 230, Fulton, Missouri, in Callaway County. Kidwell's farm is approximately 3,000 feet from Callaway's proposed CAFO site.

5. Jones owns an 84-acre farm located at 3605 County Road 230, Fulton, Missouri, in Callaway County. Jones's house is approximately 0.4 miles from Callaway's proposed CAFO site. He and his four children fish and swim in the creeks near the site. Jones raises Angus cattle. He has approximately 300 animal units[1] and his cattle drink from the creeks near the site. His annual operating expense for the 300 animal units is about $200,000.

6. Jones and other officers and directors of Friends have drinking water wells on their property.

Callaway Farrowing, LLC – Continuing Authority

7. Callaway Farrowing, LLC, is a limited liability company organized in Missouri on June 16, 2014. According to its Articles of Organization, its duration is perpetual.

8. On July 31, 2014, Callaway submitted to DNR an application for a permit to operate a CAFO.

9. DNR confirmed with the Missouri Secretary of State that Callaway is a company in good standing and has a registered agent.

[1] An "animal unit" is a unit of measurement used to compare various animal types. 10 C.S.R. 20-6.300(1)(B)3.

10. According to Callaway's Operating Agreement, the only member of Callaway is Eichelberger Farms, Inc. Callaway may be dissolved at any time upon the written consent of the member. Any debts and obligations of Callaway are solely its responsibility and the member has no liability for Callaway's obligations. Callaway is capitalized by a $10,000 capital contribution made by Eichelberger Farms, Inc. Callaway does not own or control any other assets of any kind.

11. Callaway did not submit any documents regarding its organizational or fiscal status of its company with its permit application, and DNR did not request or review any such documents.

12. DNR's Water Protection Program has issued over 450 general permits to CAFOs. DNR has never requested any financial documents from any of these CAFOs for DNR review.

Changes to CAFO Laws – House Bill 28

13. House Bill 1207, which was enacted in 1996, included provisions for CAFO regulation. The bill was codified in §§ 640.700 – .758, RSMo. Regulations related to CAFO permitting are in the CWC's Regulations 10 CSR 20-6.300 and 20-8.300.

14. House Bill ~~28 ("HB 28")~~, effective August 28, 2013, modified the ~~requirements for~~ CAFO permits. The bill amended §§ 640.715 and .725, RSMo. Cum. Supp. 2013. Section 644.051.3 now affirmatively states that construction activities at point sources such as CAFOs are exempt from construction permit requirements unless the owner proposes building an earthen storage structure to hold agricultural processed wastewater.

15. After the enactment of HB 28, DNR determined that many sections in 10 C.S.R. 20-6.300 and 10 C.S.R. 20-8.300 that pertain to construction permits were no longer valid or enforceable.

16. In response to H.B. 28, DNR recommended that the CWC revise these rules to eliminate permitting requirements that refer to construction permits. DNR staff did not believe that the need to enact changes to these two regulations constituted an "emergency" that would warrant emergency rulemaking. As of this date, the CWC has not revised 10 C.S.R. 20-6.300 and 10 C.S.R. 20- 8.300 in response to H.B. 28. The CWC and DNR have held meetings with stakeholders as the new rules are being developed.

17. In October 2013,[2] while waiting for the CWC's adoption of revisions to 10 C.S.R. 20-6.300 and 10 C.S.R. 20-8.300, DNR issued a document titled "Proposed CAFO Operating Permit Process When a Construction Permit is not Required" ("the Interim Procedures Document") to guide staff and applicants through the permitting process. Exhibit H at 2. The purpose of this "temporary" Interim Procedures Document was to provide guidance to staff concerning the processing of CAFO operating permit applications and to "help the Department provide consistent service to this sector while [it] pursue[s] the rulemaking." Exhibit H at 1.

18. The Interim Procedures Document did not impose any new requirements on permit applicants that were not already in the regulations prior to the effective date of H.B. 28.

Application for Operating Permit

19. On July 31, 2014, Callaway applied to DNR for a State no-discharge operating permit. The application sought permission to operate a swine CAFO. The proposed CAFO would be a farrowing (animals giving birth) operation that would house 7,600 gestating and farrowing sows and 2,720 gilts (unbred sows) in an isolation barn. This number of swine would classify the CAFO as a Class IB CAFO.

[2] The policy was implemented in October 2013. Tr. at 33. The Memorandum setting forth the draft policy was dated September 16, 2013. Exhibit H.

20. An initial notification letter was sent to neighbors of the proposed CAFO site on May 13, 2014. A second notification letter was sent on July 14, 2014 informing neighbors of a change of ownership of the proposed operation. Finally, a third notification was sent to all neighbors on August 7, 2014. Ex. 1 at 4.

21. According to the application, Callaway's swine will be housed in a gestation barn, a farrowing barn, and an isolation barn for new gilts that are transported to the farm from off site.

22. The barns will be fully enclosed with concrete slatted floors upon which the swine are housed. The pigs' hooves push manure, urine, and wash water through the slatted concrete floors down into a steel reinforced concrete deep pit for storage.[3] The liquid hog manure and urine stored in the deep pit will be periodically agitated and removed by a contractor.

23. Callaway's application indicated it would be an "export only" CAFO, which means Callaway will not land-apply any manure on land under its operational control. Rather, the manure will be exported off site to be land-applied on agricultural fields owned and operated by third parties.

24. Since Callaway is an export-only facility, DNR did not require it to submit any information about the ultimate use or destination of the manure produced at the facility. Nonetheless, Callaway submitted with its permit application several manure easement agreements ("Easements") allowing application on agricultural land operated by third parties. Eichelberger Farms, Callaway's sole member, is the signatory to these Easements rather than Callaway.

25. DNR considered information about the Easements in the application to be "superfluous information." Tr. at 101.

[3] The pits were described as "a concrete swimming pool under neath the building where the manure and urine is stored." Tr. at 91.

26. Callaway did not submit, and DNR did not require, certain information specified in 10 CSR 6.300 and 10 CSR 8.300, either because the information was considered to be relevant only to obtaining a construction permit, or because of the type of facility (no discharge, export only) Callaway planned to build.

27. Because Callaway applied for a no-discharge permit, it does not plan to discharge wastewater. In its application, Callaway did not provide any information regarding the location of domestic wastewater flows. If a domestic wastewater facility is constructed in the future, such a system would be regulated by the Missouri Department of Health and Senior Services in Chapter 701, RSMo. Callaway would have to apply to the county health department to construct a septic system.

28. Callaway did not provide any information in its application regarding an operation and maintenance plan. There is no operation or treatment equipment associated with the deep pits because the manure in the pits will not be treated, and only the purchasers of the manure, not Callaway, will use equipment to remove it from the pits.

29. Callaway submitted layout drawings that did not show the source of the operation's water supply because it does not yet have one. While there is an existing well, Callaway does not intend to use it, and DNR informed Callaway that it had to plug the well. If and when Callaway decides to drill a drinking water well, it would have to obtain necessary permits from a different section of DNR and meet required setback distances. The general permit Callaway applied for does not regulate drinking water wells.

30. Callaway did not submit information about manure transfer because it does not plan to transfer manure to another location. In the summary contained in its application, Callaway provided information as to how the manure will be handled and managed while at the CAFO.

Contractors will pump out the manure from the pits and transfer it through a custom applicator to another location.

31. The permit application form says a nutrient management plan ("NMP") is not required for an export-only facility; such a plan is required only if a facility plans to apply manure to land under its own operational control. Callaway submitted information making it clear that it proposed to transfer the manure to third parties for land application on their fields, and not to apply it on site.[4]

32. Callaway submitted county soil survey information with its application, but did not submit soil borings or soil permeability information because it will not discharge or deposit manure onto the CAFO site.

Review and Issuance of the Operating Permit

33. Greg Caldwell, with DNR's Industrial Permitting Unit, reviewed Callaway's application and determined that after Callaway made a few changes during the application process, all necessary requirements were met to grant the permit. Tr. at 52.

34. DNR may require groundwater monitoring or perform a hydrogeological assessment if the Division of Geology and Land Survey deems it necessary; otherwise, hydrogeological assessments are only required for construction of earthen basins like a lagoon. Because Callaway is proposing deep pit concrete basins to store manure, a hydrogeological assessment was not required.

[4] The evidence on this point is confusing. While the permit application form (Exhibit C) states that no NMP is required to be submitted, Exhibit 1, the Department's answer to the comments on Callaway's permit application, states that Callaway "has developed a NMP that includes proposed land application fields with planned crops and yields, application rates, and land application setbacks identified on maps. The Department requires submittal of a NMP prior to initial issuance of a MOGS 10000 permit. The Department has reviewed the required elements of the Callaway Farrowing, LLC, NMP and it meets the regulatory requirements." Ex. 1 at 3. The distinction appears to be between a brief plan required for an export only facility vs. a more detailed plan that would be required if the CAFO planned to discharge or treat the manure on-site.

35. Even though it was not required, Sherry Stoner, a registered geologist in DNR's Geology Survey Section, performed a hydrogeological assessment of the proposed CAFO site in response to public comments to the CAFO. In her assessment, she found:

> The hydrological characteristics of the surficial materials[5] and bedrock, and the gaining stream setting, combine to limit the amount of downward or vertical migration of fluids, subsequently slowing recharge into the subsurface. Therefore, the potential to impact groundwater is limited.

Ex. 1 at (last page).

36. Stoner did not perform a formal suitability study for the site.

37. Stoner identified two lagoons, a pond and a hand-dug well at the location, in addition to a concrete lined cistern. She did not know when these were constructed and did not conduct or review any permeability tests on the site.

38. Stoner reviewed some boring logs for wells drilled in the area, but did not review the actual soil cuttings for those wells. The closest well was ¾ of a mile from the CAFO site.

39. Stoner did not know the actual depth to bedrock or if there were any springs that fed into the large pond on the CAFO site.

40. On November 21, 2014, DNR issued to Callaway a General Missouri State Operating Permit for a Class IB Concentrated Animal Feeding Operation (Permit No. MO-GS 10485). The Permit issued to Callaway is a general permit, based upon a template, that does not allow a discharge to waters of the state. Callaway's Permit is a State No-Discharge Permit. A No-Discharge Permit is "the most restrictive effluent limitation that can be imposed on a facility." Tr. at 63.

[5] Soils above the bedrock in an area. Tr. at 148-49.

41. The Permit authorizes the operation of the CAFO on County Road 227, Fulton, Missouri, in Callaway County. The legal description of the property is Southwest Quarter, Northeast Quarter, Section 16, Township 48 North, Range 10 West, Callaway County, Missouri. Exhibit G at 003-004.

42. The Permit authorizes Callaway to operate the CAFO, consisting of 9,520 swine over 55 pounds and 800 swine under 55 pounds.

43. The Permit authorizes the operation of two deep pit barns (farrowing and gestation barns) and one shallow pit isolation barn. All three barns have sufficient capacity to store not less than the required minimum 180 days of manure. Tr. at 82-83.

44. Callaway proposes to handle mortalities in a composter, but the regulations do not require it to specify its method of handling mortalities. Thus, it may also incinerate mortalities, take them to a landfill, or hire a contractor to take them off site to a rendering facility.

45. The Permit authorizes the transfer of manure, litter, processed wastewater, or mortality by-products when the material is sold, given away, or land applied on land that is not under the direct control of the CAFO.

46. Because the regulations do not require any information about the use or destination of manure exported from a CAFO, Callaway is not limited to providing manure to be land applied on properties identified in the Easements. Callaway may sell or give manure away to any person to land apply on any other property. The general permit conditions require Callaway to provide a nutrient analysis to the transferee, who must land apply the manure at agronomic rates.

47. There is a small pond and two smaller domestic lagoons on site of the proposed CAFO. The U.S. Army Corps of Engineers evaluated the site and determined that none of these

three water bodies are considered "Waters of the United States." Callaway plans to drain and fill these three surface water bodies prior to constructing the hog barns.

48. Callaway has not constructed the CAFO.

Friends' Expert Witness

49. Kathy Martin is a registered professional engineer in Oklahoma and New Mexico and is self-employed at Martin Environmental Services, LLC.

50. Martin reviewed the Callaway permit file and conducted a site visit in November 2014. She produced a report on what she considered the permit application's deficiencies.

51. The dead animal composting facilities at Callaway were designed based on standards developed by Virginia State University and not those developed by the University of Missouri Extension Service.

52. Because the University of Missouri Extension Service standards assume a higher mortality rate than do the Virginia State University standards, Callaway used a smaller mortality rate and thus designed smaller composter bins.

53. In her report, Martin states, "It can be concluded Missouri Extension guidance would predict the size of the compost facility to be at least 2 to 3 times larger than what is proposed for this sow facility." Exhibit M at 002.

54. Midwest Plan Services ("MWPS-18") is a document that contains a set of standards developed by several land-grant universities. It sets out assumptions for manure production based on the type of hog (i.e. nursery, finisher, gilt, boar, or farrowing or gestating sow), and Callaway used the smallest farrowing sow sizes in MWPS-18 in calculating the amount of manure to be produced. Tr. at 315, 325-326.

55. In her report, Martin stated:

> The manure volume estimates for gestation sows is based on an average weight of 400 pounds per animal but the estimates for farrowing sows is based on an average weight of 375 pounds. By choosing the smallest farrowing sow size in Table 6 of MWPS-18, the applicant may have underestimated the volume of manure generated in the farrowing barn by larger sows. This manure volume is then transferred for final storage to the gestation barn.

Exhibit M at 004.

56. It is not possible to determine if any of the three surface water bodies at the site are spring fed just by doing a visual examination. Due to the close proximity of Callaway's facility to several residential drinking water wells, Martin's report opined that the lack of information concerning Callaway's water supply source presents a concern because any water well is a potential pathway to the aquifer itself. Tr. at 308-09.

57. In her report, Martin states:

> The permit application contained a map that appears to identify soil types at the production area, but none of the related information about the soils was included in the permit application or engineering report. It is assumed that the applicant did not conduct any soil borings to ascertain the subsurface materials below the proposed location of each barn or even the depth to shallow groundwater. No boring logs were included in the permit application materials. No discussion is provided to explain how the facility design will prevent leakage and seepage of manure wastewater from the pits and piping and what measures will be taken to inspect and/or detect such losses during operation.

Exhibit M at 005.

58. In September 2014, Friends submitted Martin's report to DNR. By letter dated November 26, 2014, DNR responded to the public comments, including Martin's, that it had received.

Conclusions of Law

We have jurisdiction to conduct the hearing on appeal from a clean water permit and recommend a decision to the CWC, under contested case procedure. Section 621.250.3.[6] DNR bears the burden of proof in this case. Section 640.012.

Friends did not present evidence or argument on several issues raised in its complaint. Even though the burden of proof in this case remained with DNR throughout, we do not address the issues that Friends apparently abandoned. *See Landwehr v. Landwehr,* 442 S.W.3d 139, 142 (Mo. App. E.D. 2014) (party who presented no evidence on issue at trial abandoned it). Therefore, we do not discuss the following allegations made in Friends' complaint, but for which Friends produced no evidence or made no argument, to wit: public notice during the permit application review was improper; the applicant failed to provide a soil erosion prevention plan; the true applicant's identity is in dispute, and legal access to the property has not been proven; the CAFO should be required to have groundwater monitoring wells, and to monitor surface water quality at the production site and land application sites; a 1999 settlement agreement between Pork Masters, Inc. and ten neighboring landowners prohibits the construction, operation, or expansion within five miles of that facility; and common ownership and shared land application areas means the Pork Masters' animal units should be included in this application, changing the status of Callaway's CAFO to Class 1A.

I. Standing

Standing is a threshold issue that must be addressed, 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). Both DNR and Callaway asserted in their

[6] Statutory references, unless otherwise noted, are to the 2013 Cum. Supplement to the Revised Statutes of Missouri.

answers that Friends had not established standing, but neither filed a motion to dismiss based on that theory prior to the hearing. Nonetheless, standing is an issue that may be raised at any time. *Continental Coal v. Missouri Land Reclamation Commission,* 150 S.W.3d 371, 378 (Mo. App. W.D. 2004).

To have standing, the party seeking relief must have a "legally protectable" interest. *St. Louis Ass'n of Realtors v. City of Ferguson,* 354 S.W.3d 620, 623 (Mo. banc 2011). "A legally protectable interest exists only if the plaintiff is affected directly and adversely by the challenged action or if the plaintiff's interest is conferred statutorily." *Id.* The party "must have some personal interest at stake in the dispute, even if that interest is attenuated, slight, or remote." *Ste. Genevieve School District R II v. Bd. of Aldermen,* 66 S.W.3d 6, 10 (Mo. banc 2002). DNR and Callaway argue that Friends lacks standing either in its own right or in a representative or "associational" capacity.

A. Standing in its Own Right

DNR and Callaway claim that Friends lacks standing in its own right because it cannot show that the issuance of the permit will harm the corporation's interests. Friends argues that it does have standing on its own because the purposes set forth in its bylaws include protecting the environment from the potentially harmful environmental impact of a CAFO in Callaway County and participating in litigation regarding any CAFO proposed to be located in Callaway County. Friends also relies on a rule promulgated by the CWC, 10 CSR 20-6.020(6)(D), which states in part: "The appeals referenced previously in subsection (6)(A) [referring to appeals of conditions in issued permits] of this rule may be made by the applicant, permittee, or *any other person with an interest which is or may be adversely affected.*" (Emphasis added).

Friends, a nonprofit corporation, owns no land in Callaway County. Although one of its purposes is to "protect the environment from the potentially harmful environmental impact of

a CAFO in Callaway County," that is not sufficient to show a "personal interest at stake" in the dispute, or that the corporation is or will be adversely affected by the permit as issued. If it were, any organization could confer standing upon itself in virtually any dispute by artfully drafting its organizational documents. We find that Friends, as an entity, lacks standing in its own right.

B. Associational Standing

DNR and Callaway also contend that that Friends lacks associational standing. 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). DNR and Callaway point out that Friends has no members; hence, they argue, it cannot have associational standing.

DNR and Callaway are correct that the cases that discuss associational standing for organizations speak in terms of the interests of the organizations' members. The question is whether those cases imply the converse – that there can be no associational standing without members. We have found no Missouri case that directly addresses this point. There is logic to the argument, but without convincing authority to this effect we are loath to find that a corporation formed specifically to protect the rights of concerned citizens whose officers and directors claim to be affected by a DNR decision lack standing to challenge that decision. Friends' complaint states in part: "The Friends of Responsible Agriculture is made up of concerned citizens and neighbors in Callaway County who live in close proximity to the proposed CAFO. Friends of Agriculture represent [sic] its members in this appeal, who have

standing to sue on their own behalf, because several of these members" are nearby property owners. The complaint is signed by Jefferson Jones, Friends' president, who clearly intended for Friends to represent his interest, regardless of whether the corporation actually had members.

Assuming that Friends' lack of members is not fatal, we must then consider whether the further tests for associational standing are met. DNR and Callaway argue that the officers and directors of Friends would lack standing on their own because they have asserted no legally protectable interests. Jones testified that his farm house is located .4 miles from the proposed facility; that he raises cattle that drink from creeks near the site; that water from the CAFO will come onto his property; and that his drinking water comes from a well on his property.

Jones clearly has an interest in the quality of water he uses in his home and in his agricultural business. DNR and Callaway argue, however, that he lacks standing because much of his testimony relates to the impact the manure expected to be exported from the CAFO and applied to nearby land might have on the watershed. While Callaway voluntarily supplied several of the manure-spreading agreements with its application, no statute or regulation requires it to do so. As an "export-only" facility, it must not use the manure on its own property, but no permitting law or regulation requires it to account for the destination or use of that manure once it is exported.

This is a colorable argument, but the broad language of the regulations that pertain to standing in an appeal to the CWC incline us also to broadly interpret the authority to appeal the permit. Regulation 10 C.S.R. 20-6.020 confers standing upon "any person . . . with an interest which is or may be adversely affected." Subsection (6) is titled "Time Limits for Appeals of Conditions in Issued Permits." Friends specifically alleges a number of technical deficiencies in the permit issued, including some of the permit conditions. In its complaint, Friends also cites

10 C.S.R. 20-1.020, which allows "any person adversely affected by a decision of the department or otherwise entitled to ask for a hearing" to appeal.

The appeal rights described in § 621.250.2, under which we have authority to hear this case, are similarly generous: "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 . . ." (emphasis added).

In *Missouri Coalition for the Environment v. Herrmann,* 142 S.W.3d 700 (Mo. banc 2004), the court broadly construed the language in 10 C.S.R. 20-6.020 to allow "any person with an interest that is or may be adversely affected by a permit decision" to appeal to the CWC. *Id.* at 702. The language was found not to be in conflict with other statutory provisions allowing the right to appeal only to those denied a permit. *Id.* Although § 640.010, one of the statutes granting appeal rights at issue in *Missouri Coalition for the Environment,* has since been amended, the court's opinion implies that the regulations themselves, if not in conflict with any statute, may authorize standing. *See also Saxony Lutheran,* 392 S.W.3d at 56 (Land Reclamation Commission's regulation describes the rules for establishing standing for a public hearing).[7]

Jones testified that the manure spreading agreements were one of his concerns, but that he had others as well: that the sheer volume of hog waste stored so close to his farm and residence raises the possibility for accidents and spills, and that the calculations in Callaway's permit application understated the need for the facility's storage capacity, again posing a risk of

[7] Section 640.010 formerly provided that the director's decisions were "subject to appeal to the board or commission on request of the board or commission or by affected parties." The statute now provides that they are "subject to appeal as provided by law." Because § 621.250 and the regulations discussed above are the relevant laws, the amendment to § 640.010 does not narrow the right of a potentially adversely impacted party to appeal a decision of the CWC.

leaks or spills. In a case involving the right of a citizens' group to appeal a permit issued to a rock-crushing operation, the court stated that "[a] showing of harm to the environmental well-being of parties seeking judicial review" was sufficient to establish the organization's standing. *Citizens for Rural Preservation, Inc. v. Robinett,* 648 S.W.2d 117, 133 (Mo. App. W.D. 1982). Jones showed through his testimony that his environmental well-being could be adversely affected by the presence of a large CAFO near his property.

Thus, when we consider the subject of Friends' complaint, the interests and concerns described by Jones, the broad grant of authority to appeal found in § 621.250 and the pertinent regulations, and the decisions in *Missouri Coalition for the Environment* and *Citizens for Rural Preservation,* we conclude that Jones would have standing to bring suit to challenge the permit or its conditions on his own behalf.[8] The first factor necessary to find associational standing is therefore satisfied.

The second factor – that the interest sought to be protected is germane to Friends' purpose – is easily met, given that one of Friends' stated purposes is to protect the environment from the potentially harmful environmental impact of a CAFO in Callaway County.

The third factor is also met. Neither the nature of the claim nor the relief requested requires the participation of the individual members for a proper adjudication of the issues, as would be necessary if, for example, Friends sought damages on behalf of the persons whose interests it claims to represent. *See Citizens for Rural Preservation,* 648 S.W.2d at 134 n. 15.

We conclude that Friends has associational standing to challenge the permit.

[8] Although a number of the officers and directors of Friends reside near the proposed CAFO site, only Jones presented any evidence of the potential adverse impact of the CAFO on his or her personal interests.

II. Continuing Authority

Regulation 10 C.S.R. 20-6.010(3) states:

> All applicants for construction permits or operation permits shall show, as part of their application, that a permanent organization exists which will 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.

The regulation does not otherwise define "continuing authority." Callaway listed itself as the continuing authority for its permit. Friends complains that Callaway did not submit any proof or additional information in its application to DNR indicating it was qualified to be a viable continuing authority. It argues that a continuing authority must prove financial capability and permanent existence to ensure it will be able to take responsibility for any environmental problems arising at the facility even after it goes out of business. Friends points out that at this time, Callaway has no assets and thus argues that it cannot make the requisite showing of financial capability.

A. Motion to Amend Complaint

We first note that no allegations relating to Friends' capacity to serve as a continuing authority appear in Friends' complaint. But at the close of the hearing, Friends asked to be allowed to amend its complaint to conform to the evidence under Rule 55.33. Tr. at 337.

In general, the Missouri Supreme Court's rules of civil procedure have no force of law before the Administrative Hearing Commission.[9] *Dillon v. Director of Revenue*, 777 S.W.2d 326, 329 (Mo. App., W.D. 1989); *Dorrell Re-Insulation v. Director of Revenue*, 622 S.W.2d 516, 518 (Mo. App., W.D. 1981). An exception applies if the legislature specifically incorporates

[9] Although the CWC retains final decision making authority in this matter, this Commission's "rules and procedures" apply to the process by which we hold hearings and make recommended decisions. Section 621.250.2.

them by reference into statutes that apply to this Commission. *See Wheeler v. Board of Police Commissioners of Kansas City,* 918 S.W.2d 800, 803 (Mo. App. W.D., 1996). Section 536.073.2 authorizes us to adopt the Supreme Court discovery rules, which we have done in 1 C.S.R. 15-3.420(1). No such authority applies to Rule 55.33.

In fact, our regulation 1 C.S.R. 15-3.350(4) states:

> Petitioner may amend the complaint any time before the respondent serves a responsive pleading. After the respondent serves a responsive pleading, petitioner shall amend the complaint only with the commission's leave. The motion shall include the amended complaint proposed to be filed. Petitioner shall not amend the complaint less than twenty (20) days before the hearing without respondent's consent.

Friends did not make a timely motion, nor did it furnish an amended complaint to accompany its motion, nor seek the consent of the other parties to this case. In response to its motion at the hearing, we instructed Friends to address this issue in its written argument if it wished to pursue it. Friends failed to do so. Friends never specified which matters were not in the complaint, but were addressed at the hearing. Thus, its motion to amend pertains not only to the issue of whether Callaway is a proper continuing authority, but the universe of other issues that might have been touched on at the hearing but never pled.

We deny Friends' request to amend its complaint. In the event that the CWC chooses to address the continuing authority issue, however, we provide the following discussion and legal analysis.

B. Callaway as Continuing Authority

DNR and Callaway 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, DNR has never asked any CAFO applicant for financial information. DNR and Callaway also point out that Callaway's duration of existence, as it is registered with the

Secretary of State, is "pe[illegible]tual," which is a synonym for permanent. Callaway also notes that no legal entity could pass the permanency test advanced by Friends.

We agree with DNR and Callaway on this issue. Friends bases its continuing authority arguments on strained logic, rather than law. For example, no man-made entity can prove permanence to the standard that Friends suggests: "it will continue regardless of a contingency or fortuitous circumstances." *Friends, Post-Hearing Brief,* at 5, quoting *Derschow v. St. Louis Pub. Serv. Co.*, 95 S.W.2d 1173, 1175 (Mo. 1936). The issue in *Derschow,* a personal injury case, was whether an injury was permanent – a very different issue from the one at hand. 10 C.S.R. 20-6.010(3)(B) clearly provides that a municipality, public sewer district, or regulated sewer company may serve as a continuing authority for a wastewater treatment facility. All of these types of entities are subject to dissolution. A limited liability company with "perpetual" existence is no less permanent.

Similarly, Friends argues that Callaway 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. Again, however, we can find no legal authority requiring that a continuing authority have any particular level of capitalization or assets. Callaway points out that there is no reason for it to receive additional capital until this process becomes final and all legal challenges to the Permit have been finally decided.

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

III. Is the Interim Procedures Document a Rule?

Rulemaking under Chapter 536 is a lengthy process with many steps and built-in time delays. After a proposed rule is filed with the Joint Committee on Administrative Rules

("JCAR") and the Secretary of State, it is published 30 to 45 days later in the Missouri Register. Following publication, there must be a public comment or public hearing period that extends a minimum of 30 days. The agency then writes the final rule and files it with JCAR. JCAR then has another 30 days to review the rule. At that point, the agency may file the final order of rulemaking with the Secretary of State. There is another delay for publication of the final rule in the Missouri Register. Finally, the rule becomes effective 30 days after it is published in the Code of State Regulations. These steps can easily take six months, and longer with a controversial rule that elicits many public comments or significant legislative opposition.[10]

Because of this lengthy time frame, an agency that has promulgated rules to implement a statutory scheme may find itself in a regulatory limbo when the general assembly passes a law that significantly impacts its existing regulations. It may resort to emergency rulemaking if it finds that "an immediate danger to the public health, safety or welfare requires emergency action or the rule is necessary to preserve a compelling governmental interest." Section 536.025.1(1), RSMo 2000. But emergency rules shall not be in effect for longer than 180 calendar days or 30 legislative days. Section 536.025.7. And they may not be renewed, nor may substantially identical emergency rules be promulgated. Section 536.025.8.

This is the position in which DNR would have found itself upon the effective date of H.B. 28. DNR staff determined that many provisions in 10 C.S.R. 20-6.300 and 10 C.S.R. 20-8.300 that pertain to construction permits were no longer valid and enforceable. The agency began a lengthy rulemaking process by holding public meetings and soliciting input for a new rule. But, given the realities of the rulemaking process, it also fashioned an interim guidance document. While awaiting the CWC's adoption of revisions to 10 C.S.R. 20-6.300 and 10

[10] The summary of the rulemaking process is taken from §§ 536.019 - .031, *passim*, and "Rulemaking 1-2-3, *Drafting and Style Manual*," published by Jason Kander, Secretary of State, found at http://www.sos.mo.gov/adrules/manual/ 100%20RuleManual.pdf.

C.S.R. 20-8.300, DNR [illegible]e and disseminated the Interim Proce[illegible]es document. The purpose of the Interim Procedures document is to provide guidance to staff concerning the processing of CAFO operating permit applications and to "help the Department provide consistent service to this sector while [it] pursue[s] rulemaking." Ex. H. Friends claims that the Interim Procedures document constitutes a "rule" that should have undergone the rulemaking procedure pursuant to Chapter 536, RSMo.

A "rule" is defined as follows:

> "**Rule**" means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of an existing rule, but does not include:
>
> (a) A statement concerning only the internal management of an agency and which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof;
>
> (b) A declaratory ruling issued pursuant to section 536.050, or an interpretation issued by an agency with respect to a specific set of facts and intended to apply only to that specific set of facts;
>
> (c) An intergovernmental, interagency, or intraagency memorandum, directive, manual or other communication which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof[.]

Section 536.010(6).

The Missouri Supreme Court recognizes that "[n]ot every generally applicable statement or 'announcement' of intent by a state agency is a rule." *Baugus v. Dir, of Revenue*, 878 S.W.2d 39, 42 (Mo. banc 1994). An agency statement must have a "potential impact on the rights of some member of the public to be a rule." *Missouri Soybean Assoc. v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 24 (Mo. banc 2003).

In *Missouri Soybean*, the CWC decided to include the Mississippi and Missouri Rivers in a list of impaired rivers it submitted to the federal Environmental Protection Agency pursuant to

the federal Clean Water Act. Various trade and business associations instituted a declaratory judgment action challenging the validity of the CWC's action and arguing that inclusion of the Missouri and Mississippi Rivers on the impaired waters list was rulemaking and was therefore void because it was not conducted in accord with the Missouri Administrative Procedures Act's requirements for notice, comment, and fiscal notes in rulemaking.

The Supreme Court concluded "[t]he impaired waters list is not a rule and the inclusion of the rivers [is] not rulemaking because the list has no impact on the appellants." *Id.* at 14. Additionally, the Court stated:

> A list of Missouri impaired waters does not establish any "standard of conduct" that has the "force of law." The list does not command the appellants to do anything or to refrain from doing anything; no legal rights or obligations are created.

Id. at 23. The Court concluded that "[u]nder *Baugus,* an agency declaration cannot constitute a rule unless it has a potential impact on the rights of some member of the public." *Id.* at 24. In the Court's judgment, there was no potential impact on the rights of some member of the public.

In *Degraffenreid v. State Board of Mediation*, 379 S.W.3d 171, 189-90 (Mo. App., W.D. 2012), the plaintiff complained that the "Procedures Manual" for a union election published by the Board should have been promulgated as a rule. As the court described the Manual, it contained "a good deal of information about the promulgated regulations at 8 C.S.R. 40-2, and appears to be directed to Board staff, providing operational direction to the staff involved in processing cases." *Id.* at 189.

The Board argued the manual fell within exception (c) – "An intergovernmental, interagency, or intraagency memorandum, directive, manual or other communication which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof." *Id.* at 189-90. The Western District agreed, stating that the Manual appeared "to be an

intra-agency memorandum of procedures for the staff to follow" as opposed to the general public and that it did not "substantially affect[] the legal rights of, or procedures available to, the public or any segment thereof." *Id.* at 190.

The court in *Degraffenried* surveyed past decisions delineating the concept of a rule. In *NME Hospitals v. Department of Social Services,* 850 S.W.2d 71 (Mo. banc 1993), the court held that the Department of Social Services' change in the method of calculating the Medicaid reimbursement for hospitals was a policy change involving a reimbursement standard of general applicability to all participants in a Medicaid program, and hence a rule. *Id.* at 74. In *Department of Social Services v. Little Hills Healthcare, L.L.C.,* 236 S.W.3d 637 (Mo. banc 2007), the court again decided that a change in calculating "Medicaid days" for purposes of reimbursement to service providers was a standard of general applicability that should have been promulgated as a rule. *Id.* at 642. In *Missouri Association of Nurse Anesthetists v. State Board of Registration for the Healing Arts,* 343 S.W.3d 348 (Mo. banc 2011), the court determined that a letter issued by the Board of Healing Arts advising of its opinion that advanced practice nurses were not qualified to administer certain types of anesthesia was a rule because the letter had a future effect and potential impact on advanced practice nurses and physicians who wished to employ them. *Id.* at 356-57.

All of these cases are distinguishable from the situation at hand. In none of them is there any indication that a major statutory change similar to the one effected by H.B. 28 spurred the agency's policy change. The Interim Procedures document did not, by itself, change agency policy. It did not impose any new or different requirements on applicants for permits. Rather, it provided guidance to staff on how to process applications after H.B. 28 invalidated much of the CAFO permitting regulations (which we discuss with more particularity below).

We find that the Interim Procedures document is not a rule because it does not implement the law. The Interim Procedures recognize that the law is gone, and certain regulations no longer have a statutory basis for implementation. As we discussed above, DNR lost the ability to enforce regulations or parts of regulations that were required to apply for a construction permit when the legislature removed the necessity of getting a construction permit before operating a CAFO. The Interim Procedures document is a summary of the rules that continue to apply to the CAFO permitting process after construction permits may no longer be required for most CAFOs.

We also find that the Interim Procedures document does not pose the danger expressed by *Degraffenried* of unpublished rules: "that agencies could continuously change their minds about broadly applicable policies having future effect without having to provide notice and to seek public comment" thereby undermining the purposes of Missouri's Administrative Procedure Act and having a detrimental impact on fairness and agency accountability. 379 S.W.3d at 187. To the contrary, DNR's process in implementing the statutory changes in H.B. 28 through the Interim Procedures document appears to have been a reasonable response to a major shift in policy enacted by the general assembly. It was not a result of DNR's "changing its mind" about a broadly applicable policy.

Therefore, we find the Interim Procedures document is not an unenforceable rule.

IV. House Bill 28 –Removes Requirement to Apply for a Construction Permit

In 2013, the General Assembly passed and the Governor signed H.B. 28. In part, H.B. 28 enacted changes to what is required to apply for a CAFO permit. H.B. 28 modified § 640.715 to delete the reference to construction permits and it modified § 644.051 so that it currently reads:

> 3. . . Any point source that proposes to construct an earthen storage structure to hold, convey, contain, store or treat domestic, agricultural, or industrial process wastewater also shall be subject to the construction permit provisions of this subsection. **All other**

> **construction-related activities at point sources shall be exempt from the construction permit requirements.** All activities that are exempted from the construction permit requirement are subject to the following conditions:
>
> a. Any point source system designed to hold, convey, contain, store or treat domestic, agricultural or industrial process wastewater shall be designed by a professional engineer registered in Missouri in accordance with the commission's design rules;
>
> b. Such point source system shall be constructed in accordance with the registered professional engineer's design and plans; and
>
> c. Such point source system may receive a post-construction site inspection by the department prior to receiving operating permit approval. A site inspection may be performed by the department, upon receipt of a complete operating permit application or submission of an engineer's statement of work complete.

(Emphasis added.) After enactment of H.B. 28, CAFOs are no longer required to apply for construction permits unless they are constructing an earthen storage structure (an earthen basin or lagoon). They are still required to apply for operating permits.

The CWC's CAFO regulations are codified in Chapters 6 and 8 of 10 CSR 20. Regulation 10 C.S.R. 20-6.300 sets forth "the permitting and other requirements for concentrated animal feeding operations." Introductory Purpose Statement. Regulation 10 C.S.R. 20-8.300, titled "Manure Storage Design Regulations," specifies CAFO design standards and what is required to be submitted to obtain a construction permit. Both regulations make reference to and describe the construction permitting process.

A. Changes to Permitting Regulations

Callaway and DNR argue that many of the construction permitting requirements were invalidated with the passage of H.B. 28 in 2013. One of Friends' principal arguments is that despite the changes to the law made by H.B. 28, the regulations – including those that pertain to construction permits – have not been amended, and DNR must continue to follow them as

written. Friends argues that the General Assembly is presumed to have known of the CWC's CAFO regulations, and H.B. 28 did not specify any changes to those regulations or direct that they be amended. Friends argues that this evidences a legislative intent to allow the CWC to continue to enforce the regulations as written because § 644.051.3.a, b, and c are not the exclusive conditions that can be imposed on a CAFO. An issue, therefore, is whether the change in the statute removing the requirement of a construction permit nullified the Department's authority to enforce those parts of the regulations that deal with the construction permits.

In *Beverly Enterprises-Missouri, Inc. v. Department of Soc. Serv's*, 349 S.W.3d 337 (Mo. App., W.D. 2008), the court found that the repeal of the Boren Amendment to the Medicaid law "effectively repealed the regulations implementing the statute." *Id.* at 346. The standards of the repealed Boren Amendment were not applicable to payments for services after a certain date. In *Grogan v. Hays*, 639 S.W.2d 875 (Mo. App., W.D. 1982), the court found that the Board of Chiropractic Examiners' attempt to promulgate regulations based on a prior statute's definition of the practice of chiropractic was rendered moot when that definition was changed in the statute. The court stated:

> The old § ~~331.010 and the~~ attendant regulations no longer govern the practice of chiropractic. The rights the plaintiffs assert as chiropractic practitioners under then extant § 331.010 and the adjudication of those rights by declaratory judgment no longer appertain. The very source of that claim – old § 331.010 and the administrative promulgations – was supplanted.

Id. at 878.

While neither of these cases is directly on point, we are convinced that the change in the statute that removes the requirement of a construction permit also acts to nullify the regulations that pertain to construction permits except insofar as the statute continues to require them. The regulations are now inconsistent with the statute, and administrative agencies must follow the

statute. *See Union Elec. Co. v. Director of Revenue*, 424 S.W.3d 118, 125 (Mo. 2014). We also find support in § 536.014, RSMo. 2000:

> No department, agency, commission or board rule shall be valid in the event that:
>
> (1) There is an absence of statutory authority for the rule or any portion thereof; or
>
> (2) The rule is in conflict with state law; or
>
> (3) The rule is so arbitrary and capricious as to create such substantial inequity as to be unreasonably burdensome on persons affected.

The statutory authority to enforce procedures relating to applications for construction permits no longer exists. DNR acted properly when it applied only the requirements of an operating permit to Callaway's CAFO application.

B. Remaining Requirements

Next we consider which requirements remain and whether Callaway met those requirements. Callaway and DNR argue that after H.B. 28, the following are the only requirements that apply to this CAFO application.

1. Statutory Requirements

Section 640.715 now states:

> 1. Prior to filing an application to acquire an operating permit for a new or expanded facility from the department, the owner or operator of any class IA, class IB, or class IC concentrated animal feeding operation shall provide the following information to the department, to the county governing body and to all adjoining property owners of property located within one and one-half times the buffer distance as specified in subsection 2 of section 640.710 for the size of the proposed facility:
>
> (1) The number of animals anticipated at such facility;
>
> (2) The waste handling plan and general layout of the facility;

(3) The location and number of acres of such facility;

(4) Name, address, telephone number and registered agent for further information as it relates to subdivisions (1) to (3) of this subsection;

(5) Notice that the department will accept written comments from the public for a period of thirty days; and

(6) The address of the regional or state office of the department.

Caldwell, the DNR staff member who reviewed Callaway's application, testified that after Callaway made a few changes during the application process, these requirements were met. Tr. at 52.

2. Regulations

Regulations 10 C.S.R. 20-6.300 and 10 C.S.R. 20-8.300 required a CAFO to have both a construction and operating permit. At issue are which requirements in these regulations are still required after the enactment of H.B. 28. DNR argues that it considered which documents were necessary for an operating permit as opposed to a construction permit. Caldwell testified:

> We looked at the – the permitting documents that were required in 8.300 and just chose ones that we felt were necessary to ensure compliance with the regulations for the operating permit application.

Tr. at 115. Friends argues for the inclusion of specific documents as set forth below. We previously determined that the IPD is not an unpublished rule. The corollary to this conclusion is that it also does not have the force and effect of law. Therefore, in the analysis that follows, we examine the requirements not only of the Interim Procedures document, but of the regulations themselves. Based on the evidence in the record, we have re-examined and determined which of the existing regulations apply in this situation: where a person who applies for a no-discharge, export-only permit for a Class 1B CAFO after the effective date of H.B. 28.

a. Engineering Reports

Regulation 10 C.S.R. 20-8.300 states:

> (3) Permit Application Documents. Applications for a construction permit, or for an operating permit that did not previously receive a construction permit, shall submit one (1) set of documents described in this section for department approval as part of the permit application process.
>
> (A) Engineering Documents. . . .
>
> 1. Engineering report – The following paragraphs should be utilized as a guideline for the content of the project engineering report to be submitted to the department for review and approval[.]

CAFOs constructed prior to the effective dates of 10 C.S.R. 20-6.300 or 10 C.S.R. 20-8.300 were not required to have construction permits. All CAFOs constructed after the promulgation of 10 C.S.R. 20-6.300 were required to have both construction and operating permits. Thus, any CAFO that applied for an operating permit after the effective date of the 8.300 regulation was also required to submit certain construction permitting documents as part of the application process. After the enactment of H.B. 28, CAFOs were no longer required to have construction permits. Therefore, Callaway contends that even though Callaway "did not previously receive a construction permit," the requirements of this subsection of 8.300(3) do not apply – at all. DNR believes some of the requirements of 8.300(3) continue to apply, as reflected in the Interim Procedures document, because they are relevant and necessary as requirements for an operating permit. We agree with DNR.

Friends argues that Callaway's application is defective because it did not contain the following documents that are referenced in subsection (3):

- Engineering design documents relating to the collection, treatment, and disposal of all domestic wastewater flows associated with the operation. 10 CSR 20-8.300(3)(A)1.F(VI)

- An engineering report that includes an "Operation and maintenance plan" that discusses the key operating procedures including maintenance of mechanical equipment. 10 CSR 20-8.300(3)(A)l.H
- Engineering documents such as a general layout drawing showing the source of the operation's water supply and all wells within three hundred feet of the production area. 10 CSR 20-8.300(3)(A)2.B.

In regard to the location of domestic wastewater flows, neither the facility nor any wastewater flow facility has been built. If a domestic wastewater facility were constructed, septic systems are regulated by the Missouri Department of Health and Senior Services in Chapter 701, RSMo. Callaway would have to apply to the county health department to construct a septic system. In regard to an operation and maintenance plan, DNR testified there is no operation equipment associated with the operation of deep pits because the manure will not be treated in the pits and only purchasers of the manure will use equipment to remove it from the pits. Therefore, there is nothing to submit. The layout drawing did not have to show the source of the operation's water supply and all wells because no water supply currently exists. The evidence established that if and when Callaway decides to drill a drinking water well, it would have to obtain necessary permits from a different section of DNR and meet required setback distances to the closest barn. The general permit that was issued to Callaway does not regulate drinking water wells.

Although Callaway asserts that none of the information specified in 10 C.S.R. 8.300(3) should be required after the passage of H.B. 28, DNR staff testified that some limited information otherwise included in an "Engineering report" referenced in subsection (3) is necessary to process an application for an operating permit, such as:

- Title page. Title of project, date, operation's name and address, name and address of firm preparing the report, and seal and signature of the engineer. 10 C.S.R. 20-8.300(3)(A)1.B.
- Calculations showing the estimated annual amount of manure generated at the production area. CSR 20-8.300(3)(A)1.F(III).
- Design calculations justifying the size of manure storage structures. 10 CSR 20-8.300(3)(A)1.F(IV)
- General layout drawings. Plans shall include both an aerial and a topographical map or drawing that shows the spatial location and extent of the production area. 10 CSR 20-8.300(3)(A)1.H.2.

DNR needs the title page of the applicant's engineering report, estimates of the amount of manure to be generated, and design storage calculations to ensure the CAFO can properly store the manure it generates. This requirement pertains to the ongoing operations rather than the construction of the CAFO. The general layout drawing is needed to ensure the proposed CAFO meets setback (buffer) distances required by § 640.710. This requirement, obviously, is statutory and has not changed. Caldwell testified that the remaining requirements of this regulation no longer apply to CAFOs that do not apply for construction permits. Tr. at 57-60.

Friends argues that Callaway should have provided the depth and volume tables for the manure storage bins as required by 10 CSR 20-8.300(3)(A)1.F(V). We agree. The requirement clearly relates to the manure capacity calculations, which DNR has determined are required to issue an operating permit. In its complaint, Friends states that it does not agree that this requirement pertains only to a construction permit, and DNR, which has the burden of proof in this proceeding, provided no testimony as to why this is information is not related to the operation of the CAFO in the same manner as are manure capacity calculations.

b. Swine Mortality Composter

Friends argues that Callaway's permit application was deficient because the swine mortality composter was designed in accordance with the Virginia Cooperative Extension recommendations and not the recommendations from the University of Missouri extension service. Friends cites to § 269.020.5, RSMo 2000, which states: "Composting of dead animals shall be done in a dead animal composter designed and constructed in an efficient design as recommended by the University of Missouri extension service." This statute gives enforcement over composting to the Missouri Department of Agriculture. Friends does not cite to any CWC statute or regulation that requires a dead animal composter to be designed in accordance with the University of Missouri extension service recommendations and we find none.

Regulation 10 C.S.R. 20-8.300(14) states:

> (14) Mortality Management.
>
> (A) Class I operations shall not use burial as a permanent mortality management method to dispose of routine mortalities.
>
> (B) Operations shall first receive approval from the department before burying significant numbers of unexpected mortalities and shall conduct the burial in accordance with Missouri Department of Agriculture requirements. Rendering, composting, incineration, or landfilling, in accordance with Chapter 269, RSMo Supp. 2010, shall be considered acceptable options and do not require prior approval.

This regulation does not impose any design standards. 10 C.S.R. 20-8.300(3)(A)2.A describing the general layout drawings also does not impose any design standards.

The CAFO permitting regulation also imposes requirements regarding mortality management. Regulation 10 C.S.R. 20-6.300(3)(A)5 requires that mortalities must not be disposed of in any liquid manure or process wastewater system, unless specifically designed to handle them. Mortalities must be handled in such a way as to prevent the discharge of pollutants

to surface waters and prevent the creation of a public health hazard. Once again, this regulation does not impose any design standards.

We agree that the regulations do not impose any design standards or any requirement that a composter be designed in accordance with the University of Missouri extension services' recommendations. Any **burial** must be in accordance with Missouri Department of Agriculture requirements, not the design of a composter, including composting capacity. This is not a permitting deficiency.[11]

c. Export-Only Facility

Several of the deficiencies alleged by Friends relate to the fact that Callaway has indicated it would be an "export only" CAFO. Caldwell described an export-only CAFO:

> An export only is one that does not land apply manure on any land that is owned, rented or leased by the owner. They have no operational control over it.

Tr. at 84. For example, Friends complains that Callaway did not execute the Easements submitted with the application. But DNR does not require applicants to submit manure Easements with the application for an export-only CAFO. The fact that Callaway voluntarily submitted some Easements does not change the fact that it was not required submit them. DNR considered the Easements to be "superfluous." Tr. at 101.

Callaway also alleged that Friends submitted no NMP. The permit application, Form W, for a "State No-Discharge Permit" states an NMP is not required. Friends argue that the CWC's regulations provide that the permit "shall require the development and implementation of a nutrient management plan." 10 C.S.R. 20-6.300(5). Subsection (3)(G)1 also states "[p]ermits shall require a nutrient management plan be developed and implemented. . . . New CAFOs that

[11] We do not mean to imply that Callaway does not have to comply with all applicable laws, including § 269.020.5 – only that it need not prove its compliance in order to obtain its permit from the CWC.

apply for a construction permit must develop and submit a nutrient management plan with the construction permit application." Friends submitted an NMP that DNR believed was appropriate for a no-discharge, export-only CAFO, stating that third parties would pump out the deep pits and transport the manure off site to be land applied at agronomic rates on fields owned by other persons.

Friends also contends that the permit is defective because Callaway did not submit soil borings or information about soil permeability, texture, and water-holding capacity, or detailed information about manure transfer processes. Caldwell explained that the information about soil permeability was unnecessary because manure will not be discharged or deposited on the CAFO site. And Callaway is not required to provide information about manure transport because the facility exporting the manure will transfer it through a custom applicator to another location.

d. Manure Calculations

Friends challenges the calculations of the amount of manure, arguing that Callaway used the smallest farrowing sow size and thus underestimated the volume of manure generated at the facility. But Caldwell testified that he had also performed calculations estimating the amount of manure assuming the pigs were at maximum weight all of the time. In this "worst case" scenario, all of the deep pit structures exceeded the minimum requirements. Tr. at 92-95. Martin did not disagree with his calculations. Tr. at 315.

V. Depositions

Friends offered Exhibits T and U, which were the transcripts of depositions taken of Greg Caldwell, the DNR employee who reviewed Callaway's permit application, and Amanda Sappington, the Industrial Permits Unit Supervisor. Tr. at 214. Both testified at the hearing, and we noted that the depositions were cumulative to their live testimony. Both DNR and Callaway objected on this basis and because Friends refused to designate which portions of the depositions

it was offering into evidence, or for what purpose. We admitted the exhibits subject to the objections. We ordered Friends to specify in its written arguments which portions of the depositions it wanted us to admit into evidence and to argue why that portion should be admissible. Tr. at 221. Friends did not address the depositions in its written arguments.

We sustain the objections to Exhibits T and U.

VI. Attorney Fees

In its post-hearing brief, Friends asks us to award it attorney fees pursuant to § 536.087, RSMo. 2000. This request is premature in that an application for attorney's fees is filed after a decision is rendered in the underlying case and a prevailing party has been determined. *Id.*

We deny the request for attorney fees.

VII. Motion to Re-open Hearing

On April 2, 2015, Friends filed a motion to re-open the hearing to take evidence. Friends states that the CWC conducted tours of two CAFOs, the owners of which had previously publicly stated their support for Callaway's permit. Friends refers to these tours as *ex parte* contacts and states that it was not advised of the tours and had no opportunity to attend or to know what was discussed that might relate to this case. Thus, it asks us to re-open the hearing so that it may adduce evidence about who requested the tours, when the request was made, who made the arrangements, and the reasons why these particular CAFOs were chosen. On April 7, 2015, DNR responded to the motion. Friends filed a reply on April 13, 2015.

DNR argues that the CWC's conduct is not relevant to our decision and is not ripe for adjudication. Although the allegations made by Friends on this point are troubling, we agree with DNR. Our statutory duty is to issue a recommended decision, granting or denying Callaway's permit. We have no power to superintend another agency's procedures. *Missouri Health Facilities Review Comm. v. Administrative Hearing Comm'n*, 700 S.W.2d 445, 450 (Mo.

banc 1985). The CWC has not yet made a decision, so any claim of its bias or improper *ex parte* contacts, in addition to falling outside our authority to determine, is not yet ripe.

We are also mindful of the deadline for our decision imposed by the legislature that has not been waived in this case. Friends may address its arguments relating to the alleged *ex parte* contacts to the CWC itself, or, if necessary, to a reviewing court. *See* § 536.140.4.

We deny the request to re-open the record.

Summary

DNR has met its burden of proving that the operating permit for Callaway was issued in accordance with current law. We recommend that the CWC sustain DNR's decision granting the Permit, but that the Permit be amended to require Callaway to provide the depth and volume tables as required by 10 CSR 20-8.300(3)(A)1.F(V).

SO RECOMMENDED on April 17, 2015.

KAREN A. WINN
Commissioner