Missouri Clean Water Commission Permit Decision: Ozarks Water Watch Article Addresses Potential Implications

Arkansas Environmental, Energy, and Water Law Blog

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Mr. David Casaletto, Executive Director, Ozarks Water Watch, has authored an article in his organization's April 11th newsletter addressing a Missouri Clean Water Commission ("MWC") decision to deny the Trenton Hog Farm ("Trenton") an operating permit.

Trenton is classified as a Concentrated Animal Feeding Operation ("CAFO").

The decision represents some novel developments involving Missouri water permitting.

The MWC is a seven-member citizens' board appointed by Missouri's governor and confirmed by the senate. The Missouri Department of Natural Resources provides staff support to the MWC.

As the article notes, the MWC modified the DNR's Administrative Hearing Commission's recommendation regarding Trenton's permit and determined that:

…that the Department of Natural Resources failed to meet its burden of proving that the Missouri State Operating Permit MOGS10500 issued to Trenton Farms RE, LLC on August 12, 2015 was lawful. See NO. 15-1345 CWC.

MWC's decision addresses two issues.

The first "Count I. 100 Year Floodplain" involves a certification made by a Professional Engineer on behalf of Trenton in regards to a finding that the CAFO location is "protected from inundation or damage due to the one hundred-year flood.

The decision notes standard certification language which reads:

"I hereby certify that I am a licensed professional in the State of Missouri. To the best of my 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."

MWC states in its decision:

The AHC construed that language to mean Mr. Van Maanen "has certified that the buildings will be protected from inundation or damage due to the 100-year flood as required by the rule." But Mr. Van Maanen certified and attached his seal to the calculations document—not the permit application as a whole. The calculations document reflects numeric calculations for manure. It provides no direct evidence that the CAFO is protected from inundation or damage due to the one hundred-year flood. The

AHC concluded that, by certifying the manure calculations, Mr. Van Maanen guaranteed compliance with all Missouri CAFO laws. We think it unreasonable to assume that Mr. Van Maanen intended to risk his professional engineer's license by signing one document within a permit application. In light of the above, and because we agree with the AHC's analysis and ultimate rejection of the other evidence offered in support of the contention that the proposed CAFO location is protected from the one hundred-year flood, we determine that DNR failed to meet its burden of showing compliance with 10 CSR 20-8.305(5)(A).

A second count addressed whether the AHC's analysis of whether DNR met its burden of proving that Trenton met 10 CSR 20-6.010(3) which requires:

…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.

The MWC states:

…The phrase "continuing authority" is not defined in this Commission's regulations. We do not disagree with the AHC's conclusion that Trenton Farms' compliance with Section 347.037.3, RSMo 2000 shows that it is a permanent organization. But the regulation requires more than just a permanent organization. If duly filed corporate documents were enough, then the sentence would not include the phrase "which will serve as the continuing authority for the operation, maintenance, and modernization of the facility." But it does, and so this Commission determines DNR must prove that Trenton Farms can operate, maintain, and modernize the CAFO facility it intends to build. DNR showed only that Trenton Farms is a permanent organization. Therefore, we determine that DNR failed to meet its burden as it pertains to 10 CSR 20-6.010(3).

Mr. Casaletto of Ozark Water Watch notes the ramifications of the decision stating:

As far as I know, DNR has never required any entity applying for a permit to prove that they can financially "operate, maintain, and modernize" their facility. The entity just has to prove they are a permanent organization and are in "good standing" with the state of Missouri. But this CWC decision now seems to indicate that DNR must prove that the applying entity has the financial capacity needed to take care of this permitted facility into the future. While this seems to be a very common sense idea, that anyone applying for a permit should have the money it will need to operate the facility and provide for upkeep, this has never been required in the past, and there are no existing rules or laws that would let anyone currently applying for a permit know what information they might need to provide. And the rule 10 CSR 20-6.010(3) pertains to all CWC permitted facilities, not just CAFOs.

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