

IN THE DISTRICT COURT OF DELAWARE COUNTY
STATE OF OKLAHOMA

FILED

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CAROLINE M. WEAVER
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Spring Creek Coalition)
)
Petitioner,)
)
v.)
)
The Oklahoma Department of Agriculture,)
Food & Forestry,)
An Agency of the State of Oklahoma,)
)
Respondent,)
)
And)
)
Michael Phan,)
)
Chau Tran & Donna Nguyen,)
)
Tong Nguyen,)
)
Ming Ngo,)
)
Loan Vo, and)
)
Tran & Tran LLC,)
)
Interested Parties.)

Case No. CJ-2021-33

Hon. Judge Barry Denney

PETITIONER'S MOTION FOR SUMMARY ADJUDICATION

Dated: August 4, 2022

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PETITIONER'S MOTION FOR SUMMARY ADJUDICATION

COMES Now Petitioner, Spring Creek Coalition (“SCC”) and, pursuant to Rule 13, respectfully moves this Court for Summary Judgment against the Oklahoma Department of Agriculture, Food, & Forestry (“ODAFF”). As addressed herein, before ODAFF authorizes commercial poultry operations, the agency: **1) must undertake a meaningful environmental review** of the facility including its potential impact upon the surround air, soil, and water and; **2) must allow for meaningful public participation** in such process. Because ODAFF has failed to do so, its relevant poultry approvals must be invalidated.

PREAMBLE

This litigation was brought by a group of citizens who saw their homes, communities, properties – indeed, their lives – being flooded with industrial chicken complexes and who have been deprived any opportunity to address these concerns. Sadly, *both* the Oklahoma Water Resources Board (“OWRB”) and ODAFF, the two state environmental agencies with the most skin in the game, have disclaimed jurisdiction upon the salient issues and have enabled the chicken houses’ operations without providing the impacted community requisite notice nor allowing an opportunity to be heard. Importantly, neither the OWRB nor ODAFF has conducted a meaningful environmental review over the chicken facilities – despite the public’s demands and concerns.

This Court has seen the failings of the OWRB in authorizing water use within individual chicken house operations. See Delaware Co. Case Nos. CJ-2019-36, *Cochran v. OWRB*; CV-2020-40, *Bullett v. OWRB*; and CV-2020-39 *Cochran v. OWRB*.¹ As the *Cochran* case demonstrates, in issuing water permits to Simmons’ 300,000-bird facilities in the Saline Creek

¹ Undersigned represents Petitioners in all three referenced matters, in addition to Spring Creek Coalition herein.

watershed, the OWRB did not consider pollution, surface water quality, or ground water quality; and the OWRB did not consider the health of residents nearby, nor did the OWRB consult with any other agency. Instead, the OWRB represented such concerns were solely within the administrative purview of ODAFF. See February 19, 2020 Order in Case No. CJ-2019-36, attached as Ex. No. 1 ¶67.²

Similar to Ms. Cochran, SCC members are concerned about chicken facilities near their properties and in their watershed (Spring Creek) and – just like Ms. Cochran – were never provided notice prior to ODAFF authorizing these facilities, ODAFF has refused to consider SCC’s protests, and ODAFF continues to authorize these facilities’ ongoing operations despite the expressed concerns. Doing so, ODAFF violates SCC members’ Due Process rights and subverts relevant law and authority. Through semantics and strained interpretations, ODAFF asserts it lacks jurisdiction to consider SCC’s concerns and that SCC’s water-quality concerns are solely within the jurisdiction of the OWRB. This Court’s involvement is needed to vindicate the Due Process rights of SCC members and to redirect ODAFF to its legal obligations. ODAFF has jurisdiction to administer the relief SCC requests and, quite simply, it has the duty to do so. Summary judgment is appropriate as there are no material facts reasonably in dispute but, rather, there exist only questions of legal application.

MATERIAL FACTS NOT REASONABLY IN DISPUTE

1. ODAFF is a state environmental agency charged with regulatory jurisdiction over commercial poultry operations within the state. ODAFF Answer, ¶2 (admitting ¶3 of SCC Petition).

² The Court’s Feb. 19, 2020 Findings of Fact and Conclusions of Law in *Cochran* were adopted and incorporated in the Court’s April 12, 2022 Entry of Judgment, attached as Ex. No. 2.

2. Commercial poultry facilities must receive approval from ODAFF before their construction or operation. ODAFF Answer, ¶5 (admitting ¶15 of SCC Petition).

3. Specific to this litigation, every year since 2017, ODAFF has authorized the following concentrated commercial poultry operations within the Spring Creek watershed: PFO³ 1929, PFO 1940, PFO 1944, PFO 1958, PFO 1959, PFO 1961, PFO 1964, and PFO 1968. ODAFF Answer, ¶5 (admitting ¶¶18-25 of SCC Petition). These facilities, together, are referred to as the “8 Facilities”.

4. ODAFF authorized the 8 Facilities’ construction and operation without any notice to SCC or its members. ODAFF Answer, ¶5 (admitting ¶¶ 16 & 18-25 of SCC Petition).

5. Each of the 8 Facilities is authorized by ODAFF to house at least 300,000 birds. ODAFF Answer, ¶5 (admitting ¶26 of SCC Petition).

6. ODAFF has authorized each of the 8 Facilities’ operation without understanding how, or what, the facility would exhaust into the surrounding air nor with any understanding of who or what might be impacted by such actions. ODAFF Answer, ¶5 (admitting ¶32 of SCC Petition).

7. In authorizing each of the 8 Facilities’ operation, ODAFF had no information as to whether (or not) the facility would be emitting hazardous air pollutants, including bacteria and viruses. ODAFF Answer, ¶5 (admitting ¶33 of SCC Petition).

8. In authorizing each of the 8 Facilities’ operation, ODAFF made no inquiry into, took no consideration of, and had no knowledge as to how much water would be utilized within

³ “PFO” refers to and means “Poultry Feeding Operation.” ODAFF assigns each facility a unique identification number (*i.e.* 1929, 1940, 1944, 1958, 1959, 1961, 1964, and 1968).

the facility, nor how the water would be used, nor what would happen to the water after use. ODAFF Answer, ¶5 (admitting ¶34 of SCC Petition).

9. In authorizing each of the 8 Facilities' operations, ODAFF lacked any evidence to suggest that the facility would not cause pollution, environmental degradation, or a public health hazard. ODAFF Answer, ¶8 (admitting ¶35 of SCC Petition).

10. In relation to the 8 Facilities, within SCC membership there are individuals who: own property or reside near the 8 Facilities; and/or own property, fish, swim, and recreate on Spring Creek downstream from the 8 Facilities. *See* SCC's 2020 Protest Letters regarding the 8 Facilities, attached as Ex. Nos. 3-11.

11. SCC members were alarmed by the rapid expansion of the poultry industry in the area and concerned about the adverse effects of concentrated poultry facilities, including the 8 Facilities, upon the area and its people. These concerns include: health effects upon surrounding residents due to harmful exhaust emissions into the ambient air, including putrid smells; contamination of the surrounding surface waters and groundwaters, including polluting nearby wells; pollution emanating from the poultry houses entering Spring Creek and damaging fishing, swimming, boating, recreational, and aesthetic opportunities and ecological integrity; and damaging of surrounding property values due to the annoyance, endangerment, and risks associated with the commercial poultry operations. ODAFF Answer, ¶5 (admitting ¶ 39 of SCC Petition); *see* Ex. Nos. 3-11.

12. SCC member concerns were focused upon the chicken facilities themselves, including the 8 Facilities, but SCC member concerns also include handling of waste generated at the facilities – including waste handling which may occur away from the facilities. Ex. Nos. 3-11.

13. Given these concerns, in 2020, on behalf of its members, SCC filed with ODAFF a protest towards each of the 8 Facilities. ODAFF Answer, ¶5 (admitting ¶39 of SCC Petition); 2020 Protest Letters, Ex. Nos. 3-11.

14. Because ODAFF's authorizations for each of the 8 Facilities are good for only one year, SCC's protest letters requested ODAFF not issue new authorizations to any of the 8 Facilities until SCC members were provided an opportunity to present their concerns to the agency and until and unless the agency determines the facility will not cause public health or environmental harms. *See* T. Gunter June 18, 2021 Depo. Trans. (herein "2021 Depo. Trans."), attached as Ex. No. 12, 164:8-16; 2020 Protest Letters, Ex. Nos. 3-11.

15. ODAFF never responded to SCC's protest letters but, rather, simply set them aside without acting upon. 2021 Depo. Trans., Ex. No. 12, 165:2-12.

16. Despite SCC's protests, ODAFF issued the 8 Facilities new authorizations which were functionally identical to the previous years' authorizations – all without notice or opportunity to be heard, even after receiving SCC's protest letters. ODAFF Answer, ¶12 (admitting ¶51 of SCC Petition) & ¶11 (admitting ¶¶ 52, 53 of SCC Petition).

APPLICABLE LEGAL STANDARD

Summary judgment is a procedural tool, used to reach a final judgment where there is no dispute as to any material facts. *Hargrave v. Canadian Valley Elec. Coop., Inc.*, 1990 OK 43 ¶14, 792 P.2d 50, 55. The same standards for summary judgment are applicable to summary disposition of issues. *See* District Court Rule 13; *State ex rel. Fent v. State ex rel. Okla. Water Res. Bd.*, 2003 OK 29, ¶¶13-14, n. 31, 66 P.3d 432, 439, n.31; *Reams v. Tulsa Cable Television, Inc.*, 1979 OK 17, 604 P.2d 373. Rule 13 provides for summary disposition of issues if the trial court "finds that there is no substantial controversy as to certain facts or issues." *See* Rule 13(e). Summary

adjudication should be granted when there is no substantial controversy as to any material facts when those undisputed facts would lead reasonable minds to a single conclusion that would entitle the moving party to judgment as a matter of law. *Testerman v. First Family Life Ins. Co.*, 1990 OK CIV APP 108, ¶13, 808 P.2d 703, 706; *Kelly v. City of Tulsa*, 1990 OK CIV APP 30, ¶9 791 P.2d 826, 828.

After a moving party has met its burden of showing there is no substantial controversy as to any material fact, the opposing party must show, by materials included with the response, that there is a material fact remaining in dispute. *Seitsinger v. Dockum Pontiac Inc.*, 1995 OK 29, ¶7, 894 P.2d 1077, 1079. Mere contentions that facts exist or might exist are not sufficient to create a substantial controversy of material facts. *Mengel v. Rosen*, 1987 OK 23, ¶9, 735 P.2d 560, 562-563. An assertion in a pleading, repeated in an affidavit unsupported by any proof is not sufficient to require the credibility of the opposing party's evidence to be determined at trial. *Weeks v. Wedgewood Village, Inc.*, 1976 OK 72, ¶12, 554 P.2d 780, 784. All material facts which are properly supported by evidentiary materials and which are not disputed by evidentiary materials stand admitted. *Spirgis v. Circle K Stores, Inc.*, 1987 OK CIV APP 45, ¶10, 743 P.2d 682, 684.

OVERVIEW OF RELEVANT MATTERS

I. Spring Creek Coalition

Spring Creek Coalition is a citizens group, existing since the 1990s:

- (a) To preserve, protect, and restore the quality of water and the natural beauty of the adjacent lands of Spring Creek and all of its tributaries within the boundaries of the watershed.
- (b) [. . .] to maintain[] the highest water quality standards and the pristine beauty of Spring Creek, its tributary streams, and the Fort Gibson reservoir.
- (c) To prevent, eliminate, and correct the pollution of Spring Creek, its subsidiary streams, and the Fort Gibson reservoir.

(d) To protect and preserve the environment and the ecosystems of Spring Creek and its tributaries from despoliation, destruction, and waste, and to restore said environment and ecosystem.

(e) To preserve, protect, promote, secure, and enhance the scenic, historic, aesthetic, educational, recreational, and scientific benefits of Spring Creek, its tributaries, and downstream lakes and reservoirs.

Certificate of Incorporation, filed January 20, 1995, §4.2, attached as Ex. No. 13. “It is the mission of Spring Creek Coalition to unite as citizens and actively engage in the preservation of the Spring Creek Watershed.” Amended and Restated Bylaws, attached as Ex. No. 14.

II. Recent Poultry Expansion in Northeast Oklahoma

Beginning around 2017-2018, Northeast Oklahoma experienced “a surge of poultry house construction.” *See Northwest Arkansas Poultry Farmers Take Root in Oklahoma*, Northwest Arkansas Democrat Gazette, September 2, 2018, attached as Ex. No. 15. By September of 2018, dozens of farms – consisting of 160 chicken houses – were underway “to supply Arkansas-based chicken producer Simmons Foods,” which was opening a new \$300 million chicken processing facility south of Decatur, just ten miles from the Oklahoma border. *Id.*; *see also \$300 Million Simmons Foods Plant Takes Shape South of Decatur*, March 31, 2019, attached as Ex. No. 16. The public expressed concern over this rapid expansion of concentrated poultry operations and the potential ramifications. *See Poultry Industry’s Rapid Expansion in Northeast Oklahoma Ruffling Feathers Among Angry Neighbors*, September 27, 2018, attached as Ex. No. 17 (“residents in the concentrated area have started to file complaints about related odors and have voiced concerns about possible water quality impacts”). Community members were particularly frustrated that the first they learned of these chicken houses was when they saw construction start on the facilities or when they received notice from the OWRB that a poultry facility was seeking a water use permit – such notice arriving *after* the chicken house had been authorized by ODAFF. *See e.g.* Ex. Nos.

3-11 Protest Letters (SCC explaining it has “seen massive poultry operations constructed [. . .] without any notice provided by, or on behalf of, ODAFF or the individual [poultry] operators”).⁴

ODAFF fielded much of the community’s frustration and recognized that one of the chief concerns in the area was the impact the chicken houses would have on surrounding water resources. *See* Ex. No. 17. However, ODAFF responded to the public concern by stating that its jurisdiction is aimed at “prevent[ing] runoff of poultry litter from land application” and it has very limited authority over the chicken houses themselves. *See Advocates are Concerned About Air Quality Near Poultry Farms. Researchers are Studying It*, December 3, 2020, Ex. No. 18. General Counsel for ODAFF stated that the agency had no authority to deal with air contaminants created by the chicken barns and lacked jurisdiction to address any public health risks arising from such air pollution. *Id.*

At the same time ODAFF was declining to act on the public’s pollution and water quality concerns based upon a purported lack of jurisdiction, pollution and water quality concerns which were lodged with the OWRB went similarly unaddressed based upon a purported (and parallel) lack of jurisdiction by *that* agency as well. Specifically, the OWRB stated it was not responsible for pollution issues but, rather, chicken barns “are subject to pollution determinations by [ODAFF], as poultry operations are squarely within their jurisdiction.” *See* OWRB Final Order re: Permit No. 2017-583, p. 4, ¶10, attached as Ex. No. 19.⁵ The OWRB concluded that “operation

⁴ This same general fact pattern was on display within the *Cochran* litigation. *See* Feb. 19, 2020 Order in Case No. CJ02019-36, Ex. No. 1 ¶16 (Court finding “Plaintiffs received no notice regarding Tran & Nguyen’s poultry CAFO before construction on it began” but “did receive notice of Tran & Nguyen’s long-term [water] Permit Application with the OWRB.”).

⁵ In granting a water permit, the OWRB expressly declined to make any determination as to whether a particular chicken barn was causing pollution. Ex. No. 19, p. 5, ¶18. The OWRB further stated that any protestant alleging a chicken farm is causing waste by pollution must request “relief from the agency with environmental authority in that area.” *Id.*, p. 5, fn 11.

of concentrated poultry farming [is] an activity which is within the jurisdictional responsibility of [ODAFF] thus, [OWRB] is without jurisdiction to determine whether pollution via poultry farming waste” will occur. *Id.* p. 7, ¶27. More specifically, OWRB advised that a chicken farm’s “use of groundwater falls clearly within the jurisdiction of ODAFF” such that the OWRB is precluded from making a determination of waste by pollution. *See* OWRB’s Nov. 24, 2020 Response Brief in Delaware Co. Case No. CV-2020-39, attached as Ex. No. 20, p. 7. OWRB attempted to justify its inaction by pointing to ODAFF: “All [water] applications undergo a review to prevent waste by pollution, even if that review does not occur at the [OWRB].” *Id.* p. 9. According to the OWRB and in relation to industrial chicken barns, “pollution is regulated by another state agency” – and that agency is not the OWRB. *Id.*

While the OWRB asserts that ODAFF has sole jurisdiction to address water quality and pollution issues, ODAFF asserts the opposite – that it is the OWRB which has such jurisdiction. Despite this game of finger-pointing between agencies, the agencies agree that they did not confer with one another on these issues. Instead, these environmental agencies have allowed these critical issues to go unaddressed and fall through the cracks. In regard to this litigation, the OWRB and ODAFF have not – independently or together – addressed if or how the 8 Facilities within the Spring Creek watershed will adversely impact the surrounding areas; deplete surrounding water resources; lead to degradation of water quality within Spring Creek; or create public health risks.

III. Nature of Spring Creek Coalition’s Concerns

Spring Creek Coalition members were attuned to – some even involved in – the discontent regarding the surge in concentrated poultry operations associated with Simmons’ Decatur expansion. In particular, SCC was concerned how the expansion within the Spring Creek watershed – by and through the 8 Facilities – might adversely impact Spring Creek and its

surroundings and with what – if anything – the State was doing to protect its natural resources (and the community’s reliance upon them) from despoliation. *See* Ex. Nos. 3-11. Given the underlying geology, if Spring Creek is to be protected, it requires management of the watershed. *See Ecology of Spring Creek, A Large Ozark Creek in Oklahoma*, Nov. 15, 1988, Oklahoma Water Resources Board (herein “1988 OWRB Report”), attached as Ex. No. 21. Quite simply, what happens with the 8 Facilities stands to adversely impact the interests of SCC members.

a. Groundwater

The Boone groundwater aquifer covers more than 3,000 square miles in northeastern Oklahoma and underlies all of Delaware County. *Hydrogeological Investigation Report of the Boone Groundwater Basin, Northeastern Oklahoma*, Noel I. Osborn, Oklahoma Water Resources Board, attached as Ex. No. 22, p. 1. The Boone serves as a domestic water source for more than 1,000 homes in addition to providing the baseflow to streams, rivers, and springs in the area including Spring Creek. *Id.* pp. 1, 9. “[T]he Boone aquifer is considered a karst aquifer [with] Karst features, such as caves, sinkholes, disappearing streams, and springs . . . These features provide direct conduits for precipitation and runoff to transport contaminants to the water table, making the aquifer **highly vulnerable to contamination** from surface sources. Other characteristics common to karst aquifers are the rapid [. . .] groundwater flow rate.” *Id.* p. 8 (emphasis added). “[T]he groundwater quality of the Boone aquifer is susceptible to surface contamination and is being affected by increased concentrations of nitrate and the presence of pesticides. Elevated concentrations of nitrate in the groundwater of the Boone aquifer are widespread, particularly in areas where land use is predominantly agricultural.” *Id.* p. 13. Given these particular attributes, the OWRB has designated the Boone’s vulnerability to contamination to be “high.” *See* 785 OAC 45-7-3(c); 785 OAC 45 Appendix D. The Boone’s high vulnerability

not only impacts people immediately near a particular source of contamination but, given the highly fractured karst formation, such contamination is subject to the Boone's rapid groundwater flow rate, quickly dispersing contaminants to surrounding groundwater wells and discharging into surface waters. *See* Ex. No. 22, p. 8-9.

Many SCC members have groundwater wells which could be adversely impacted as a result of the 8 Facilities' operations. *See* 2020 Protest Letters Ex. Nos. 3-11. Reliance upon groundwater from the Boone to meet domestic needs is not without basis but, rather, is a part of a landowner's "bundle of sticks" and is a protected property right. *See* 60 O.S. § 60; *DuLaney v. Okla. State Dep't of Health*, 1993 OK 113, ¶ 18, 868 P.2d 676 ("Water rights are property which are an important part of the landowners' 'bundle of sticks'. . . No commodity affects and concerns the citizens of Oklahoma more than fresh groundwater."). Further, the State's own science shows that degradation of the aquifer can readily lead to surface water quality issues in Spring Creek because these groundwaters provide the creek's baseflow. *See* 1988 OWRB Report, Ex. No. 21, p. 13 ("the creek is fed by springs and groundwater"). Accordingly, SCC members have protected interests in seeing that the aquifer is not contaminated from improvident concentrated poultry farming.

b. Surface water

SCC membership includes individuals who own real property through which Spring Creek flows. Undisputed Material Fact Nos. 10, 11; 2020 Protest Letters, Ex. Nos. 3-11. Additionally, SCC members include persons who recreate on and in Spring Creek through swimming, fishing, and paddling. *Id.* Such uses of the Creek are dependent upon the nature and state of the Creek. For instance, SCC members cannot swim in a creek that does not have water. Equally important, SCC members cannot safely swim in a creek which is polluted.

For decades, Spring Creek has been recognized as a “relatively-pristine, very-lightly-impacted Ozark creek” and it has been designated by the State of Oklahoma as a “High Quality Water” in light of these particular attributes. *See* 1988 OWRB Report, Ex. No. 21, p. 2. This not only provides tremendous value to Spring Creek for Spring Creek’s sake but, importantly, it affords researchers and scientists “an opportunity to investigate life histories of species and composition, structure, and ecology of a fish community that are not modified or impaired by anthropogenic impact” – unlike most of the other Ozark streams in the area which have been altered from their natural state. *Id.* The State’s “antidegradation policy” applies to High Quality Waters expressly:

It is recognized that certain waters of the state possess existing water quality which exceeds those levels necessary to support propagation of fishes, shellfishes, wildlife, and recreation in and on the water. These high quality waters shall be maintained and protected.

785 Okla. Admin. Code 45-3-2(b). This helps effectuate the State’s policy that “Waters of the state constitute a valuable resource and shall be protected, maintained and improved for the benefit of all the citizens” and shall be protected against degradation. 785 Okla. Admin. Code 45-3-1.

In addition to protecting the water itself, Oklahoma also protects the uses of such water from degradation. *See* 785 Okla. Admin. Code 45-3-2(d) (“No water quality degradation which will interfere with the attainment or maintenance of an existing or designated beneficial use shall be allowed.”). Oklahoma has recognized certain “beneficial uses” of surface waters: Fish & Wildlife Propagation; Aesthetics; Agriculture; Primary Body Contact Recreation; Public & Private Water Supply; and Fish Consumption. *See* OWRB Spring Creek Beneficial Use Report, attached as Ex. No. 23. Spring Creek’s “relatively-pristine” status has allowed it to be one of the very few water bodies in Oklahoma with healthy enough water to support all of these beneficial uses and SCC members are engaged in each of the recognized Beneficial Uses. *See* 1988 OWRB Report,

Ex. No. 21, p. 2. Simply stated, SCC members' ability to use the Creek is directly dependent upon the ecological health of the Creek and its associated water quality.

However, Spring Creek is not what it once was – nor is Spring Creek what it should be. Recently, Spring Creek's water quality has been degraded such that the Creek does not support all the beneficial uses that it previously did. The State of Oklahoma knows this. Indeed, Oklahoma's most recent data shows that Spring Creek does not support "Primary Body Contact Recreation" (swimming) due to bacteria pollution. *See*, Ex. No. 23. Specifically, Spring Creek is suffering from elevated enterococcus counts. *Id.* (denoting that enterococcus sampling "Mean>OWQS," signifying that it exceeds Oklahoma Water Quality Standards). A brief read of the U.S. EPA's summary of enterococcus, attached as Ex. No. 24, explains why a person should be concerned about elevated levels in any surface water body:

Enterococci are bacteria that live in the intestinal tracts of warm-blooded animals, including humans, and therefore indicate possible contamination of streams and rivers by fecal waste. Sources of fecal indicator bacteria such as enterococci include wastewater treatment plant effluent, leaking septic systems, stormwater runoff, sewage discharged or dumped from recreational boats, domestic animal and wildlife waste, improper land application of manure or sewage, and runoff from manure storage areas, pastures, rangelands, and feedlots.

Id. The EPA notes it is important to evaluate enterococcus because they "are indicators of the presence of fecal material in water and, therefore, of the possible presence of disease-causing bacteria, viruses, and protozoa [which] can sicken swimmers and others who use rivers and streams for recreation." *Id.* Further, "eating fish or shellfish harvested from waters with fecal contamination can also result in human illness." *Id.* "Significant amounts of enterococci in a water body can negatively affect the recreational and economic value of the aquatic resource" and lead to its closure. *Id.*

However, enterococcus and Primary Body Contact are not the only concerns regarding Spring Creek. In 2020, Oklahoma reported that Spring Creek's water quality failed to support the

Cool Water Aquatic Community. *See* 2020 Comprehensive Waterbody Assessment, Appendix B, Ex. No. 25 (excerpted, p. 20). Both Primary Body Contact and Cool Water Aquatic Community are recognized “Beneficial Uses” of Spring Creek that should be protected by the State of Oklahoma and, further, are both “Beneficial Uses” made by members of the Coalition. Undisputed Material Fact Nos. 10, 11; Ex. Nos. 3-11. The exhibited degradation inhibits Coalition members from making use of the creek as they have in the past and they have suffered as a result.

c. Health and Property Concerns

SCC members reside, work, and own property within the Spring Creek watershed – some of whom are nearby to any of the 8 Facilities. Undisputed Material Fact Nos. 10, 11; Ex. Nos. 3-11. These individuals have the right to the peaceable use and enjoyment of their property and to be free from unreasonable intrusions or noxious odors. Quite simply, Coalition members should have their air, soil, and water (and their uses thereof) protected from despoliation.

ARGUMENTS AND AUTHORITIES

I. Oklahoma’s Regulatory Oversight of Agriculture, Including Poultry

Pursuant to the Oklahoma Constitution, the Board of Agriculture has “jurisdiction over all matters affecting animal industry. . . .” *See* Okla. Const. Art VI, §31. Statutes provide that the Board of Agriculture has “jurisdiction over all matters affecting agriculture as contained and set out in the Oklahoma Agricultural Code, which have not been expressly delegated to another state or federal agency. . . .” 2 O.S. §2-4(A)(16). In form and practice, the Board of Agriculture governs ODAFF. *See* State Board of Agriculture website, attached hereto as Ex. No. 26; *see also* 2 O.S. §1-2 (the “Department of Agriculture shall consist of the State Board of Agriculture”). The Board of Agriculture is empowered to perform any necessary services for ODAFF. *See* 2 O.S. §2-4.

ODAFF is one of Oklahoma's six (6) "state environmental agencies." *See* 27A O.S. §§ 1-1-201(12), 1-3-101. As a state environmental agency, ODAFF has certain "jurisdictional areas of responsibility" which are "in addition to those otherwise provided by law". 27A O.S. §1-3-101. ODAFF is also designated as one of the State's six (6) "groundwater protection agencies." 27A O.S. §1-1-201(5). By designating ODAFF as a state environmental agency and as a groundwater protection agency, the Legislature did nothing to limit the Board's jurisdiction over "all matters affecting animal industry," Okla. Const. Art. VI, §31; *see also* 2 O.S. §2-4(A)(7) (Board has "jurisdiction over all matters affecting animal industry"). Quite simply, if it involves agriculture in Oklahoma, ODAFF and its Board are responsible. *See* T. Gunter Aug. 27, 2008 Depo. Trans. (herein "2008 Depo. Trans."), attached as Ex. No. 27, 66:23-24.

With respect to concentrated poultry houses, ODAFF is responsible to protect against "emission of pollutants into the air, soil, and water and ensure that commercial poultry operations do not cause pollution." *See* ODAFF's Answer, ¶14 (admitting paragraph 60 of SCC's Petition); *see also* Ex. No. 28 (ODAFF's website stating that "The Agricultural Environmental Management Services (AEMS) Division is dedicated to working with producers and concerned citizens in protecting the state's soils, air and waters from animal waste."). Likewise, "ODAFF is obligated to ensure that commercial poultry operations do not cause degradation – or impairment – of existing uses of waters of the State and the United States." *See* ODAFF's Answer, ¶14 (admitting ¶61 of SCC's Petition). Further, "ODAFF is responsible to ensure that commercial poultry operations do not lead to a public health hazard." *See* ODAFF's Answer, ¶14 (admitting ¶62 of SCC's Petition).

However, in response to public concerns about the Simmons-related poultry expansion – out of apparent administrative convenience – ODAFF attempts to hamstring itself by asserting that

it lacks jurisdiction to address public concern on the substantive issues. Teena Gunter, former General Counsel for ODAFF and current Director of AEMS, stated “virtually everything in [the] law is aimed toward the litter application,” rather than addressing operation of the barns and “the only requirements for opening a poultry feeding operation is submitting an application to [ODAFF] with basic information about the operation and paying a \$10 application fee.”⁶ *See State Regulations have not Kept up with Poultry Industry, Lawmakers Told*, August 13, 2020, Ex. No. 29. ODAFF’s then-Secretary Jim Reese offered similar remarks to justify ODAFF’s lack of substantive action on the poultry expansion, stating “Current law is simply a registration process. It is not a permitting process. It essentially only requires a location, a Nutrient Management Plan, and a storm water construction runoff plan.” *See Emergency Rules on Poultry Operations not Approved by Department of Agriculture*, December 11, 2018, Ex. No. 30.

The “law” which Ms. Gunter and Mr. Reese were referencing is the Oklahoma Registered Poultry Feeding Operations Act, 2 O.S. §§10-9 *et seq.* ODAFF has promulgated attendant rules for PFOs, found at 35 Okla. Admin. Code 17-5-1 *et seq.* Through strained and capricious interpretations, ODAFF utilizes the “Poultry Feeding Operation” moniker to avoid the agency’s constitutional and environmental responsibilities and – perversely – limits itself to receiving a \$10 annual fee from each chicken farm and requiring only “basic” information from the grower. And, importantly, by utilizing the “PFO” label, ODAFF prevents public involvement. SCC would agree that the Registered Poultry Feeding Operations Act requires little apart from these administrative steps. However, ODAFF’s responsibilities stretch well beyond these clerical tasks.

II. ODAFF’s Environmental Jurisdiction and Responsibilities

⁶ An exemplar application – this one from PFO 1929 – is attached as Ex. No. 31.

In prior litigation, Ms. Gunter stated that ODAFF's "environmental jurisdiction is outlined in Title 27A" of the Oklahoma Statutes. 2008 Depo. Trans., Ex. No. 27, 65:24-66:4. It is Title 27A which designates ODAFF as a state environmental agency and a groundwater protection agency, discussed above. Title 27A outlines ODAFF's express environmental responsibilities to include "point source discharges and nonpoint source runoff" from agricultural activities, "groundwater protection" for activities within ODAFF's jurisdiction, and "utilization and enforcement of Oklahoma Water Quality Standards." 27A O.S. §1-3-101(D)(1); *see* also 27A O.S. §1-1-202(A)(2). Title 27A obligates ODAFF to effectuate Oklahoma's anti-degradation water policy. 27A O.S. §1-1-202(B)(3). This policy is in place to ensure:

- (1) maintenance of water quality where beneficial [water] uses are supported,
- (2) removal of threats to water quality where beneficial [water] uses are in danger of not being supported, and
- (3) restoration of water quality where beneficial [water] uses are not being supported.

27A O.S. §1-1-202(B)(3)(a). Title 27A requires ODAFF to "cooperate" with other state and federal environmental entities to protect "the environment and natural resources of this state." 27A O.S. §1-1-202(5). Moreover, Title 27A obligates ODAFF to implement a complaint investigation process by which ODAFF or any other state environmental agency with authority responds to complaints which are lodged with ODAFF. 27A O.S. §1-1-204(A).

Importantly, as one of the State's environmental agencies, ODAFF is required to implement the State's anti-pollution policy towards water for activities within the agency's jurisdiction. This provides that:

pollution of the waters of this state constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and aquatic life, and impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of water, and whereas the problem of water pollution of this state is closely related to the problem of water pollution in adjoining states, it is hereby declared to be the public policy of this state to conserve the waters of the state and

to protect, maintain and improve the quality thereof for public water supplies, for the propagation of wildlife, fish and aquatic life and for domestic, agricultural, industrial, recreational and other legitimate beneficial uses; to provide that no waste or pollutant be discharged into any waters of the state or otherwise placed in a location likely to affect such waters without first being given the degree of treatment or taking such other measures as necessary to protect the legitimate beneficial uses of such waters; to provide for the prevention, abatement and control of new or existing water pollution; and to cooperate with other agencies of this state, agencies of other states and the federal government in carrying out these objectives.

27A O.S. §2-6-102.⁷ Accordingly, ODAFF is obligated to see that water is “conserve[d]” and not polluted. *See id.* These responsibilities are not exclusive to ODAFF but, rather, are shared amongst the State’s other agencies as well – each obligated to cooperate with the others to effectuate this policy. *Id.*

ODAFF’s environmental jurisdiction (prescribed in Title 27A) is not constricted by Oklahoma’s Agricultural Code (found in Oklahoma Statutes Title 2) but, rather, it is further refined and articulated, providing, *inter alia*, that it is

unlawful and a violation of the Oklahoma Agricultural Code for any person to cause pollution of any air, land or waters of the state by persons which are subject to the jurisdiction of the Oklahoma Department of Agriculture, Food, and Forestry pursuant to the Oklahoma Environmental Quality Act.

2 O.S. §2-18.1(A). ODAFF is required to enforce against pollution “of the air, land, or waters of the state” subject to its jurisdiction. 2 O.S. §2-18.1(B).

As it was obligated to do, *see* 27A O.S. §§1-3-101(D)(1), §1-1-202(A)(2), ODAFF has promulgated rules regarding its Water Quality Standards Implementation Plan. 35 Okla. Admin. Code 45-1-1. As part of this, ODAFF’s “programs affecting water quality” include:

(1) The Agricultural Environmental Management Services (AEMS) Division of ODAFF is responsible for the review of applications for animal feeding operations

⁷ *See also* 27A O.S. §2-6-105(A) (“It shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state.”).

that meet size and type requirements. The division also investigates complaints received by the Department regarding animal waste issues that could affect water quality.

(2) In December 2012, The EPA authorized ODAFF to perform NPDES permitting pursuant to the CWA. ODAFF reviews NOIs for authorizations pursuant to a general permit and reviews applications for individual permits. AgPDES activities include CAFOs, pesticides, silviculture, and storm water at agricultural facilities.

(3) The animal waste program, pesticide program, fertilizer program, and forestry management program can affect groundwater and surface water beneficial uses if facilities are not designed and operated properly. The application process is targeted at removing the possible threat of pollution to the waters of the State by not allowing any discharge to surface water, except in limited circumstances, by promoting recycle and beneficial reuse of wastewater, by not permitting any hydrologic connection between waste storage facility and groundwater, by preparing or reviewing animal waste management plans, nutrient management plans, or equivalent documents, emphasizing best management practices and conservation measures, and by routine inspections of regulated CAFOs, LMFOs, and poultry feeding operations.

35 Okla. Admin. Code 45-1-7(c). As discussed below, *each* of these “programs affecting water quality” are implicated with the 8 Facilities.

III. ODAFF’s Actions Pertaining to the 8 Facilities

Ms. Gunter, now serving as Director of ODAFF’s AEMS Division after previously serving as General Counsel, sat for a deposition in this litigation and recounted how ODAFF considers and approves concentrated poultry houses such as the 8 Facilities. According to Ms. Gunter, ODAFF does not consider where the farmer gets water because “that’s not required by [ODAFF’s] statute. That’s a separate process available through the [OWRB].” 2021 Depo. Trans, Ex. No. 12, 22:17-22; *id.* 22:25-23:3 (solely in the OWRB’s jurisdiction). The farmer does not need to apprise ODAFF how much water will be used because “it’s not part of [ODAFF’s] statutory requirements.” *Id.* 23:4-7. Likewise, the farmer does not need to inform ODAFF how he will use the water because “it’s not part of [ODAFF’s] statutory requirements.” *Id.* 23:8-10. Ms. Gunter clarified the agency’s position: the use of water is not within ODAFF’s jurisdiction and is not considered by ODAFF as part of its review and approval of concentrated poultry operations. *Id.*

23:24-24:4. Even so, ODAFF recognizes that water use is implicit in poultry operations – both the farmer and the birds need water. *Id.* 25:22-25. ODAFF does not consult with the OWRB prior to approval of chicken houses, *id.* 27:8-17, nor does ODAFF make any determinations pertaining to the “waste” of water as that term is defined by statute, *id.* 24:18-20. Moreover, farmers do not need to tell ODAFF how they will keep the birds cool in the summer, *id.* 35:2-4, despite industry often using water misters and evaporative coolers for temperature control even though using water “for air conditioning or cooling purposes without providing facilities to aerate and reuse such water” is prohibited by statute as “waste,” *see* 82 O.S. §1020.15(A)(9).

Upon successful application for a Poultry Feeding Operation, ODAFF issues a “permanent approval of the facility.” 2021 Depo. Trans. Ex. No. 12, 51:14-19. The approval, though, is good for only one calendar year and the operator must “renew every year” yet “it is intended that the facility will have a lifetime longer than a year.” *Id.* 52:1-11. For the subsequent year(s), ODAFF does not issue a new authorization but, instead, issues a renewal of the authorization already in place. *Id.* 52:20-23. In Ms. Gunter’s view, barring some major issue at the facility, if a farmer submits a technically complete and correct application, ODAFF does not have discretion to *not* issue the renewal or registration. *Id.* 59:2-60:2.

Regarding PFOs, ODAFF’s “primary concern is the land application [of waste] because that’s where there’s data that it shows that [pollution] can happen from these facilities and can result in water quality issues.” *Id.* 54:4-8; *id.* 56:10-12 (ODAFF looks “to regulate the land application [of waste] from poultry facilities”). ODAFF does not go into barns on inspections to see how the farm is operating because, according to Ms. Gunter, that is not ODAFF’s jurisdiction, *id.* 56:17-25, rather, “the law was very specifically written to protect waters of the state from potential runoff from poultry waste” associated with land application of waste, *id.* 57:3-5.

Ms. Gunter believes ODAFF has no jurisdiction relating to air pollution from concentrated poultry operations. *Id.* 115:8-19, 157:3-4 (ODAFF has no “air quality authority”), 160:2-6 (no jurisdiction regarding particulate matter emissions), 160:2-6 (“statute” does not allow ODAFF to act in regard to air emissions or viruses released to the atmosphere). If data were to show a poultry operation was creating a public health risk, Ms. Gunter believes the legislature would have to act to give ODAFF authority to address it, *id.* 156:1-3, because ODAFF currently lacks authority to deal with air contaminants, *id.* 156:13-23. Instead, per Ms. Gunter, the Oklahoma Department of Environmental Quality (“DEQ”) has “sole authority for air quality.” *Id.* 115:12-13.

Under that backdrop, ODAFF initially authorized the 8 Facilities without any notices to the public. *Id.* 163:13-164:3. Likewise, ODAFF did not require or provide any notices for the 8 Facilities’ annual renewals. *Id.* 164:4-7. ODAFF received SCC’s 2020 protests to the 8 Facilities’ renewals. *See id.* 164:8-16. However, after reviewing the protest letters, ODAFF “just sat them aside [finding] there wasn’t anything actionable” in them, upon ODAFF determining “they were asking for a process that doesn’t exist.” *Id.* 165:2-8. ODAFF did not follow up with SCC after receiving the protest letter, *id.* 165:9-12, and ODAFF does not have a process for handling protests to Poultry Feeding Operations, *id.* 165:16-19.

IV. In Authorizing the 8 Facilities’ Operations, ODAFF has Failed to Satisfy Minimum Substantive and Procedural Safeguards

Throughout the recent poultry expansion, ODAFF pointed to the “PFO” label in an attempt to avoid any meaningful review of the 8 Facilities. In doing so, ODAFF neglects its environmental responsibilities and the concerned public. The instant matter before the Court is not whether any of the 8 Facilities are – in fact – polluting the surrounding environments. Rather, the issue at bar is whether in authorizing the 8 Facilities ODAFF satisfied its obligations to protect the environment from pollution. As addressed herein, ODAFF’s shortcomings are manifest and

judgment is appropriate at this juncture in order to realign ODAFF to its non-discretionary duties in these matters.

a. Concentrated Poultry Operations

The public is justified to be concerned about the expansion of concentrated poultry operations: “Because large numbers of animals are confined in relatively small areas at CAFOs, a very large volume of manure is produced and must be kept in a correspondingly small area. . . .” *See Risk Assessment Evaluation for Concentrated Animal Feeding Operations*, U.S. Environmental Protection Agency *p.* 1, Ex. No. 32 (“CAFO” is the acronym for “Concentrated Animal Feeding Operation”). Further, modern agriculture’s “emphasis on intensive housing and speeding the growth of livestock to market weight” often employs “antibiotics to combat the spread of disease among animals housed in close quarters” and uses hormones to speed growth. *Id.* These substances ultimately make their way into poultry waste where they – in addition to the typical “nutrients” associated with animal manures – “pose a threat to the environment.” *Id.* “CAFO manure contains potentially pathogenic microorganisms [which may] find favorable breeding grounds in the barns, manure storage and handling systems and are released into the watershed environment routinely during the land application of waste.” *Id.* *p.* 3. The spread of pollutants from CAFOs occurs via “surface runoff, air transport and redeposition, and groundwater flow. Nutrients, pathogen organisms, hormones and metals may easily reach waterbodies via these means.” *See id.* *p.* 4. The U.S. EPA has presented various measures to mitigate the risks associated with CAFOs, including but not limited to: treating manure to kill pathogens; composting of waste to control odors, nutrients, and pathogens; and modifying barn ventilation to minimize the release of airborne pollutants. *Id.*

These are not new-fangled ideas but – rather – common knowledge as demonstrated by this report from the EPA nearly two decades ago. *See generally id.* What remains clear is that

CAFOs' release of nutrients "into the watershed may cause eutrophication of water bodies with consequent degradation of potential uses of the water [and create] problems with fisheries and human health." *Id.* p. 20. "The pollutants leaving the CAFOs may affect watersheds directly or indirectly." *Id.* p. 24. Whereas "[d]irect effects occur when wastes flow directly into a receiving water, indirect effects occur – for example – when ammonia is "volatized from the waste directly into the air," leading to "odor and downwind deposition problems." *Id.*⁸ CAFOs "are likely to release pathogens into the environment" and "are a major source of pathogenic contamination in most watersheds" – such pathogens include bacteria, fungi, protozoa, viruses, and worms. *Id.* pp. 28-29.⁹ Regarding CAFOs, "the literature in the area of nutrients and nutrients as pollutants is **overwhelming.**" *Id.* p. 24 (emphasis added). Even with regulatory oversight and action, there remains a "possible threat of pollution to waters of the state" simply "because there's poultry operations there." 2008 Depo. Trans., Ex. No. 27, 259:21-260:9; 2021 Depo. Trans., Ex. No. 12, 64:15-18 (poultry houses can cause environmental harm, independent from land application of waste). ODAFF's own rules recognize that waste generation from concentrated poultry operations can adversely impact water quality and its beneficial uses, including:

- (1) Fish and Wildlife Propagation may be impaired by lack of [dissolved oxygen] due to nutrient loading.
- (2) Public and Private Water Supplies may be impaired by fecal coliform, algae growth, and nutrient loading.

⁸ The various forms and compounds of nitrogen pollution from CAFOs create considerable and varied environmental harms. This includes: ammonia which may "move as an air pollutant after volatilization from animal waste [and] lead to eutrophication, excessive oxygen demand in surface waters and fish kills, reduced biodiversity, objectionable tastes and odors, and growth of toxic organisms;" nitrites which are "toxic to fish and most aquatic species;" and nitrates which are "highly mobile and may easily leach downward through the soil profile to an aquifer." *See id.* p. 25.

⁹ "There is ample evidence that pathogens from agricultural operations have caused human disease outbreaks in the past. Ecological damage has also been indicated." *Id.* p. 32.

- (3) Recreation may be impaired by pathogens.
- (4) Aesthetics may be impacted by nutrient loading.

35 Okla. Admin. Code 45-1-7(2).

The federal Clean Water Act (“CWA”) has provisions to address CAFOs and their propensity to pollute waters of the United States. These responsibilities fall to the EPA but Congress crafted the CWA to allow for its enforcement at the state level if the individual state so desires. Like most states, Oklahoma petitioned for what is referred to as CWA “delegation” or “primacy” in order to administer the CWA at the state level. *See* Oklahoma 2012 Delegation Application Packet, attached as Ex. No. 33. After demonstrating that the State had the technical resources and the legal tools to enforce the CWA, ODAFF assumed primary CWA jurisdiction over concentrated animal feeding operations in 2012 through operation of the Oklahoma Agriculture Pollutant Discharge Elimination System (“AgPDES”) program – the state corollary to the National Pollutant Discharge Elimination System (“NPDES”) for agricultural activities. *See* Oklahoma Agriculture Pollutant Discharge Elimination System Act, 2 O.S. §2A-1 *et seq.* (purpose of the program is to “implement the federal National Pollutant Discharge Elimination System requirements”). This process included the State of Oklahoma entering into a lengthy Memorandum of Agreement (MOA) with the federal government, wherein the State committed to implement and enforce specific provisions pertaining to concentrated animal feeding operations. *See* Ex. No. 33, bates 119-153.

Oklahoma agreed that “ODAFF shall administer the AgPDES program in accordance with the CWA, federal and state statutory and regulatory requirements implementing the CWA. . . .” *Id.* bates 123. Oklahoma agreed to “Develop, maintain, and exercise the legal authority and the resources required to carry out all aspects of the AgPDES program, including the legal authority to carry out all of the requirements for permitting (40 CFR §123.25), compliance evaluation (40

CFR § 123.26), and enforcement authority (40 CFR § 123.27).” *Id.* bates 125. ODAFF is responsible to ensure that “the AgPDES program is consistent with all requirements within this MOA, the Clean Water Act, 40 CFR Parts 123-125 and EPA policy and guidance.” *Id.* bates 149.

b. “Poultry Feeding Operation” Nomenclature

Concentrated poultry operations must receive approval from ODAFF prior to operation. Undisputed Material Fact No. 2. The 8 Facilities at issue have all been approved by ODAFF as “PFOs” and have not been considered by ODAFF to be “CAFOs.” Beyond semantics, this has significant impacts. Oklahoma requires that “Any animal feeding operation meeting the criteria defining a concentrated animal feeding operation shall be required to obtain a license to operate pursuant to the Oklahoma Concentrated Animal Feeding Operations Act and rules promulgated pursuant thereto.” 2 O.S. §20-44. Unlike with PFOs, Oklahoma:

- Prohibits CAFOs from being established within one (1) mile of ten or more occupied residences (2 O.S. §20-57(B));
- Prohibits CAFOs from being established within three (3) miles of a state park or resort, incorporated municipality, or surface public water supply; (2 O.S. §20-57(E));
- Mandates certain notice, public comment opportunities, and hearing requirements – for the public at large as well as affected property owners (2 O.S. §20-46);
- Requires development of a Pollution Prevention Plan (2 O.S. §20-47); and
- Requires CAFO operators to provide adequate veterinarian services; have necessary mechanical equipment to scrape, clean, and grade the premises; and provide weather resistant surfaces around feeding and water areas (2 O.S. §20-56(A)).

Accordingly, by declining to view any of the 8 Facilities as a CAFO, ODAFF eliminates those regulatory safeguards. Instead, by construing these facilities as PFOs, ODAFF views its regulatory oversight as “simply a registration process,” “not a permitting process,” and “essentially only requir[ing] a location, a Nutrient Management Plan, and a storm water construction runoff plan.” *See* Ex. No. 30. The “law” which ODAFF would have apply is limited to the Oklahoma Registered Poultry Feeding Operations Act. Perversely, ODAFF relies upon the Registered Poultry Feeding

Operations Act to: frustrate the agency's responsibilities under the wider Oklahoma Agricultural Code (Okla. Stat. Title 2); avoid its federal Clean Water Act delegation jurisdiction; trivialize its environmental obligations within Title 27A; and disregard its mandates under the State's Constitution (Art. VI, §31). In doing so, ODAFF denies these facilities are CAFOs and, importantly, denies the concerned public (including SCC) any consideration.

c. Each of the 8 Facilities is a CAFO

The federal government defines any chicken house holding more than 125,000 birds as a "Large concentrated animal feeding operation" ("Large CAFO"). 40 CFR § 122.23(b)(4).¹⁰ In order to secure CWA delegation, Oklahoma had to adopt provisions no less "stringent" than the federal minimums. *See* Ex. No. 33, bates 150 (referencing inability of Oklahoma to adopt provisions "less stringent than the CWA or its regulations"). To effectuate this, as part of the AgPDES program, ODAFF "incorporat[ed] by reference" certain federal provisions including 40 CFR § 122.23. *See* 35 Okla. Admin. Code 44-1-2(2)(I); *id.* 44-3-1(a)(1)(B). The AgPDES rules and the incorporated federal definitions "apply to applications for and holders of [ODAFF] permits and other authorizations." 35 Okla. Admin. Code 44-1-1. This includes holders of a PFO "registration" (such as the 8 Facilities) under Oklahoma's Registered Poultry Feeding Operations Act. *See* 2 O.S. §1-3(11) (Oklahoma's Agricultural Code defines "permit" to mean "a written document issued by the [State Board of Agriculture] giving consent for a person to engage in an activity."); *see also id.* §1-3(8) ("license" means "a written document issued by the [State Board of Agriculture] granting authority to engage in a business, occupation, or activity.").

¹⁰ Logically, Large CAFOs are defined to be CAFOs, *see* 40 CFR §122.23(b)(2). By holding 300,000+ birds, each of the 8 Facilities is, by federal definition, a "CAFO."

By housing 300,000 birds, *see* Undisputed Material Fact No. 5, each of the 8 Facilities falls within the federal definition of CAFO. Further, because each of the 8 Facilities has a “written document” authorization from ODAFF, each facility falls within ODAFF’s AgPDES program and, in turn, falls within the incorporated-by-Oklahoma federal CAFO definition. *Contra* 2021 Depo. Trans., Ex. No. 12, 65:1-2 (Ms. Gunter asserting it is a “registration,” not a “permit” nor a “license,” and “the terminology is important in our programs, so it’s important that we use the right terminology.”),¹¹ 69:2-4 (Ms. Gunter representing the PFO registration process is not subject to the AgPDES program). Despite black-letter direction, ODAFF “absolutely [does] not” consider the 8 Facilities to be CAFOs. *Id.* 70:24-71:1. According to Ms. Gunter, the 8 Facilities are “not, by definition, a Concentrated Animal Feeding Operation.” *Id.* 71:20-23. While “the federal government considers it [to be a] CAFO, the State of Oklahoma does not.” *Id.* 105:14-17.

d. Pollution and Water Quality Considerations

Despite statute allowing for poultry complexes like the 8 Facilities to be labeled as “PFOs,” the reality is they are – still – CAFOs. More importantly however, these facilities pose the same risks to the surrounding people and environment irrespective of what labels they are given. Despite having the framework and tools in place to provide meaningful oversight of farms like these, ODAFF strains to limit itself to the “PFO” label and refuses to utilize the resources at hand which are – purportedly – only applicable for CAFOs. *See* 2021 Depo. Trans. Ex. No. 12, 42:20-24 (the primary remedy ODAFF has to rectify problems at a PFO is to “designate them as a CAFO”), 69:5-14 (concentrated poultry operations only come within the AgPDES program “if the facility is severe enough that it’s going to result in designating them as a Concentrated Animal Feeding

¹¹ In securing CWA authorization from EPA, Oklahoma expressly noted that “ODAFF’s definition of ‘permit’ is broader than the federal definition.” *See* Ex. No. 33, bates 229. It presses the bounds for ODAFF to now represent that “permit” does not include “registration.”

Operation.”). The result is as absurd as ODAFF’s path getting there. Notwithstanding the semantics, the Board still has “jurisdiction over all matters affecting animal industry,” Okla. Const. Art VI, §31, and it is still illegal for anyone subject to ODAFF’s jurisdiction “to cause pollution of any air, land or waters of the state,” 2 O.S. §2-18.1(A), and ODAFF is still obligated to protect against such pollution, 2 O.S. §2-18.1(B).

Despite this broad and deeply important grant of jurisdiction, ODAFF authorized the 8 Facilities without any concern or inquiry into salient issues:

- ODAFF did not consider how the facilities would use water, nor did ODAFF refer the matter to the OWRB – the agency which ODAFF asserts is responsible for the issue – for its consideration. Undisputed Material Fact No. 8; 2021 Depo. Trans. 22:17-22, 22:25-23:3, 23:4-7, 23:8-10, 23:24-24:4, 27:8-17;¹²
- ODAFF did not consider how the facilities would cool their birds or whether this would constitute “waste” of water, nor did ODAFF refer that matter to the OWRB – again the agency which ODAFF asserts is responsible for the issue – for its consideration. 2021 Depo. Trans. 24:18-20, 35:2-4, 27:8-17;
- ODAFF did not consider how or what the facilities would exhaust/ventilate into the surrounding air, nor did ODAFF refer the matter to DEQ – the agency which ODAFF asserts is responsible for the issue – for its consideration. 2021 Depo. Trans. 115:8-19, 157:3-4, 160:2-6, 156:13-23, 115:12-13.

Moreover, ODAFF authorized the 8 Facilities without the agency considering what would happen with the massive amounts of waste generated at these facilities – ostensibly this being the only material issue where ODAFF agrees it has jurisdiction. While it is true that each of these facilities must ultimately prepare a “Nutrient Management Plan” (“NMP”), in practice this comes *after* the farm is approved by ODAFF and operating. 2021 Depo. Trans, Ex. No. 12, 17:10-12 (the PFO registration process requires the applicant demonstrate “they’ve at least applied for that nutrient

¹² In its Water Quality Standards Implementation Plan, ODAFF represents that the agency promotes the “recycle and beneficial reuse of wastewater” within concentrated poultry facilities and that it prohibits any hydrologic connectivity between waste storage and groundwaters. See 35 Okla. Admin. Code 45-1-7(c)(3). It appears ODAFF fails to effectuate or implement these Water Quality Standards safeguards.

management plan”); *see* Ex. No 31, p. 5 (PFO Application complete upon “requesting [ODAFF] to write [nutrient management plan]” for the facility). Additionally, and providing no consolation, ODAFF accepts essentially meaningless NMPs which provide no insight or guidance into where or how the waste is handled, instead allowing for “export only” NMPs – effectively only requiring that *this farmer* will not spread the manure at *this facility*. *See id.* 33:19-20 (“Everyone has to have a nutrient management plan, but sometimes it’s an export only plan.”). According to ODAFF, so long as it happens offsite, how or where the manure is spread is a wholly separate issue from operation of the facility itself. *See* 2021 Depo. Trans., Ex. No. 12, 57:6-58:2 (representing that the Oklahoma Poultry Waste Applicators Certification Act is a different law entirely). All the while, ODAFF authorizes (i.e. permits) more poultry waste generation within the Spring Creek watershed and the community is – literally – left without *any recourse before the agency*. It is entirely unclear that ODAFF afforded any prospective ecological considerations prior to authorizing any of the 8 Facilities. *See e.g.* Undisputed Material Fact Nos. 6, 7, 8, 9.

e. ODAFF’s Unmet Regulatory Obligations Regarding the 8 Facilities

i. Management Practices

In order to secure primary CWA enforcement from the federal government, Oklahoma committed to enforcing specific management practices for CAFOs. *See* August 15, 2012 AgPDES CAFO Program Description Procedures, attached as Ex. No. 33, bates 218-219. However, because ODAFF refuses to consider these facilities as CAFOs and in direct contravention of its commitments under its CWA delegation, ODAFF does not ensure or require implementation of these management practices. *See* 2021 Depo. Trans., Ex. No. 12, 144:15-145:21. Rather, ODAFF only requires implementation of these practices if the facility gets a permit as a CAFO – which ODAFF does not require for operations like the 8 Facilities. *Id.* 145:22-146:10. Instead, ODAFF applies a *different* and less stringent set of management practices to PFOs: practices found in a

facility's individual Nutrient Management Plan (often issued after-the-fact), the Registered Poultry Feeding Operations Act, or ODAFF's PFO rules. *Id.* 33:21-34:12. ODAFF has not informed EPA that ODAFF is not requiring the more robust (and committed-to) management practices for all CAFOs. *Id.* 149:10-14.

ii. Discharge Limitations

Despite utilizing this different set of operational standards for PFOs, ODAFF contends it is maintaining compliance with all applicable antidegradation and water quality requirements by ensuring these operations are “zero discharge” facilities. 2021 Depo. Trans. Ex. No. 12, 133:5-10. According to Ms. Gunter, “If it’s not discharging, it’s not degrading.” *Id.* 133:15-16. It would appear that the only safeguard in place – found within the Registered Poultry Feeding Operations Act – is that the facilities are not to “discharge [] poultry waste to waters of the state.” 2 O.S. §10-9.7(B)(2); 2021 Depo. Trans, Ex. No. 12, 133:15 (“You don’t need anything more” than the no discharge provision), 118:14-20 (ODAFF enforces Oklahoma Water Quality Standards by seeing that PFOs are “no discharge facilities”).¹³ However, in order to understand the hollow nature of this “safeguard,” one must consider the narrow definition ODAFF has prescribed by rule for PFOs: “‘Discharge’ means any release by pumping, pouring, emptying, or dumping of poultry waste directly or through a manmade conveyance into waters of the State.” 35 Okla. Admin. Code

¹³ Yet, in its rules, ODAFF purports to satisfy its Water Quality Standards obligations at the outset:

The application process is targeted at removing the possible threat of pollution to the waters of the State by not allowing any discharge to surface water, except in limited circumstances, by promoting recycle and beneficial reuse of wastewater, by not permitting any hydrologic connection between waste storage facility and groundwater, by preparing or reviewing [NMPs], emphasizing best management practices and conservation measures, and by routine inspections of regulated CAFOs, LMFOs, and poultry feeding operations.

35 Okla. Admin. Code 45-1-7(c)(3).

17-5-2. This is markedly different definition of “discharge” from ODAFF’s other provisions. *See* 2021 Depo. Trans., Ex. No. 12, 110:14-111:20 (Ms. Gunter agreeing ODAFF’s definition for “discharge” for PFOs “is not the same definition for AgPDES”).

Quite simply, through ODAFF’s constricted definition, if someone releases poultry waste from a “PFO” but the waste does not directly enter waters of the state, then it is not a discharge. *Id.* 114:10-13. This entirely avoids the well-documented indirect pathways towards degradation, discussed above. This would not include a release of pollution onto any surrounding lands from where the pollution might percolate into the groundwater or runoff into nearby surface waters – because such a release does not fit within the narrow “discharge” definition ODAFF applies to PFOs.

Similarly, this constrained definition fails to include atmospheric releases. Among the many publications on the matter, EPA published a short and to-the-point brochure titled “Identifying and Controlling Discharges from Poultry Operations,” which highlights sources of discharges “including exhaust fans.” Attached as Ex. No. 34. The brochure notes that “improperly managed areas around and below exhaust fans may result in unauthorized discharges of nutrients (N, P, K) and bacteria (e-coli) to nearby waterways. These discharges may also cause contamination of drinking water sources and recreational waters.” *Id.* Though not a “discharge” under ODAFF’s unreasonably restrictive definition for PFOs, according to the EPA exhaust/ventilation emissions can be – and routinely are – “discharges.” Yet ODAFF’s overview of PFOs fails to account for them in any way despite EPA’s recognition that “exhaust fan deposits **can be transported to offsite receiving waters.**” *Id.* (emphasis added). According to ODAFF, its air protection jurisdiction is limited and “strictly related to odor issues.” 2021 Depo. Trans. Ex. No. 12, 49:6-10. By failing to even consider atmospheric releases apart from odor issues (coupled

with ODAFF's improvidently narrow definition of "discharge"), ODAFF wholly ignores this pollution pathway.

Just like with water-related concerns, ODAFF endeavors to justify its inaction over air-related concerns through agency finger-pointing – alleging that DEQ has sole jurisdiction over air issues. *Id.* 115:8-15 (referring to DEQ's jurisdiction in Title 27A). While it is true that DEQ has "sole and exclusive jurisdiction for air quality" under the Clean Air Act, 27A O.S. §1-3-101(B)(8), the Clean Air Act explicitly provides that it does not "limit, modify, or repeal or affect in any way the powers, duties or functions of the State Board of Agriculture," 27A O.S. § 2-5-103(C). Irrespective of whether any of the 8 Facilities need authorization under the Clean Air Act (a matter ODAFF *should* be working with DEQ to determine), ODAFF maintains jurisdiction to see that agricultural activities do not pollute "any air, land or waters of the state." 2 O.S. §2-18.1 (emphasis added). Yet ODAFF refuses to act on air issues – even those creating public health risks. 2021 Depo. Trans, Ex. No. 12, 156:1-3.

All told, ODAFF's blind reliance upon its own constricted definition of "discharge" which the agency applies to PFOs (and only applies to PFOs) is insufficient to satisfy the agency's environmental protection obligations and ODAFF fails to ensure the facilities it authorizes – including the 8 Facilities – do not lead to degradation of the surrounding air, soils, and water. *See* Undisputed Material Fact Nos. 6, 7, 8, 9.

iii. ODAFF's Concurrent Jurisdiction

Title 27A specifies certain "jurisdictional areas of responsibility" for the various state environmental agencies. As addressed herein, responsibilities outlined in Title 27A are "in addition to those otherwise provided by law." 27A O.S. §1-3-101. Further, ODAFF is obligated to "coordinate" and "cooperate" with other environmental agencies to see that: public concerns are "addressed in an expedient manner;" Oklahoma's Water Quality Standards are utilized and

enforced; and, ultimately, “the environment and natural resources of this state” are protected. *See* 27A O.S. §§1-1-102(4), 1-1-202(A)(5). Despite the clear statutory mandate to work with the State’s other agencies, ODAFF does not consult with any other agency regarding the agency’s approval of concentrated poultry operations. 2021 Depo. Trans. Ex. No. 12, 17:20-24, 27:8-17, 29:11-16. Instead, ODAFF silos its efforts from the other agencies and erects artificial and erroneous jurisdictional walls which prevent coordination and cooperation, ostensibly under the notion that respective jurisdiction is “exclusive” to an agency. *See e.g. id.* 22:25-23:3 (Ms. Gunter asserting that OWRB has sole jurisdiction over water quality), 115:8-15 (Ms. Gunter asserting that DEQ has sole jurisdiction over air quality).

ODAFF’s constrained interpretation of environmental jurisdiction would miss the forest for the trees and deprive each agency the tools it needs to effectuate its obligations because:

in the modern administrative state, regulation is frequently complementary, overlapping, and comprehensive. Absent a nearly irreconcilable conflict, to allow one remedial statute to preempt another or to co-opt a broad field of regulatory concern, simply because the two statutes regulate the same activity, would defeat the purposes giving rise to the need for regulation. It is not readily to be inferred that the Legislature, by enacting multiple remedial statutes designed to augment protection, actually intended that parties be subject only to one source of regulation.

Okla. Op. Atty. Gen. 07-33 (October 16, 2007) (quoting *Lemelledo v. Beneficial Mgmt. Corp.*, 696 A.2d 546, 554 (N.J. 1997)). The Oklahoma Supreme Court has adopted a similar stance. *Id.* (referencing *Messer-Bowers Co. v. State ex rel. Okla. Water Res. Bd.*, 2005 OK 54, 8 P.3d 877 (Okla. 2000)). *Messer-Bowers* came to the Oklahoma Supreme Court after the OWRB granted a contested water use permit to a CAFO. *Id.* ¶2. The neighbors protested the permit before the agency, arguing that the proposed permit would mix fresh water with animal wastes and could lead to groundwater pollution and constitute waste by pollution such that the OWRB should not issue the permit. *Id.* ¶14. The OWRB refused to consider what impacts might result from the farm’s water usage because, according to the OWRB, operation of the CAFO was under the jurisdiction

of ODAFF and, thus, outside the OWRB's purview. *Id.* The Court rejected OWRB's jurisdictional interpretations and held that, pursuant to the Oklahoma Environmental Quality Act (Okla. Stat. Tit. 27A), the OWRB and ODAFF "have concurrent environmental jurisdiction over livestock facilities which require water permits." *Id.* ¶18. The Court dispelled the notion that the agencies had exclusive jurisdiction over such facilities or activities, noting that Title 27A's grants of "jurisdictional areas of environmental responsibility [. . .] shall be in addition to those otherwise provided by law and assigned to the specific state environmental agency." *Id.*

Title 27A's operative language remains intact today. Further, to the extent that individualized actions within a concentrated poultry operation may fall to the exclusive purview of some agency other than ODAFF and – thus – not subject to "concurrent environmental jurisdiction," ODAFF would *still* be obligated to "coordinate" and "cooperate" with said agency to ensure that the concerns and safeguards are adequately addressed. Regardless, because ODAFF failed to consult with any other state environmental agency and because ODAFF declined to consider any water use and air pollution concerns, ODAFF failed to satisfy its obligations on these issues.

iv. ODAFF's Due Process Deprivations

Regarding Simmons' expansion, ODAFF's former-Secretary recognized that "In some cases, probably, neighbors weren't appropriately notified and considered in building these chicken farms." Ex. No. 17. Indeed, prior to issuing operational permits to the 8 Facilities, ODAFF did not provide the public or SCC members with notice. 2021 Depo. Trans., Ex. No. 12, 163:13-164:3. Likewise, ODAFF provided no notice prior to its annual renewals of the 8 Facilities' licenses. *Id.* 164:4-7. This is because the Registered Poultry Feeding Operations Act does not require notice be given, *id.* 163:17, and unless the legislature tells ODAFF that it needs to provide such notice, "then that's not something [ODAFF] would do." *Id.* 169:2-9. Ms. Gunter suggests that the agency

is actually *prohibited* from providing notice, stating: “There’s no authorization in the act to allow us to do it. . . .” *Id.* 169:10-16. Further, because the Registered Poultry Feeding Operations Act does not articulate a protest process, ODAFF “just sat [] aside” SCC’s protest letters. *id.* 165:3-8, and ODAFF provides no means to protest Poultry Feeding Operations, *id.* 165:16-19.

Understanding that ODAFF does not consider these facilities to be CAFOs and, similarly, that ODAFF does not consider the PFO “registration” process to be part of its AgPDES program, this is still a marked deviation from Oklahoma’s representations to the EPA regarding how ODAFF would allow public involvement in CAFO proceedings, assuring that:

any person having any interest connected with the geographic area or waters or water system affected, including but not limited to any health, environmental, pecuniary, or property interest, which interest is or may be adversely affected, shall have the right to intervene as a party in any administrative proceeding before the Department, or in any civil proceeding, relating to violations of the AgPDES Act or rules, permits or orders.

Ex. No. 33, bates 38, *id.* bates 229 (ODAFF also requires “public notice and participation” for NMPs for CAFOs). ODAFF’s streamlined approach to PFOs – on the other hand – fails to account for constitutional Due Process. However, “due process is conferred, not by legislative grace, but by constitutional guarantee” and the legislature “may not constitutionally authorize the deprivation of such an interest [] without appropriate procedural safeguards.” *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (internal quotations omitted); *Daffin v. Oklahoma Dept. of Mines*, 2011 OK 22, 251 P.3d 741 ¶23 (“The right to due process is conferred by constitutional guarantee by the United States and the Oklahoma Constitutions” and an Oklahoma agency’s procedures may not eliminate neighboring property owners’ ability to appear and be heard before the agency).

The state may not deprive a person of his/her vested property rights “except by due process of law.” *Ricks Exploration Co. v. Okla. Water Res. Bd.*, 1984 OK 73, ¶15, 695 P.2d 498. A landowner’s “water-related property interest alone requires that [he or she] be given notice and an opportunity to participate in a hearing whose outcome could affect their constitutionally protected

rights.” *DuLaney v. Okla. State Dep’t of Health*, 1993 OK 113, ¶ 18, 868 P.2d 676. Here, SCC members’ property interests in their land (and the water thereupon/thereunder) and their personal health entitles them to notice and an opportunity to be heard regarding administrative proceedings “which **may** directly and adversely affect [their] legally protected interests. . . .” *DuLaney*, 1993 OK 113, ¶9 (emphasis added). This requires that ODAFF provide and allow for “notice and an opportunity to contest the permit at the administrative level.” *Id.* ¶10 (emphasis added). Notice is an “indispensable element” of due process. *Tucker v. New Dominion LLC*, 2010 OK 14, ¶14, 230 P.3d 882. In addition to notice, due process requires “a meaningful opportunity to appear and be heard.” *Daffin*, 2011 OK 22, ¶16. While state law and agency regulations may prescribe how the process is administered, they “may not curtail rights guaranteed by federal law or the United States Constitution.” *Id.* Satisfaction of state statute or agency rule does not necessarily meet minimum due process requirements. *See id.*

Even if ODAFF satisfied its procedural obligations under the Registered Poultry Feeding Operations Act and **even assuming** ODAFF satisfied its substantive PFO directives as well, such ostensible compliance does not – by itself – satisfy Due Process safeguards. Regrettably, this is a lesson that Oklahoma’s environmental agencies need to be reminded of – and reminded often. *See Purcell v. Parker*, 2020 OK 83, 475 P.3d 834, (despite complying with the statutory procedures applicable to water permits, the OWRB failed to satisfy minimum constitutional due process, leading to the invalidation of the underlying permit). This is also something that the Oklahoma Attorney General has weighed in on numerous times, and ODAFF is obligated – yet has failed – to comport its actions with the Attorney General’s counsel.¹⁴

¹⁴ The Attorney General is the chief law officer of the state and his/her opinions are “binding on state officials unless the opinion is inconsistent with a final determination of a court of competent jurisdiction.” *Branch Trucking Co. v. State, ex rel. Okla. Tax Comm’n*, 1990 OK 41,

In a 1996 Opinion, the Oklahoma Attorney General directly addressed the question of whether and how ODAFF could satisfy constitutional due process regarding the licensing of concentrated animal feeding operations. *See Okla. Op. Atty. Gen. 96-76* (November 1, 1996), attached as Ex. No. 35. Briefly acknowledging the “potential pollution hazards” associated with CAFOs and by analogizing the risks to those associated with landfills, the Opinion provides a roadmap for how ODAFF could – and should – be addressing these very issues. *See id.* (citing *Dulaney*, 868 P.2d 676). “Given the safeguards built into” the CAFO Act as well as ODAFF’s associated rules and regulations, one may “not presume harm to adjacent landowners.” *Id.* ¶10. However, when adjacent landowners present concerns showing that “direct, immediate and substantial harm may result from the issuance of the permit,” they should be afforded the opportunity for a hearing, “to reduce the risk of erroneously depriving them of any of their rights.” *Id.* ¶9 (emphasis added). The Opinion noted that such process would enable adjacent landowners to protect their interests from “potential” harms. *Id.* ¶10.

The following year, Oklahoma’s Attorney General again returned to the subject of CAFOs and outlined that “the Oklahoma Constitution provides substantially more protection to private property than does its federal counterpart[, whereas] the United States Constitution prohibits only the uncompensated taking of property[, the Oklahoma Constitution prohibits the taking or

P.2d 686, 690 (citing *Rasure v. Sparks*, 75 Okla. 181, 183 P. 495 (1919)); *see also Globe Life & Acc. Ins. Co. v. Okla. Tax Comm’n*, 1992 OK 65, 831 P.2d 649, 650 (same). “With the exception of an Attorney General’s opinion that an act of the legislature is unconstitutional, an Attorney General’s opinion is binding upon the state officials whom it affects. Public officers have the duty to follow Attorney General opinions until they are judicially relieved of compliance.” *Oklahoma ex rel. Fent v. State ex rel. Okla. Water Res. Bd.*, 2003 OK 29, ¶16, 66 P.3d 432, 441. “It is the duty of public officers [. . .] to follow, and not disregard, the advice of the Attorney General, charged with the duty of giving opinions in writing upon all questions of law submitted to him by any state official, commission, or department.” *Rasure v. Sparks*, 1919 OK 231, 75 Okla. 181, 183 P. 495, 498.

damaging of property.” Okla. Op. Atty. Gen. 97-30 (May 5, 1997), attached as Ex. No. 36 (emphasis added). These safeguards go beyond protecting against “physical injury to the property” and “include the right of quiet enjoyment of that property.” *Id.* ¶3. This includes protections against less-than-tangible harms such as noxious fumes, pollution of groundwater, noise and dust, and “annoyance and inconvenience.” *Id.*

The Attorney General issued an additional CAFO-specific opinion in 2000 which is particularly relevant. *See* Okla. Op. Atty. Gen. No. 00-52 (October 18, 2000), attached as Ex. No. 37. The Opinion addresses whether adjacent landowners could protest a CAFO’s renewal – as opposed to its initial permit issuance. *Id.* The Opinion notes that nothing within statute required notice or an opportunity to protest such renewal but found that constitutional Due Process does, and again likened CAFO permitting to that of landfills. *Id.* ¶¶4, 6. “To be entitled to a hearing, a property owner must request a hearing and present specific factual allegations showing that the continued operation of the CAFO may have a direct, substantial and immediate effect on his or her property or other legal interest. At the hearing, he or she must go further and present evidence sufficient to support his or her claim that the permit should be denied.” *Id.* ¶ 8 (internal citation omitted) (emphasis added). For renewal, a protestant must raise new issues or the protest must rest “on new evidence” as “protestants do not have a due process right to relitigate issues that they have raised in earlier protests.” *Id.* The right to notice and opportunity to protest did not arise from the CAFO Act (indeed, the CAFO Act did not provide for it) but, rather, is premised upon constitutional due process. *Id.*

Irrespective of how ODAFF desires to label the 8 Facilities, the facilities cannot operate without authorization from ODAFF. Irrespective of whether statute or rule provides for notice or an opportunity to protest, because SCC has presented specific factual allegations that each of the

8 Facilities may have a direct and substantial interest on SCC member interests (including water quality), *see* Ex. Nos. 3-11, ODAFF is obligated to provide SCC a hearing where SCC can present evidence to demonstrate why the concentrated poultry farms should not be allowed to operate. This cuts to the prospective nature of Due Process – aimed at preventing the taking or damaging of protected interests. Oklahoma courts have long-recognized that “[t]he difficulty, complexity and costliness of remedying groundwater contamination is well documented [and] once seriously contaminated[,] groundwater is often rendered unusable and cleaning it up is often unsuccessful.” *Sharp v. 251st St. Landfill, Inc.*, 1991 OK 41, ¶30, 810 P.2d 1270. As with most other forms of environmental damage, such pollution can “seldom be remedied by money damages and is often permanent or at least of long duration.” *Id.* ¶38 (citing *Amoco Production Co. v. Gambell*, 480 U.S. 531, 545 (1987)). Due process requires SCC members be afforded the opportunity to present on these very issues.

V. This Court’s Assistance is Necessary to Rectify the Agency’s Errors Relating to the 8 Facilities

While this case is wholly independent from the *Cochran* litigation, it follows a roughly parallel path. The State of Oklahoma – by and through its environmental agencies – has authorized operation of dozens of poultry CAFOs in Delaware County and has precluded public involvement on the salient issues: will water be polluted? will surface waters be degraded? will the air be contaminated? will surrounding property owners be harmed? The State would perhaps hope no such harms will result but, importantly, has no process in place to ensure against these harms. Spring Creek Coalition respectfully submits that such provisions exist, but ODAFF’s errant interpretations have precluded their execution – to the public’s and the environment’s detriment.

CONCLUSION

Accordingly, SCC requests this Court – pursuant to 12 O.S. §1651 and 75 O.S. §306 – provide the following declaratory relief:

- Declare that all concentrated poultry operations housing 125,000+ birds, including but not limited to the 8 Facilities, are “Concentrated Animal Feeding Operations,” irrespective of whether or how they are “permitted.”¹⁵ ODAFF’s CWA delegation authority allows for no other interpretation. *See* 40 CFR §122.23 (federal definition of “Large CAFO”); 35 Okla. Admin. Code 44-1-2(2)(I), 44-3-1(a)(1)(B) (ODAFF incorporating federal definition of “Large CAFO”); Ex. No. 33, bates 284, fn 1 (“The CWA regulates the conduct of persons, which includes the owners and operators of facilities and activities” and “facilities” is intended “to cover the owners or operators of facilities and activities, both permitted and unpermitted, within ODAFF’s jurisdiction.”) (emphasis added).
- Upon finding that concentrated poultry operations housing 125,000+ birds are “concentrated animal feeding operations,” declare that such facilities are “point sources” as opposed to “nonpoint sources.” *See* 2 O.S. §2A-2(10) (defining “point source” to include any “concentrated animal feeding operation, from which pollutants or wastes are or may be discharged and which is within the Department’s environmental jurisdiction”) (emphasis added); *see also* 40 CFR §122.2 (defining “point source” to include any “concentrated animal feeding operation from which pollutants are or may be discharged”) (emphasis added); *contra* 2021 Depo. Trans., Ex. No. 12, 53:18-19 (regarding the 8 Facilities, Ms. Gunter stating “It’s not a point source, because it’s not a Concentrated Animal Feeding Operation), 118:22-119:3 (Ms. Gunter representing that “if one of [the 8 Facilities] was labeled as a point source, then they would have to comply with water quality standards, sometimes relating to high quality waters”).
- Declare that ODAFF’s regulatory oversight of concentrated poultry operations housing 125,000+ birds is subject to Oklahoma’s AgPDES program. Ex. No. 33, bates 284 (“The ODAFF compliance and enforcement program assures compliance with AgPDES permit and program requirements from covered facilities [and ‘covered facilities’ includes both permitted and unpermitted facilities] by using a combination of compliance monitoring, inspections, compliance assistance and enforcement.”). The AgPDES program is subject to NPDES minimum provisions, including: 40 CFR §123.25 (Requirements for permitting); 40 CFR §123.26 (Requirements for compliance evaluation programs); and 40 CFR §123.27 (Requirements for enforcement authority). *See* 2 O.S. §2A-1(B)(1) (purpose of the AgPDES program is it implement the federal NPDES requirements); *see also* Ex. No. 33 bates 130 (“Upon AgPDES

¹⁵ “[W]here state agencies have environmental expertise they are entitled to ‘some deference’ with regard to questions concerning their area of expertise. But a state agency’s interpretation of federal statutes is not entitled to the deference afforded to a federal agency’s interpretation of statutes that it is charged with enforcing.” *Arizona v. City of Tucson*, 761 F.3d 1005, 1014–15 (9th Cir. 2014) (internal citation and alterations omitted).

program authorization, ODAFF is responsible for drafting, providing public notice for, issuing, reissuing, modifying, denying, revoking and reissuing, and terminating AgPDES permits”), bates 142 (as part of the AgPDES program, “ODAFF shall maintain a vigorous program to identify noncompliance and initiate timely, appropriate, and effective action to return the discharger to compliance.”), bates 146 (“ODAFF shall maintain a vigorous enforcement program [and] ODAFF shall perform a compliance assessment of all facilities and activities subject to ODAFF’s jurisdiction and shall take timely and appropriate enforcement actions for violations of program requirements [and] Citizens’ complaints and unauthorized discharges endangering public health shall receive immediate and paramount attention.”). *Contra* 2021 Depo. Trans., Ex. No. 12, 68:24-69:4 (Ms. Gunter representing that ODAFF registration or authorization of PFOs not subject to AgPDES), 69:15-19 (Ms. Gunter representing that public complaints pertaining to PFOs are not subject to AgPDES).

- Declare that ODAFF’s espoused position that notice is not required prior to agency approval of a concentrated poultry operation housing 125,000+ birds does not satisfy minimum Due Process protections.
- Declare that ODAFF must accept and consider protests which challenge the agency’s approval of concentrated poultry operations housing 125,000+ birds when such protest presents factual allegations showing the operation may have a direct and substantial effect on the protestant’s legal rights.
- Declare that, prior to authorization, ODAFF must provide a hearing to any protestant who presents factual allegations showing that a concentrated poultry operation housing 125,000+ birds may have a direct and substantial effect on the protestant’s legal rights.

Further, and without intending to put too a fine point on its contours, SCC would ask the Court declare that ODAFF does, in fact, have administrative jurisdiction over potential air, soil, and water contamination arising from operation of concentrated poultry operations housing 125,000+ birds. To the extent that ODAFF’s jurisdiction is concurrent with some other agency, ODAFF must coordinate and cooperate with said agency(ies) to prospectively ensure that such poultry operations will not lead to the pollution of air, soil, and water. Because ODAFF failed to consider these issues itself and, additionally, because ODAFF failed to coordinate with any other agency on these issues, ODAFF failed to satisfy its obligations on this front.

Finally, in line with Due Process safeguards, SCC would ask that the Court direct ODAFF to conduct an administrative hearing for each of the 8 Facilities wherein SCC and its members

could remonstrate against ODAFF's ongoing authorizations for the respective facility and that the Court invalidate or suspend all ODAFF authorizations currently in effect for the 8 Facilities until the agency effectuates its substantive and procedural safeguards as addressed herein.

Respectfully submitted this 4th day of August, 2022,



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CERTIFICATE OF MAILING

I hereby certify that on the 4th day of August, 2022, a true and correct copy of the foregoing instrument was deposited in the United States mail, to the following persons, postage prepaid, first class:

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