

FILED

JUN 28 2024

KARMA SAPP
DELAWARE CO. COURT CLERK

IN THE DISTRICT COURT IN AND FOR DELAWARE COUNTY,
STATE OF OKLAHOMA

SPRING CREEK COALITION,)

Petitioner,)

Vs.)

Case No. CJ-21-33

STATE OF OKLAHOMA, ex rel.,)

THE OKLAHOMA DEPARTMENT OF)

AGRICULTURE, FOOD AND FORESTRY,)

Respondent,)

And)

MICHAEL PHAN,)

CHAU TRAN & DONNA NGUYEN,)

TONG NGUYEN,)

MING NGO,)

LOA VO,)

And)

TRAN & TRAN LLC,)

Interested Parties.)

ORDER FOR SUMMARY ADJUDICATION

Now on this 28th day of June, 2024, the above matter came on for ruling

on Petitioner's *Motion for Summary Adjudication*. Summary judgment or Summary Adjudication are authorized when there is no dispute over material facts. *Manora v. Watts Regulator Co.*, 784 P2d 1056 (Okla. 1989), *Hargave v. Canadian Valley Elec. Coop., Inc.* 1990 OK 43 ¶14, also see District Court

Rules 13. After reviewing the court file and hearing arguments of counsel, the court finds the following facts are not in substantial dispute, and based thereon, grants partial summary adjudication, to-wit:

1. The Petitioner, Spring Creek Coalition (herein Spring Creek), is “a grass-roots citizens group, whose purpose is to protect the waters and environment within the Spring Creek watershed.” (Plaintiffs’ Petition ¶1)

2. The Coalition’s members live, reside, own property, recreate, work, or attend school or religious services in the Spring Creek watershed in Delaware County.” (Petition ¶2). Also see the Affidavit of Beth Rooney, President of the Spring Creek Association, attached to the *Plaintiff’s Response to Motion to Dismiss* filed October 28, 2022.

3. The Defendants, MICHAEL PHAN, CHAU TRAN & DONNA NGUYEN, TONG NGUYEN, MING NGO, LOA VO, TRAN & TRAN LLC (the Interested Parties), are owners of poultry feeding operations (PFO) located in the Spring Creek watershed within Delaware County, Oklahoma (hereinafter referred to as the “Facilities”).

4. *The Clean Water Act* (CWA) “establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating standards for surface waters.” 33 U.S.C. 1251 et seq. (1972).

5. The Environmental Protection Agency (EPA) is the federal agency charged with administering the CWA. The EPA may enter into agreements which allow state agencies to administer permit programs under the National Pollutant Discharge Elimination System, (NPDES). Title 40 CFR §122.1 et seq.

6. The State of Oklahoma has been granted authority by the EPA to implement the federal NPDES requirements. Oklahoma Agriculture Pollutant Discharge Elimination System Act (AgPDES), Title 2 O.S. §2A-1(2005). The Oklahoma Department of Agriculture, Food and Forestry (ODAFF or the

Department) is the state agency which administers the AgPDES. See Defendant's *Response and Objection to the Petitioners' Motion for Summary Adjudication pages 2&3* (filed October 18, 2022).

7. The Department must meet certain requirements as a condition to receiving authority from EPA to administer the NPDES. Title 40 CFR §123.1 et seq.

8. The conditions which the state of Oklahoma must meet to receive their authority to administer certain programs under the NPDES are described in Title 40 CFR 123.25(a), which states "*All State Programs under this part must have legal authority to implement each of the following provisions and must be administer in conformance with each, except that States are not precluding from omitting or modifying any provision to impose more stringent requirements.*"

9. One of the programs which the Department administers under the NPDES are Concentrated Animal Feeding Operations (CAFOs). 40 CFR §123.25(a)(6).

10. Concentrated Animal Feed Operations are point sources, subject to NPDES permitting requirements. 40 CFR 122.23

11. An Animal Feeding Operation (AFO) is a facility where animals will be confined and fed for a total of at least 45 days in any 12-month period. 40 CFR §122.23(b)(1).

12. Among other things, a CAFO is an Animal feeding Operation which contains at least 125,000 chickens (non-laying hens) so long as the facility uses other than a liquid manure handling system. 40 CFR §122.23(b)(4)(x).

13. There's no dispute, the Facilities, all contain as many as 300,000, and they each use a non-liquid manure handling system.

14. The Department admits that, by federal definition, the Faculties are CAFOs, but argues they are not defined as such under Oklahoma statutes. Oklahoma Statutes Title 2 O.S. §20-41(B)(11), defines the various farming operations which are recognized as CAFOs. The only mention of chickens is in sub-part

(11)(f), where it says: “100,000 laying hens or broilers, if the facility has continuous overflow watering” and sub-part (g), “30,000 laying hens or broilers, if the facility has a liquid manure system” are CAFOs.

15. Nowhere in the Oklahoma Concentrated Animal Feeding Operations Act, (Title 2 O.S. 20-41 et Seq.) does it mention facilities containing 125,000 or more chickens (non-laying hens) which use other than a liquid manure handling system. These facilities are not listed in, but not explicitly excluded from, the Oklahoma CAFO definitions.

16. Facilities, such as the ones owned by the Interested Parties, are addressed in Oklahoma statutes as Poultry Feeding Operation (PFO). Title 2 O.S. §10-9.1 (B)(20)

17. A PFO is “a property or facility where poultry have been, are or will be confined and fed or maintained for a total of forty-five days or more in any twelve-month period and producing over ten (10) tons of poultry waste per year.” See Title 2 O.S. §10-9 et seq. The Facilities are PFOs and each one raises 300,000 chickens, multiple times per year.

18. The Department authorizes the building and operation of PFOs. (2 O.S. §10-9.1 et. seq.) The Interested Parties were required to make an application to the Department to register their PFO and receive authorization from the Department before them may proceed to build and/or operate their PFO. 2 O.S. §10-9.3

19. PFO operators must make an application each year before they can operate their PFO the following year. It is “unlawful for any person to construct or operate a new poultry feeding operation without having first registered with the State Board of Agriculture.” 2 O.S. §10-9.3; and §10-9.4

20. An "Application" means a document or set of documents, filed with the Oklahoma Department of Agriculture, Food, and Forestry for the purpose of receiving a permit. 2 O.S. §2A-22 (A)

21. A “Permit” is “a permission required by law and includes things like certifications, registrations, licenses and plan approvals.” 2 O.S. §2A-22 (1) & (3)(a)

22. A registration to authorize a poultry feeding operation (PFO) is clearly a permit. It's required by law to operate a facility like those owned by the Interested Parties. If the Department properly classify these PFO permits, it will provide substantial procedural due process to the Plaintiff and the public, just as it does to other parties who are affected by the CAFO permit process.

23. The potential for pollution, arising out of the confined feeding of hundreds of thousands of chickens, should be "intuitively obvious to the most casual observer" (a phrase used by Admiral Hyman G. Rickover, USN when describing things of an obvious nature). Litigation over the cumulative effects of poorly regulated poultry operations in Northeast Oklahoma has been going on for decades. See *State of Oklahoma v. Tyson Foods, et al.*, United States District Court for the Northern District of Oklahoma, Case NO. 05-CV-329-GKF-SH, *City of Tulsa v. Tyson Foods, et al.*, United States District Court for the Northern District of Oklahoma, Case NO. 01-CV-0900 EA(C)

24. "Minimum standards of due process require that administrative proceedings, which may directly and adversely affect legally protected interests, be preceded by notice calculated to provide knowledge of the exercise of adjudicative power and an opportunity to be heard. *DuLaney v. Oklahoma State Dept. Of Health*, 1993 OK 113, 868 P.2d 676, also see *Purcell v. Parker*, 202 OK 83, 475 P.3d 834

25. Spring Creek complains that its members are denied due process because they were not given notice and an opportunity to be heard when the Interested Parties submitted their applications to the Department seeking permission to build and operate their poultry facilities or when the Interested Parties renewed their registration to operate each year. The Department admits they have no provision for notice to neighboring landowners or the public, prior to the approval of the initial registrations for the Facilities or their annual renewal.

26. The Department is authorized to promulgate rules, which effectively provide procedural due process rights to neighboring property owners and the public, before they issue CAFO operating permits.

Title 2 O.S. §2A-23A

27. The Department divides CAFO applicants into three Tiers, to determine the level or degree of due process, each applicant must give to the public and neighboring landowners, before their application is approved. In determining which Tier each CAFO applicant will be placed, the Department is directed to consider the following:

1. The significance of the potential impact of the type of activity on the environment;
2. The amount, volume, and types of waste proposed to be accepted, stored, treated, disposed, discharged, emitted, or land applied;
3. The degree of public concern traditionally connected with the type of activity;
4. The federal classification, if any, for the proposed activity, operation, or type of site or facility; and
5. Any other factors relevant to the determinations. Title 2 O.S. §2A-23 (B)

28. Title 2 O.S. §2A-23 (C) states: “For purposes of this section, the Board shall ensure that (Tier) designations are, at a minimum, consistent with any analogous classifications set forth in applicable federal programs.”

29. There is no evidence the Department gave any consideration to the significance of the potential impact the Facilities, each containing upwards of 300,000 chickens, may have on the public environment or the peace and enjoyment of property owned by contiguous landowners.

30. Also, there is no evidence the Department gave any consideration to the degree of public interest in the registration process of the Facilities. Further, it is clear, the Department ignored federal classifications of these facilities, and consequently neglected to design due process rules for the Plaintiff, the neighboring landowners and the public.

31. In its Order, dated April 12, 2023, this court considered the Department’s argument that Spring Creek had not availed itself of the due process opportunities found in the Oklahoma Administrative Code §35:1-5-1. Spring Creek, through its attorney, Matthew Alison, initially contacted the Department’s General Counsel, Teena Gunther, about filing a letter, protesting the operating permit for each of the Facilities. Gunther told Alison he could either send his letter of protest to her or he could file a

Declaratory Action under the Administrative Code. After Alison sent protest letters to the Department and got no response, he filed this action. The Department responded by filing a Motion to Dismiss, alleging that Spring Creek failed to pursue administrative relief. See the *Order*, pp 6-7, April 12, 2023.

32. The court finds the Department's treatment of Spring Creek and its protest letters to be deceptive and made with the intent to deny the Plaintiff and its members due process rights, including the right to notice and right to be heard.

33. The court further finds that the Oklahoma Administrative Code, including but not limited to §35:1-5-1, does not adequately inform Spring Creek, and others who are similarly situated, about the processes and methods the Department requires in order to secure their due process rights and to redress grievances before this government entity.

34. Further, the Administrative Code fails to notify the Plaintiff, and the public, that unless they request a declaratory ruling, their rights to challenge a poultry feeding operation permit are forfeited.

35. The Department should have classified the Facilities as CAFOs in compliance with definitions established under federal regulations, and applied the factors outlined in 2 O.S. §2A-23 (B), in order to afford neighboring landowners and the public, Tier III type notice and hearing opportunities before accepting or renewing registrations for the Facilities.

36. Spring Creek complains that the Facilities emit large volumes of odorous air and suggests that the air coming from the Facilities contain pathogens, from the chickens, that could be harmful to human health. Spring Creek further alleges that the Department does not perform any testing of air emitted from the Facilities, or any other chicken operations that seek to register their facilities. The Department does not deny these allegations but says the Oklahoma Department of Environmental Quality is responsible for regulating air born pollution.

37. A person only needs to travel the highways and section line roads in Northeast Oklahoma to understand that chicken house facilities emit a strong and noxious odor. Anyone vaguely familiar with the function of the human olfactory system knows that smell is the result of inhaling particles or solutions in the air. In addition to the offensive smell, those particles and/or solutions, emanating from the Facilities, will eventually precipitate out of the air and settle on the ground to be picked up again in the next rainfall. This ground water will eventually find its way into the watershed. Whether these sources of pollution are enough to present problems for humans living, working, recreating, etc. in the area around the Facilities is unknown because the Department has not tested or required testing of air emissions from chicken farms. The Department has authority to enforce regulations for all forms and sources of pollution, that may result from agriculture endeavors within the state. 27A O.S. §§1-1-202(A)(2) & (B)(3), §1-3-101D1; The Department is the agency charged with granting permission to build and operate the Facilities and all others like them. The Department is the last line of defense against pollution of the waters of our state that are caused by agricultural activities. The Department has ignored or neglected its duties to protect and preserve the waters of the state of Oklahoma which have denied the Plaintiff protections afforded other United States citizens under the Clean Water Act.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED THAT, the Department is hereby enjoined and restrained from accepting, approving, granting or otherwise sanctioning any registration, permit, license or authorization, for the construction and/or operation of the Facilities, and other operations which houses more than 125,000 chickens (non-laying hens) so long as the facility uses other than a liquid manure handling system, and any other facility or operation defined or regulated under the Oklahoma Registered Poultry Feeding Operations Act, unless and until the Department implements the following for each such facility or operation, to-wit:

1. Ninety days prior to commencement of the construction of any facility or operation, such as those described above, the Department shall, at the applicant's expense, give written notice to all

landowners within a one-mile radius of the geographical location of the proposed facility or operation. The notice shall be mailed to these landowners, based on the tax records of their respective County Treasurer. The notice shall contain the following: (a) specific information about the size of the operation, including the number of structures and the number of chickens each structure is intended to house in a given year, (b) the source of water to be used in raising the chickens, including an estimate of annual usage in gallons, (c) the method and nature of sampling and treatment of air and air born solutions (moisture in either liquid or vapor form) and particulates, emanating from the structures which house chickens, (d) instructions for easy access to a copy of the Nutrient Management Plan established for the proposed facilities, (e) detailed instructions for requesting a public hearing regarding the permit, registration or authorization, which will be held in the county where the facility is or will be located, (f) a deadline by which time a request for hearing must be made, which is not less than forty-five days after the first notice, required by paragraph 2 below, is published.

2. The Department, at the applicant's expense, shall publish notice, two times, not less than fourteen days apart, in a newspaper of general circulation in the county where the facility is being built, Said publication notice shall contain the information described in subsections (a) through (f) above. The Department shall maintain and allow public access to the written and/or published notices described above.

3. The Department shall provide a meaningful consideration of public concerns regarding the environmental effect of the air emanating from the proposed facilities, the source and use of water at the facilities, and the storage and disposal of all the waste and litter generated and produced at the facilities. The Department shall consult with the Oklahoma Department of Environmental Quality, the Oklahoma Water Resources Board and any other Oklahoma agency charged with protection of the environment, in order to address and consider the concerns raised by the public regarding the environmental impact of the proposed facility.

4. Upon an application to renew a registration, permit, license or authorization, which was granted prior to the filing of this Judgment, the Department, at the applicant's expense, must give the written notice to landowners and the publication notice, as described in paragraphs 1 through 3 above, before it accepts, approves, grants or otherwise sanctions any registration, permit, license or authorization, for the construction and/or operation of any facility or operations as described above.

5. The parties hereto, shall develop a form, to be presented for court approval, which shall address an application to renew a registration, permit, license or authorization, which was granted after the filing of this Judgment. The form shall provide instructions for accessing the information contained in prior notice/s, together with any new, amended or altered conditions which have occurred since the last notice was given.

IT IS FURTHER ORDERED ADJUDGED AND DECREED THAT, any issue raised by the Plaintiff, which is not addressed by this Partial Summary Judgment, may, upon proper motion, be brought before the court for either trial or other summary adjudication.

Done this 28th day of June 2024.


Judge of the District Court

