

Before the
Administrative Hearing Commission
State of Missouri



IN RE COUNTRY CLUB HOMES, LLC,)
PERMIT NO. MOG010872) Nos. 18-0498 and 18-0501
)

ORDER

We stay of the Department of Natural Resources’ (“Department”) action of June 15, 2018 granting Permit No. MOG010872 pending this Commission's findings and determination in the cause.

Procedure

On June 25, 2018, Lone Jack Neighbors for Responsible Agriculture, LLC, filed a complaint appealing the Department’s decision to issue Class IB CAFO Permit No. MOG010872 in the name of Valley Oaks Steak Company, LLC (“Valley Oaks”). On June 27, 2018, Powell Gardens, Inc., Ryan and Elizabeth Deich, and the Robert M. Chamness Trust filed a complaint appealing the same permit. On July 3, 2018, Valley Oaks filed a motion to intervene in both cases, which we granted. The Petitioners in both cases filed a motion for a stay of the Department’s action granting the permit. On July 9, 2018 we held a combined hearing in both cases on the issue of the stay. Stephen G. Jeffery appeared for Lone Jack Neighbors; Charles W. Hatfield and Aimee Davenport appeared for Powell Gardens, Inc., *et al.*; Assistant Attorneys General Jennifer Hernandez and Shawna Bligh appeared on behalf of the Department; and Jean Paul Bradshaw II and Jennifer Griffin appeared for Valley Oaks.

Findings of Fact for Purposes of the Stay

1. Lone Jack Neighbors is a Missouri limited liability company registered in good standing with the Secretary of State.
2. Lone Jack Neighbors, its members, and its supporters reside in the vicinity of the Valley Oaks CAFO and fields where manure generated by the CAFO may be land applied.
3. Karen Lux, Rachel Foley, and Caroline Wilkinson are members of Lone Jack Neighbors who live in the vicinity of the CAFO Property.
4. Powell Gardens is a botanical garden in the Kansas City, Missouri, area that has 100 acres of gardens and cultivates thousands of species of plants, including some that are endangered.
5. Powell Gardens is located less than three miles from the CAFO property.
6. Tabitha Schmidt has been the CEO/President of Powell Gardens since August 2016, and testified on behalf of Powell Gardens at the stay hearing.
7. Ryan Deich and his family live on property that is adjacent to the CAFO property.
8. Patrick Splichal is a soil scientist who prepared written comments and testified at the stay hearing on behalf of Powell Gardens, *et al.*
9. Greg Caldwell reviewed the permit application. He has been employed by the Department for over 30 years. Caldwell testified on behalf of the Department and Valley Oaks at the stay hearing.
10. Countryclub Homes, LLC, is Missouri limited liability company owned solely by David Ward. Ward testified at the stay hearing.
11. Ward, through business entities owned by him, began operating an animal feeding operation (“AFO”) in September 2016.
12. The AFO was comprised of approximately 900 head of cattle.

13. On December 19, 2017, Ward submitted a Permit Application (Form W) to the Department for a proposed concentrated animal feeding operation (“CAFO”) to be located on the property comprising the AFO in Johnson County, Missouri. (“the facility” or “Valley Oaks”). “Country Club Homes, LLC” was listed on the application as the continuing authority that is responsible for the operation, maintenance, and modernization of the facility to which the permit is issued.

14. On June 15, 2018, DNR issued Permit No. MOG010872 to “Country Club Homes, LLC, 1120 NE Eagle Ridge Blvd., Grain Valley, Mo 64029” for the operation of a Class IB CAFO.¹ A Class IB CAFO requires a permit from the Department.

15. A “Certificate of No Record,” dated June 27, 2018, from the Missouri Secretary of State indicates than no entity named “Country Club Homes, LLC, 1120 NE Eagle Ridge Blvd., Grain Valley, Mo 64029” exists.

16. The holder of a Class IB CAFO permit may hold up to 6,999 animal units in its facility. One cow is equal to one animal unit. No permit is required for a facility holding up to 1,000 beef cattle.

17. As of June 15, 2018, there were approximately 900 head of cattle at the facility, and since that time, the facility has added 1,000 head of cattle. Ward plans to add 2,600 additional head of cattle to the Valley Oaks CAFO by the end of 2018.

18. With the permit application, plans were submitted for a facility with six confinement barns and two manure storage sheds that Valley Oaks projects that, when operating at full capacity, the allotted capacity of 6,999 beef cattle raised on the facility would generate approximately 111,134 tons of manure and urine on an annual basis.

¹ The permit is actually issued in the name of “Country Club Homes, LLC.”

19. In its application materials, Valley Oaks projected that it will dispose of approximately 70% of that process waste by land application (under the Nutrient Management Plan), and approximately 30% of that waste by exporting it from the site.

20. Valley Oaks indicated in its application that it would store the process waste in two locations: (1) the animal confinement barns, and (2) manure storage sheds.

21. No plan was submitted for operation of the facility in a partially completed state. Valley Oaks did not propose to have, and did not have, the required 180 days of storage as of the date the permit was issued.

22. Valley Oaks proposed to eventually have 186 days of temporary manure storage available on site, a conclusion reached by determining that manure will be stacked 2.3 feet high against the stem walls in the animal confinement pens.

23. The stem walls in the animal confinement buildings are also 2.3 feet high.

24. The automatic waterers supplying drinking water to the cattle are located 2.0 feet high on the stem walls. If manure stored in the animal confinement pens reaches the maximum permitted capacity, the manure will completely bury the animals' only source of drinking water.

25. Stacking manure to the very top of the stem walls will likely lead to manure spilling outside of the open confinement pens and onto the soil.

26. An unnamed Tributary to East Branch Crawford Creek bisects the Valley Oaks property, flowing from the north to the south.

27. Valley Oaks' CAFO buildings, including its actual and planned manure storage sheds, are located immediately to the west and uphill from the Tributary.

28. In between the CAFO buildings and the Tributary, Valley Oaks has two fresh water retention ponds located within 100 to 200 feet of the Tributary. These ponds are not depicted in the site plan in the permit application.

29. The Permit requires process wastes to be “collected and reused as a soil amendment by spreading onto agricultural fields at agricultural rates”, as set forth in the nutrient management plan attached thereto as Attachment A (the “Nutrient Management Plan”).

30. The Nutrient Management Plan was submitted to the Department on behalf of Valley Oaks and, ultimately, approved by the Department.

31. Some of the lands on which Valley Oaks has indicated it will land apply manure are in the same watershed (Blackwater) as Powell Gardens.

32. The Nutrient Management Plan projects cool season grass hay yields of 6.0 tons per acre on fields 18A, 18B, 18C, 18D, 19A, 19B, 20A, 36A, 37A, 40A, 40B, 40C, 40D, 76A, 76B, 76C, 76D, 76E, 76F, 76G, 77A, 77B, 77C, 93C, 93D, 93E, 93F, 93G, 93H, and 93I.

33. 17. Valley Oaks’ projections for cool season grass hay yields at 6.0 tons per acre are nearly three times the state historical average and the historical average for the counties in which the fields are located.

34. In 2017, the average cool season grass hay production in the state of Missouri, as a whole, was 1.95 tons per acre.

35. In 2017, the average cool season grass hay production in Johnson County, Missouri, was approximately 2.20 tons per acre.

36. Caldwell does not know how Valley Oaks calculated its cool season grass hay yield goals.

37. Caldwell testified that “I have seen other hayfield, other cool season grass hayfields achieve that goal and higher.” Tr. 206.

38. The Department record does not contain any evidence of how Valley Oaks arrived at its cool season grass hay yields.

39. At the stay hearing, Ward testified that he now plans to dry, bag, and sell commercially approximately half the manure produced at the facility, departing from both the facility design and the Nutrient Management Plan submitted with the permit application.

40. Approximately \$20 million has been invested in the CAFO to date. An additional \$10 million is needed to complete the remaining two CAFO buildings. Valley Oaks has taken on a loan from FCS Financial for this construction.

41. Valley Oaks has entered into a \$55 million, five-year contract with Scavuzzo's Food Delivery Service in Kansas.

42. If a stay is issued, costs for debt service and utilities will not cease, and Valley Oaks may incur additional costs for depopulating the CAFO, and 47 employees may be laid off.

43. The Department received around 1400 public comments, primarily in opposition to Valley Oaks' permit applications. Caldwell reviewed all of the comments and prepared the Department's responses to the comments.

44. Ward admitted that he was a member in Woodbury Homes, LLC, and testified that on May 30, 2007, he entered a guilty plea in the U.S. District Court, District of Kansas, on behalf of Woodbury Homes, LLC, to a charge concerning the submission of a falsified form to the Environmental Protection Agency concerning a storm water permit, and that Woodbury Homes, LLC, paid a fine of over \$90,000.

45. Ward testified that he was a partner in Ward Investments, Inc., and that in 2004, Ward Investments, Inc., paid a civil penalty of \$13,500 for violations of the Missouri Clean Water Law.

Analysis

Under § 621.035, and 1 CSR 15-3.320, the Commission "may stay or suspend any action of an administrative agency pending the commission's findings and determination in the cause."

Absent a specific statutory framework outlining the conditions for a stay, this Commission follows the guidelines set forth in *State ex rel. Director of Revenue, State of Missouri v. Gabbert*, 925 S.W.2d 838, 839-840 (Mo. banc 1996). The person seeking a stay of an administrative order must justify the stay. An administrative order or decision will not be stayed pending appeal where the applicant has not sustained his or her burden of proof or otherwise has not made the required showings. *Id.* To decide whether to issue a stay, we consider four factors:

- (1) the likelihood that the party seeking the stay will prevail on the merits;
- (2) the likelihood that the moving party will be irreparably harmed absent a stay;
- (3) the prospect that others will be harmed if the court grants the stay; and
- (4) the public interest in granting the stay.

To obtain a stay, Petitioners must present evidence to:

Show that the probability of success on the merits and irreparable harm decidedly outweigh any potential harm to the other party or to the public interest if a stay is issued. . . . Of course, this inquiry should not be rigid or “wooden” and cannot be accomplished with “mathematical precision.” . . . “The equitable nature of the proceeding mandates that the court’s approach be flexible enough to encompass the particular circumstances of each case.”

Id.

(1) Likelihood of Success on the Merits

(A) Continuing Authority

To successfully challenge the issuance of the permit, Petitioners must show that the permit was issued in violation of statute or regulation. 10 CSR 20-6.010(3)(A) provides:

All applicants for construction permits or operating permits shall show, as part of their application, that a permanent organization exists which 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 undisputed evidence at the stay hearing shows that Country Club Homes, LLC, the entity listed in the permit and application as the continuing authority, does not exist. Ward testified that he has submitted a request to the Department to correct this error. But the permit has been issued to an entity that does not exist, and none of the parties have cited authority that would allow the Department to transfer such a permit to a different entity or make such a correction. A brief review of the Department's regulations would seem to require two willing entities with signatory authority to accomplish a transfer. *See*, 10 CSR 20-6.010(11). We conclude that Petitioners have shown a reasonable likelihood of success on this point.

(B) Storage Capacity

Department regulations recommend that Class IB CAFOs such as Valley Oaks provide for manure storage sheds that have at least 365 days of temporary manure storage on site. 10 CSR 20-8.300(5)(B)1. At minimum, the storage period for liquid manure, solid manure, and dry process waste to be land applied is 180 days. 10 CSR 20-8.300(5)(B)2. After revisions to its permit application, Valley Oaks' final submission provided for 186 days' storage. Petitioners put on evidence suggesting that the only way Valley Oaks was able to reach storage of 180 days' of manure was to provide for storage in the confinement barns. After accounting for bedding and compaction of the manure by the animals walking on it, the barns must hold manure to a depth of 2.3 feet, when the walls of the barns designed to confine the animals are only 2.3 feet deep. At this depth, the animals' drinking sources will be buried in compacted manure, and manure will inevitably spill outside of the open confinement pens. We conclude that Petitioners have shown a reasonable likelihood of success on this point.

(C) Nutrient Management Plan

Department regulations require that Class IB CAFOs such as Valley Oaks develop and implement nutrient management plans that have "realistic production goals." See 10 CSR 20-

6.300(3)(G)2.A. The “Missouri Concentrated Animal Feeding Operation Nutrient Management Technical Standard (NMTS) approved by the Clean Water Commission on March 4, 2009”, which is incorporated by reference into the regulations governing Class IB CAFOs and into Valley Oaks’ Permit, require that yield goals be justified by historical data:

Yield goals should be based on crop yield records from multiple years for the field. Good judgment should be used to adjust yield goals to counteract unusually low or high yields. When a field’s yield history is not available another referenced source may be used to estimate yield goal.

Petitioners produced evidence indicating that the cool season grass hay yields submitted by Valley Oaks and approved by the Department, as part of its Nutrient Management Plan, are not supported by any historical data. The evidence indicates that Valley Oaks’ projected cool season grass hay yields of 6.0 tons per acre are approximately three times the average for the Johnson County, Missouri, and the state of Missouri as a whole. Valley Oaks did not submit any historical data to support its cool season grass hay yields, and no such information exists in the Department’s record. The permit approval appears to be based on Caldwell’s anecdotal recollection that “I have seen other hayfield, other cool season grass hayfields achieve that goal and higher.” Tr. 206. We conclude that Petitioners have shown a reasonable likelihood of success on this point.

(2) Likelihood of Irreparable Harm to the Moving Party

Petitioners submitted evidence that Valley Oaks has ramped up its operation in the weeks since June 15. Ward’s testimony was that as of the date of our stay hearing, he had increased the number of cattle on site from approximately 900 to approximately 1,900, and had plans to increase the number further to approximately 4,500 by year’s end. He has built additional confinement structures and a manure storage shed, and testified that another storage shed will be completed in about 60 days. Valley Oaks’ facility design submitted with its permit application purports to assure the Department and the public that the facility, when constructed, will be able

to accommodate up to 6,999 beef cattle with no discharge of waste into the waters of the state. Further, the design purports to assure the Department and the public that it can store more than 180 days' (111,134 tons) of waste. But neither the permit application nor any evidence adduced at the hearing suggest that any particular lesser phase of completion will accommodate any particular lesser number of animals. In briefing, Valley Oaks has supplied calculations to demonstrate that if it constructs the additional storage shed by September 9, 2018, there will be adequate waste storage for the number of animals it plans to bring onto the site by the deadline for this Commission's recommended decision. This does not change the fact that Valley Oaks is not permitted for a partially completed facility. And its plans for additional construction and additional animals are subject to change at the whim of Ward, a developer who has no experience operating a CAFO. An unnamed tributary runs through the facility to carry animal waste off the property into the watershed. Valley Oaks' *ad hoc* approach to running a CAFO without any significant regard for the plans it submitted to the Department only increases the risk of manure reaching the waters of the state. We conclude Petitioners have shown a significant potential for irreparable harm.

(C) Prospect of Harm to Others

About \$20 million has been invested in the CAFO to date. An additional \$10 million is needed to complete the remaining two CAFO buildings. Valley Oaks has taken on a loan from FCS Financial for this construction. Additionally, Valley Oaks has entered into a \$55 million, five-year contract with Scavuzzo's Food Delivery Service in Kansas. If a stay is issued, costs for debt service and utilities, will not cease, and Valley Oaks may incur additional costs for depopulating the CAFO, and 47 employees may be laid off. Ward speculated that Valley Oaks may go bankrupt. The purpose of a stay of the action of an administrative agency is to preserve the *status quo*. In this case, a stay would temporarily return Valley Oaks to an unpermitted

facility with the ability to keep up to 1,000 beef cattle on the premises. The lion's share of the costs listed by Ward were incurred or contracted-for prior to June 15, 2018 – in other words, when Valley Oaks was an unpermitted facility with the ability to keep up to 1,000 beef cattle on the premises. We conclude that while a stay may result in financial harm to Valley Oaks, the bulk of that harm is the result of Ward's own actions in anticipation of receiving a permit, and as a result, does not outweigh the other factors in our analysis.

(C) Public Interest

The public at large, and the government of the State of Missouri, have an interest in protecting water quality and the environment. The public and the government also have an interest in promoting responsible agriculture and a reliable food supply. The Department received thousands of pages of letters from concerned citizens opposing the CAFO and expressing concern about its environmental impacts. Considered along with the frailties outlined above in Valley Oaks' permit application and the Department's approval process, we conclude that the environmental protection interests outweigh Valley Oaks' interests in accelerating its operations during the time in which this appeal is pending.

Summary

We grant a stay of the Department's action of June 15, 2018 granting Permit No. MOG010872 pending this Commission's findings and determination in the cause.

SO ORDERED on July 26, 2018.

BRETT W. BERRI
Commissioner