

Continuing Authority

The 2 words that can (and did)
bring a permit to a grinding halt,
.....but should it have?

Is your permit next?

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What is Continuing Authority – what was the original indent?

“Continuing”:

Continuous – constant.

“Authority”:

the power to give orders or make decisions : the power or right to direct or control someone or something.

For reference -

“Responsible Party”:

the person who has a level of control over, or entitlement to, the funds or assets in the entity that, as a practical matter, enables the individual, directly or indirectly, to control, manage or direct the entity and the disposition of its funds and assets.

Continuing Authority

What is it and what does it really mean?

Per state water pollution regulation:

10 CSR 20-6.010(3) Continuing Authorities

(A) All applicants for construction permits or operating 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.

Continuing Authority

What is it and what does it really mean?

Section 4.6.3 of the DNR Permit Manual

The continuing authority is the permanent organization responsible for operation, maintenance and modernization of the facility described in the permit. Generally, the owner and the continuing authority of a facility are the same, but this is not a requirement. There can be an owner and a separate continuing authority.

Trenton Farms - Permit Appeal - AHC Decision

- Trenton Farms LLC – the owner/CA applied for and obtained a CAFO permit.
- Permit was subsequently appealed by a 3rd party.
- 3rd Party claimed that continuing authority provision was not followed, farm did not submit proof that it is a “permanent organization” with “sufficient financial resources”.
- DNR and Trenton Farms argued that the CWC has no authority or criteria to evaluate the financial strength of a continuing authority as part of the permitting process.
- Also, DNR has never before asked for financial docs from a CAFO.

Conclusion:

- AHC found no legal authority requiring that a continuing authority have any particular level of capitalization or assets. AHC recommends to CWC it uphold permit.

Trenton Farms - Permit Appeal - CWC Decision

CWC decision – on a 4-2 vote, CWC disagreed w/ the AHC and denied the permit.

- CWC stated that “CA” is not a term defined in regulation, and that CA must require more than just showing that the CA is a permanent organization.
- CWC ordered that DNR must prove that Trenton can operate, maintain and modernize the facility it intends to build.

Question – Is CA a confusing term? Perhaps, that’s reasonable.

Question - Is clarification on CA needed in regulation? Perhaps, that’s reasonable.

Question – is a permit appeal the proper venue to impose a different definition or attempt to clarify a regulatory term? – No way, not reasonable, perhaps illegal.

Question – then why did the CWC choose to do just that? Good question.

Concerns with this CWC decision.

1. Did CWC enact new regulation and circumvent the formal rulemaking process?
2. Why has CWC only applied this requirement to one individual CAFO only?
3. Why is CWC seem only interested in targeting CAFOs with this requirement?
4. Is CWC asking DNR to do an impossible task, something it really doesn't have the credentials to do?
5. Is DNR prepared to make judgement calls on fiscal soundness of a businesses?
6. Why did CWC provide "zero" guidance to Trenton on what it would take to "prove" it can operate, maintain, etc?
7. Why is CWC fixated on finding a solution to a problem that doesn't exist w/ CAFOs?
8. Where was the demonstration that a legitimate water quality problem existed?
9. Where in the decision was the evidence or factual basis for this concern and action?
10. Was this decision based on speculation, a "what-if" hypothetical scenario?

Implications – at least as I see them.

- *Arbitrary, confusing if not disturbing* –
CWC evidently can freely re-interpret and re-define regulations as it sees fit and direct that on specific operations of its own choosing.
- *No confidence in process = no predictability* –
It seems all permit appeals are fair game. Can anyone expect a predictable, honest and fair regulatory decision making process when rule decisions are made on the fly and outside proper rulemaking processes?
- *Creates bad regulatory & business environment* –
places Missouri at a significant competitive disadvantage to other states. We should be taking steps to streamline regulatory processes, this did just the opposite.
- *Private financial records not so private anymore* –
Financial records submitted to DNR would be subject to open records requirements under the Missouri Sunshine Law. Private financial and business records would be open to public disclosure and scrutiny. This is a serious privacy concern and represents a totally irresponsible approach.

Unanswered Questions

Newly issued permits -

Are all new permits being issued right now vulnerable to appeal and CWC action?
We have at least 2 CAFO permits under appeal, time will tell I suppose.

Applicability –

CWC focus was on CAFOs, but decision is far reaching, will it impact all sectors and all permits? How can it not?

Fiscal Criteria –

What will be the fiscal criteria that a regulated business must meet to be compliant? Is this an ongoing requirement, what happens at renewal?

Compliance –

What happens when DNR finds that a CAFO is no longer fiscally sound during the middle of a permit cycle?

And the million dollar question(s) are:

- What amount of CA “proof” will it take for the CWC to approve the Trenton farm permit?
- Will they make the same call on the forthcoming Calloway hog farm appeal?
- In the upcoming rulemaking process, will everyone (and CWC) take an objective view of the facts surrounding CA, and make an effort to seek out and focus on legitimate problems?