

ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

IN THE MATTER OF C&H HOG
FARMS, INC.

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DOCKET NO. 18-001-P
ORDER NO. 8

ORDER

I. Introduction

After the February 9, 2018, preliminary hearing the Administrative Law Judge (ALJ) issued Order No. 5 on February 12, 2018. Order No. 5 found that the Ozark Intervenors and the BRWA-Canoe Intervenors (collectively "Intervenors") met the requirements of Reg.8.604 and granted the Intervenors' Motions to Intervene in this appeal. However, the ALJ reserved the issue of the limit of the Intervenors' participation in this case until the Intervenors had an opportunity to file a Reply to C&H Hog Farms Inc.'s Response to the motions to intervene.

On February 20, 2018, Intervenors filed their Reply. The issue of Intervenors' level of participation in this case is now ripe for a decision. After reviewing the pleadings filed and reviewing the applicable law and Commission regulations, the ALJ finds as follows:

II. Ark. Code Ann. § 8-4-205(b) (2) And Regulation 8.613(B) (5)

In C&H Hog Farm Inc.'s ("C&H") Response to the Intervenors' Motions to Intervene, C&H contends that because Intervenors did not comment on the "procedural issues raised by C&H" in this appeal, Intervenors are "barred by ADEQ's regulations and applicable law, including Reg.8.613(B)(5), from participating in

those issues." *C&H Response* p. 1. During the February 9, 2018, preliminary hearing counsel for C&H informed the ALJ that the procedural issues referred to in C&H's Response to the Motions to Intervene dealt with C&H's Regulation 6 permitting argument and C&H's estoppel defense. *Preliminary Hearing Tr. pp. 16-17.* In response Intervenor's argue that nothing in Regulation No. 8 limits an intervenor from fully participating in all issues raised in an appeal. *Reg. 8.604.* Intervenor's also contend that it was not possible - even with reasonable diligence - to comment on the procedural issues and estoppel raised by C&H in its Request for Hearing and they should not be limited in their participation in this appeal by the provisions of Ark. Code Ann. § 8-4-205(b)(2) and Regulation 8.613(B)(5). After reviewing the record to date, and the applicable law and regulations, the ALJ agrees with Intervenor's. Regulation 8.604 does not limit participation in an existing Commission appeal in the same fashion as a third-party Request for Commission Review does. As correctly noted by Intervenor's, to have standing to intervene Intervenor's must have commented during the public comment period and filed a timely petition for intervention whose contents are the same as set forth in Reg. 8.603(C)(1)(a)(b)(c)(d) and (e). Once those two prongs are met, as is the case here, an intervenor can participate fully in a Commission appeal.

Notwithstanding the language of Reg.8.604, Intervenors full participation in this appeal would also apply when viewed against the backdrop of Ark. Code Ann. § 8-4-205(b)(2) and Reg.8.613(B)(5). Those provisions of law and regulation state:

No person other than the applicant or permittee may raise any issue in the hearing that was not raised during the public comment period on the record, unless the person raising the issue shows good cause why the issue could not, **with reasonable diligence**, have been discovered and presented during the public comment period. *Emphasis added*

The ALJ's review of C&H's Regulation 5 permit application, the ADEQ's draft Regulation 5 permitting decision, ADEQ's responses to public comments, and ADEQ's final Regulation 5 permitting decision demonstrates that the continued viability of C&H's Regulation 6 permit after ADEQ's Regulation 5 permitting decision was not an issue contemplated, discussed, analyzed, or otherwise addressed by ADEQ, C&H, or public commenters during the Regulation 5 permit decision making process. In short, it would have been impossible for Intervenors to comment on C&H's Regulation 6 procedural permitting claims that it now raises in its Request for Hearing. In the same vein, C&H's claim of estoppel against ADEQ is an issue that arose well after the close of public comment.


III. Conclusion

The ALJ finds that Reg.604 does not limit an intervenor's participation in a Commission appeal to what they raise in public comment. Furthermore, even if Ark. Code Ann. § 8-4-205(b)(2) and

Reg.8.613(B)(5) are applicable, the ALJ finds that Intervenors could not have discovered and presented during public comment C&H's Regulation 6 procedural permitting claims and estoppel arguments that it has raised in its Request for Hearing. The ALJ finds that Intervenors may participate and argue all issues raised by C&H in its Amended Request for Hearing.

IT IS SO ORDERED

This 21st day of February 2018



Charles Moulton
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Patricia Goff, Commission Secretary, hereby certify that a copy of the foregoing Order No. 8, In the Matter of C&H Hog Farms, Inc.; Docket No. 18-001-P, has been mailed by certified mail or by first class mail, postage prepaid, to the following parties of record, this 21st day of February 2018.

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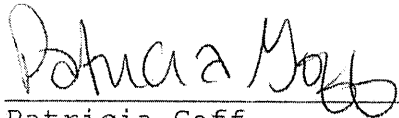
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