

A Case Study of Permit Applications under the Old and New Regulations

The following case study relates the experiences of one farmer who 1) had a permit issued under the old regulations, 2) had a permit approved but ultimately denied under the old regulations and 3) had a permit ultimately upheld under the new regulations.

First Permit Under Old Regulations

The farmer applied for his first permit in 1994. A site inspection was performed in May of that year. In June 1994 permission was granted for the farmer to proceed with the planning and design of his facility. In order to obtain a permit to construct a no-discharge waste treatment system, the farmer would have to provide

- 1) a Waste Management Plan prepared either by a private, licensed engineer or the Soil Conservation Service (now NRCS) and a signed Application for Permit to Construct,
- 2) a statement that the owners will be responsible for operating and maintaining the waste system in accordance with design criteria, and
- 3) two required easements as discussed during the site inspection.

The two easements were signed on July 3, 1994. Note that these easements required the signers to indicate that they "have/have no objections to this construction." (Circle one.) This differs from the form required under the new regulations.

On July 26, 1994, the farmer submitted his Application for Permit to Construct. The proposed date for the beginning of operations was September 1, 1994. The Permit to Construct was issued on November 21, 1994. The operation consists of four broiler houses. The broilers are raised in houses with earthen floors topped with wood fractions. Waste is land applied. 20 special conditions were placed on the operation. The expected amount of waste is 900 tons based on 5 flocks per year (600,000 broilers per year.)

On December 15, 1994, a final construction inspection was performed. The permit to operate was issued on December 20, 1994. The first birds were placed in April 1995.

On February 22, 1996, a site inspection was conducted by DHEC for the purpose of determining the suitability of the site for a dead bird composter.

On February 11, 1997, a Permit to Construct was issued for the dead bird composter. This permit was appealed on July 3. On October 21, 1997, application for Permit to Operate the dead bird composter was approved. In May 1998, a judge ruled against the composter permit. On appeal permission to construct the dead bird composter was upheld and the composter was built.

Under the old regulations, the original permit for the chicken houses was approved in about seven months. Approval of the dead bird composter took approximately twenty months from the original site inspection until the Permit to Operate was approved.

Between May 1995 and February 1999, at least 23 inspections were made at the facility. Of these 9 were routine inspections, 13 were complaint-driven and 1 was a follow-up inspection. Only one unsatisfactory rating was given and it was for a routine inspection. Most of the complaints involved odors and flies, but DHEC did not find any permit violations on inspection.

Second Permit Under Old Regulations

On February 22, 1996, a preliminary site inspection was conducted for a proposed broiler operation to be run by the same farmer. On February 24, 1996, DHEC wrote giving permission to proceed with the planning and design of the system.

The letter indicated that the farmer again needed to submit

- 1) a Waste Management Plan prepared either by a private engineer or by the Soil Conservation Service (SCS),
- 2) a statement that the owners will be responsible for operating and maintaining the Waste system in accordance with design criteria, and
- 3) two easements that the farmer indicated were needed during the site inspection.

On May 30, 1996, DHEC received the Waste Management Plan for the facility which was prepared with assistance from the District Conservationist for SCS in Clarendon County. On July 23, 1996, DHEC issued a permit for the construction of four broiler houses. The farmer began construction of the broiler houses.

Eight months later in March 1997, the controversy over the chicken houses began. Parties involved included a member of the SC House of Representatives, the assistant to the Commissioner of DHEC, the owner of a tomato packing shed, the SC Department of Labor, and the SC Migrant Workers Department. Individuals who had signed waivers withdrew their consent. Others wrote to say that they should have been asked to sign waivers or just to protest

On April 16, 1997, another farmer filed a request with DHEC for administrative review of the permit to construct the broiler houses by the Administrative Law Judge Division. Additional petitioners moved to intervene in the matter on May 14, 1997. The two groups appealed the permit to build a dead bird composter on the existing facility on July 3, 1997. The motion to intervene was granted and the two appeals were consolidated on August 19, 1997. A hearing was held on November 24, 25 and 26, 1997 at the Administrative Law Judge Division Offices in Columbia.

On May 4, 1998, the Chief Judge issued his opinion in which he found that the permits for both the new facility and the composter had been improperly issued. He therefore denied the permits finding that

- 1) DHEC had failed to promulgate regulations as required by law. Because of this, the Petitioners and the public were unprotected and their rights to "a healthy

environment" and to "the unencumbered use and enjoyment of their property" were in jeopardy.

- 2) Under the Restructuring Act of 1993, jurisdiction over contested case hearings was transferred from DHEC to the Administrative Law Judge Division. Prior to this, DHEC both made the rules and interpreted them. The Administrative Law Judge should consider the department's guidelines to be evidence. However, the guidelines "do not have the full force and effect of law and do not establish a binding norm.
- 3) DHEC's guidelines specify that a facility must be located at least 1,000 feet from neighboring property lines unless a signed waiver is obtained from the owners of such property. The proposed barns would be only 200 feet from the property lines of Vonnie Ridgeway and Peggy Baxley and no waivers were obtained.
- 4) "...the generation of noxious odors, dust and contaminants will occur with certainty as a result of the normal biological process of the decay of poultry waste. Even optimal management practices will not eliminate these normal odors associated with poultry litter. The Department has taken the position in response to odor complaints about Mr. Wells' existing facility that such odors were normal incidents of a poultry facility and that no agency action was available so long as the facility was operating in compliance with its permit. The evidence clearly established--without serious dispute--that pungent, acrid, ammonia-like odors, dust and airborne contaminants will routinely be generated during the normal and proper operation of this poultry facility." The Department did not visit the site prior to writing the permit. The Department did not evaluate the transport of odors and other contaminants to neighboring residences nor did they evaluate the impact of the prevailing winds. "Furthermore, staff failed to evaluate the availability of alternative sites despite evidence that the farmer's extensive properties afforded other locations with superior protection for neighbors." No evidence was presented that DHEC considered imposing conditions on the permit to protect the neighbors. No evidence was presented to support the Department's departure from its own 1,000-foot setback guideline.
- 5) The Department's argument that it is limited to considering the issues of environmental and health protection and pollution control "... fails to recognize that these odors and dust emissions are themselves a threat to the health and welfare of the Petitioners as well as to Petitioners' use and enjoyment of their property." Legislation effective July 1, 1996, requires the Department to avoid permitting a source of nuisance odors and to require remediation of such emissions. The Department recognizes its responsibilities in this area in its permitting guidelines and cannot now "pass the buck" to local zoning and land use authorities.
- 6) The Department failed to protect the property rights of the Petitioners and their right to due process.

In light of these findings, the Judge denied the permits for the new broiler houses and the dead bird composter.

On June 4, 1998, DHEC and the farmer appealed the Judge's ruling to State of South Carolina Board of Health and Environmental Control.

On October 8, 1998, the SC Board of Health and Environmental Control upheld the denial of the permit for the chicken broiler houses. The decision was based solely on the fact that the facility was less than 1,000 feet from adjoining property lines as required in the Department's *Agricultural Facility Permitting Requirements of the Bureau of Water Pollution Control*.

In this case permit approval took about three months from the time of the initial site inspection. Then another eight months passed during which time construction was begun. Only then was the permit appealed. The final decision to revoke the permit was issued on October 8, 1998, more than two and a half years after process was begun.

Permit Under New Regulations

On September 22, 1998, SCDHEC conducted a preliminary site inspection for a proposal to build four (4) broilers houses on the property. On October 2, 1998, DHEC wrote to the farmer stating that the site appeared to be suitable for the broiler operation and giving permission to go ahead with the formulation of the necessary waste management plan. The letter also outlined some of the required procedures and regulations.

DHEC determined that two neighbors had to be notified of the farmer's intention to construct new broiler houses. The farmer hand delivered the Public Notice of Intent to Construct to one neighbor on October 5, 1998, who refused to sign. The farmer mailed a Public Notice of Intent to Construct to the other neighbor. She signed at first, but then scratched out her name and wrote in "Refused to sign" and returned the form dated October 10, 1998, to the farmer. The form clearly states that no rights are forfeited by signing the form.

On November 5, 1998, the farmer filed a Waste Management Plan with SCDHEC for the construction of 4 broiler houses to be built in the Bloomville community of Clarendon Country. Each house would have the capacity to hold 22,000 birds at a time and 5 flocks could be produced each year in each house. The plan indicates that the set back distances for the broiler facility itself would greatly exceed those required by South Carolina's regulations. Setbacks for the land application areas would meet those required by the regulations. The amount of land available for land application of waste is 284 acres. The amount of land needed to apply all the waste (537 tons) at agronomic rates for the proposed corn, wheat and soybean crop rotation is 215 acres.

A Permit to Construct was issued by the Bureau of Water of SCDHEC on December 24, 1998 with an effective date of January 12, 1999. The permit included 25 Special Conditions that must be met by the operation. A public notice was placed in The Manning Times on December 24, 1998 notifying the public that a permit had been issued to construct the new broiler facility.

On January 8, 1999, the clerk of the Board of SCDHEC received an appeal of the permit. Six individuals were listed as Petitioners. SC Department of Health and Environmental Control and the farmer were listed as Respondents. The basis for the appeal was that the

community was already suffering from smells from an existing broiler facility owned by the farmer. The Petitioners also expressed concern over water quality. Approximately 80 signatures were attached to the letter of appeal. The construction permit was suspended pending the appeal

On June 7, 1999, the appeal was heard by a Judge in the ALJ Division. The Petitioners were represented by an attorney. SCDHEC was represented by an in-house attorney. The farmer represented himself. The farmer is the owner of an existing poultry operation and is in partnership with his father and sister in the farm that proposes to build the new facility being appealed here.

The Petitioners' witnesses all testified that they had been troubled by odors from the farmer's existing chicken houses ever since they were first built. They feel that they are severely limited in their ability to enjoy activities. They are concerned about health issues (for example, asthma attacks), water quality and property values.

The Respondents' witnesses testified that all rules for issuing a permit had been followed. Setback distances are being observed and setbacks for the new facility will exceed the minimums required. The farmer has installed a composter to take care of dead animals. He has received a permit to build a stacking shed. These plus his use of chemical litter treatments should be sufficient to control odors.

On August 4, 1999, the Judge filed his judgement in the case. The Judge found that the petitioners had failed to meet the standard of a preponderance of evidence on the two issues that formed the basis of their appeal:

1. "Whether the permit was properly issued pursuant to the applicable statutory and regulatory laws.
2. "Whether Respondent's construction and utilization of the broiler houses would negatively affect the surrounding community by creating nuisances from flies, dust, and odor detrimental to the health of the residents."

The Judge found that the permit did conform to laws and regulations, it contains restrictions that should prevent nuisances and that, in the case of nuisances, the Petitioners have recourse through DHEC or the courts.

On January 13, 2000, the farmer was informed by letter that the Judge's ruling had not been appealed by the Petitioners. Thus, the judge's decision became the final decision on the case and the farmer was free to begin construction of the broiler facility.

Under the new regulations, the permit was approved in three months. The appeal was filed 15 days later on January 8, 1999. A hearing was held five months later. The appeal was denied after an additional two months. After five more months, the farmer was allowed to begin construction. Sixteen months had elapsed since the first site inspection.